

JONATHAN MADZIKANDA GWATURA

Versus

RODWELL MADZIMA MUGWENI

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 21 MARCH & 17 APRIL 2003

N T Mashayamombe for the applicant
Miss P Rusike for the respondent

Judgment

CHIWESHE J: In this matter the plaintiff's prayer is for an order directing the defendant to sign the necessary transfer documents in respect of certain immovable property namely stand 1330 Torwood Township of Ripple Creek Estate situate in the District of Que Que (also known as R 75 Torwood Township Redcliff) to facilitate the transfer of the property to the plaintiff. Alternatively, failing such signing by the defendant that the Deputy Sheriff be ordered to sign the necessary documents on behalf of the defendant. Further the plaintiff prays for an order of costs on an attorney and client scale.

The facts of the matter according to the plaintiff are briefly as follows. On 5 November 1998 the plaintiff and the defendant entered into an agreement of sale of the property in question wherein the defendant agreed to sell to the plaintiff the property for the sum of \$22 713,00. The agreement in question has been admitted as exhibit number one. It is clear from that document that at the time the defendant was the sitting tenant of the property which then belonged to Ziscosteel. It was understood then that Ziscosteel was desirous and willing to transfer its rights and title

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to the defendant as the sitting tenant upon payment of a certain purchase price by the defendant. And in terms of the preamble to the agreement between the plaintiff and the defendant, the defendant was desirous of selling his rights, title and interest to be acquired from Ziscosteel to the plaintiff who in turn was desirous to purchase the said rights, title and interest from the defendant. The agreement stipulates that the purchase price would be the sum of \$22 713,00 as between the plaintiff and the defendant. (It is worth noting that in terms of the offer made by Ziscosteel to the defendant, the same purchase price would be payable to Ziscosteel by the defendant).

In terms of the agreement between the parties the plaintiff was to pay the purchase price directly to Ziscosteel. Thereafter Ziscosteel would be expected to transfer the property to the defendant who would in turn transfer it to the plaintiff. Ziscosteel has since transferred the property to the defendant. The defendant has refused to transfer his newly acquired title to the plaintiff leading to the present dispute.

In his plea the defendant states that the agreement was void *ab initio* because when it was entered into the seller had not taken over ownership of the property and accordingly could not sell what he did not own. In any event the seller would have been required to seek the consent of Ziscosteel before he could sell the property. Such consent was never sought and obtained. He further pleads that, as the agreement of sale was invalid, the amount paid by the plaintiff can only be regarded as a loan which the defendant tendered and paid into court in full and final settlement of the plaintiff's claims.

The plaintiff and the defendant both gave evidence under oath. It is clear from their evidence that exhibit 1 was drafted by Paradza and Partners Legal

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Practitioners and duly signed by both in the presence of witnesses in the employ of that firm. It is also common cause that it was the plaintiff who paid off Ziscosteel on behalf of the defendant. The property has since been transferred by Ziscosteel into the defendant's title. The bone of contention is the purport of exhibit "1". The plaintiff says that it is an agreement of sale. The defendant accepts that on the face of it is an agreement of sale and that he had queried this arrangement before signing the agreement. He says that he was persuaded by the plaintiff and Mr Paradaza to sign the agreement as it would serve as security for the loan advanced to him. He was further advised that the agreement would be torn or destroyed once the loan had been repaid. So far as he was concerned despite what the documents purports to be, it was in fact a loan advanced to him by the defendant in order that he the defendant pays off Ziscosteel who in turn would transfer the property to him. He says that he never sold the property and never intended to do so. He said that he trusted the plaintiff as a long-standing friend and neighbour. He had on previous occasions assisted the plaintiff to source bank loans to pay for a property in Harare and later to buy his first commuter omnibus. It was with that background that he signed exhibit "1".

The plaintiff has not denied the nature of the relationship between the parties and the assistance previously rendered him by the plaintiff. His evidence is to the effect that the defendant had been offered the property by Ziscosteel but did not have the money to pay the purchase price. The defendant had then approached him with a view to sell the house to him if he plaintiff could pay off Ziscosteel. The plaintiff agreed to that proposal and together they approached Paradza and Partners who drafted exhibit "1". Both sides did not call further witnesses.

The issue to be decided is whether exhibit "1" is an agreement of sale or an

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agreement of loan. On the face of it, it is what it purports to be – an agreement of sale. Having heard both parties it appears to me that the defendant's version of what transpired is more probable than that of the plaintiff. There are two agreement here – one between Ziscosteel and the defendant and another between the defendant and the plaintiff (exhibit 1). Both of them relate to the same property. The arrangement according to the plaintiff was that the defendant would pay Ziscosteel in order to secure transfer of title to him.

The amount owing by the defendant to Ziscosteel was \$22 713,00. That amount was duly paid to Ziscosteel and transfer effected in favour of the defendant. It was the plaintiff who paid Ziscosteel on behalf of the defendant. Thereafter according to the plaintiff the defendant was to transfer the property to him in terms of exhibit '1'. The question to be asked is for what consideration would the defendant be bound to transfer the property to the plaintiff? The amount that was paid to Ziscosteel in respect of the first agreement between it and the defendant is also the same amount that should be taken as the purchase price in respect of the second agreement between the defendant and the plaintiff. In other words once the plaintiff had paid Ziscosteel on behalf of the defendant, then he would also have discharged his obligations with regards the defendant in terms of exhibit "1". That to me does not make sense. It means that no benefit accrues to the defendant at all. Would the defendant have entered an arrangement in which he sold the property in return for nothing? The plaintiff has attempted to say that the defendant sold his house in return for free tenancy for a period of six months after transfer to the plaintiff. There is nothing in exhibit "1" to that effect nor is that raised anywhere in the pleadings. I am satisfied that the plaintiff is not being honest with the court in that regard.

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The defendant has stuck to his story, namely that he was duped into signing exhibit “1” because of his limited knowledge of the law and the trust that he had of the plaintiff and the legal practitioners concerned. He believed genuinely that despite its wording exhibit “1” had been prepared purely to safe guard the plaintiff’s position as security for the monies advanced. A month after the transaction he had attempted to repay the loan but the plaintiff to defendant’s surprise refused to accept the money insisting that he had bought the property. Given that no consideration would have been payable to the benefit of the defendant. I find it unlikely that the defendant would have sincerely sold his house for nothing.

I would therefore find in favour of the defendant and dismiss the plaintiff’s claim in its entirety with costs.

It is ordered therefore that the plaintiff’s claim be and is hereby dismissed with costs.

Paradza, Dube & Associates applicant’s legal practitioners
Makonese & Partners respondent’s legal practitioners