

SMART MALABA

Versus

LAZARUS MUJURU

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 2 AND 25 MARCH, 25 APRIL 2004 AND 15 DECEMBER
2005

R Nyathi for the applicant

L Nkomo for first defendant

Trial Cause

NDOU J: The plaintiff's claim is for an order compelling the first defendant to effect transfer of the right, title and interest in property known as house number 2467 New Magwegwe, Bulawayo from his name to that of the plaintiff pursuant to an alleged verbal agreement of sale. The first defendant is opposing the claim and avers that there was no agreement of sale between the parties between him and the plaintiff. The first defendant instead alleges that all there was between the two parties is a verbal lease agreement entered into in 1977.

The material dispute between the plaintiff and the first defendant is therefore, whether the verbal agreement they entered into in respect of the immovable property in dispute was an

agreement of sale, as contended by the plaintiff or a lease agreement as contended by the first defendant.

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It is common cause that since the verbal agreement between the two parties (in 1977 according to the first defendant or in 1979 according to the plaintiff) the plaintiff immediately took occupation and had continued in undisputed occupation of the said property to date of this trial in 2004. It should be pointed out that the plaintiff's occupation came in the form of the property being occupied by his lover Violet Mhlanga (MaMhlanga) and their children. In a heterogeneous society like urban Bulawayo, where diverse moral standards prevail and where conditions are rapidly changing and the fear of social disapproval decreases even more rapidly, such relationships are common. This is so because the hitherto accepted Christian way of marital relationships faces the challenge of the polygamous mindset of the bulk of indigenous people. In short the plaintiff and MaMhlanga were in some form of marital relationship which was blessed with children. It was on account of this relationship that the plaintiff felt duty bound to provide a roof over the heads of MaMhlanga and their children. The disputed property provided the answer. The plaintiff's case is that he bought this property for his children with MaMhlanga.

Plaintiff's case

- (a) **Smart Malaba:** He was prominent businessman at the time of the agreement. His testimony is largely that he got to know the first defendant as a salesman from the then Rhodesia Sugar Refineries. He was operating a number of shops including the Malaba Supermarket where the first defendant used to deliver sugar. In 1979 the first defendant had revealed to his

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employees that he was selling a house in New Magwegwe. This information was conveyed to him. He took interest in it and instructed his said employees namely Lesimon Tshalibe and Abednico Masibi, to proceed to view the property on his behalf. After the property was viewed he agreed with the first defendant on the purchase price of \$1 500,00. He then issued a cheque for the entire purchase price in favour of the first defendant. He, with his driver Tshalibe, accompanied the first defendant to encash the cheque at the Barclays Bank, 10th Avenue and Abercon Street (now Jason Moyo Street). Thereafter the first defendant immediately delivered vacant possession of the property to him. These transactions were witnessed by Tshalibe and Masibi while first defendant had no witnesses of his own. He said that it was a term of agreement of sale that the first defendant would subsequently approach the second defendant and seek its consent to the cession of

the rights, title and interest in his favour. He said that the first defendant initially gave the impression that he would fulfil this condition of the sale of agreement, but continuously failed to do so. It was only in 1999 i.e some twenty (20) years after the conclusion of the agreement, that the first defendant then disputed having sold such right, title and interest to him resulting in the initiation of these proceedings. The first defendant then insinuated that he was no longer desirous of ceding the property to him as he had sold it without his wife's knowledge. First defendant now wanted to pay

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him back the purchase price. He turned down this suggestion upon which the first defendant undertook to proceed with the cession and undertook to attend with him (the plaintiff) at second defendant's offices for this said purpose. He spent a day waiting for the first defendant to attend but the latter did not. He denied that the first defendant had leased the property to him at all. It is common cause that he did not pay rentals to the first defendant from 1979 to the date of trial. He disputed that the agreement was that he pays Council rates and charges and electricity in place of the rent. He confirms that MaMhlanga approached the first defendant several times about the property. The plaintiff gave a detailed account which, naturally attracted some lengthy cross-examination. Having closely watched his demeanor and

examined the probability of his version, I hold the view that his version is credible. He was not shaken under the skilful cross-examination that he was subjected to. His version was materially consistent throughout.

(b) Lesimon Tshalibe

He rendered testimony that was largely corroborative of the plaintiff's version. The plaintiff is his uncle and he used to work for him. He indicated that while first defendant did not tell him personally, that he was selling the property, this was communicated to his colleague Abednico Masibi, who conveyed the information to the plaintiff. However, he stated that subsequent discussions relating to the sale were conducted in his presence. He affirmed having proceeded to view the house for the specific

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purpose of advising the plaintiff about whether or not it was worth purchasing. He confirmed that it was after they had viewed the property that the plaintiff and the first defendant discussed and agreed on the purchase price and the payment was done by cheque in his presence. He accompanied the plaintiff and the first defendant to Barclays Bank for the purpose of the encashment of the cheque. This witness did not conceal the fact that he is related to the plaintiff and that they at times discussed the matter. He impressed me as a truthful witness. He confirmed in a material way what the plaintiff said.

(c) Violet Mhlanga

She testified that she was not married to the plaintiff but she had children by him. The two did not live together as the plaintiff, at all material times, and up to date, lived in his house in Mpopoma. She said sometime either in 1977 or 1978 (she could only approximate) the plaintiff approached her and indicated that he bought the disputed house for their daughter Gabisile. She took occupation of the said property with the plaintiff's children and has remained in occupation to date of trial. At all material times she viewed the house as property properly purchased by the plaintiff. When the plaintiff fell ill she approached the first defendant to expedite the cession. The first defendant personally told her that the plaintiff had paid the full purchase price. He assured her that she was not under threat. Notwithstanding the assurances by the first defendant no cession took place. The plaintiff's medical condition deteriorated and so did her frustration with first defendant's failure to effect the transfer. She

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informed the plaintiff. At the ensuing discussion the plaintiff sought that the first defendant goes beyond assurance and effect the transfer at which point the first defendant then disclosed that he wanted to refund the plaintiff the purchase price. He indicated that he was being sued by his wife as he had sold the property without her knowledge. This did not go down well with the plaintiff. A heated debate ensued, which almost degenerated into a physical confrontation such that she had to intervene.

Thereafter the first defendant then agreed that he would effect the transfer and the necessary arrangements were made for him to meet with the plaintiff on a specified date at the offices of the second defendant. On the appointed date the first defendant did not present himself resulting in the present litigation. She also testified that from the time she took occupation the first defendant never, at any stage visited the property either, to inspect it and satisfy himself as to its condition or to check whether everything was in order and that rentals and rates were duly paid. She indicated, however, that the only point when the first defendant attended to the house was when she requested him to attend at the Council offices to sign certain documents relating to the conversion in the supply of electricity. The witness was subjected to lengthy cross-examination. I am satisfied that her story remained materially consistent throughout. She impressed me as a truthful witness. She made concessions favourable to the first defendant's case. Although she is related to the plaintiff and had discussed the matter with him from time to time I do not think her material testimony is a product of such relationship or discussions.

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She recounted only what she knew. She further recounted certain actions she had taken on her own and in the absence of the plaintiff. She also related discussions that she had had with the first defendant again, in the absence of the plaintiff. The fact that she had had such discussions is confirmed by the first defendant

himself. The only point of dispute is the content of such discussion. All the above indicate that her credibility is unassailable.

First Defendant's case

Lazarus Mujuru

He is the sole witness in support of his case. In essence his testimony was a complete denial of the agreement of sale. He alleges that he had leased the property to the plaintiff on condition that the latter was to vacate as soon as he secured his own. He testified that he knew the plaintiff very well since 1975 when he was a salesman at Rhodesia Sugar Refineries. He said that he had developed a personal relationship with him. He went on to state that it is the plaintiff who had approached him looking for a house to rent. He stated that this was sometime in October 1977. He then told the plaintiff that he had a full house to let out. It was then that an agreement was reached that the plaintiff would simply pay all rates and water charges due to Council. He also left the plaintiff the rent card and subsequently moved out. He said he used to check with the housing office whether the relevant charges were being paid. In 1982 he asked the plaintiff to vacate the property. The plaintiff's response was that he would move out when he secured alternative accommodation. In 1983 he repeated his request for

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the plaintiff to vacate. He stated that he wanted the plaintiff to vacate for two reasons which he gave as follows:

- (a) he had given the property to his daughter and he wanted her to occupy it, and
- (b) his nephew had been transferred from Harare to Bulawayo and he required accommodation.

The plaintiff did not vacate. In 1985 he again went to the plaintiff but found his shop closed. He failed to trace him at the disputed property. The plaintiff only approached him on 31 October 1999. He said when he was looking for the plaintiff MaMhlanga told him that she had bought the disputed property. On 31 October 1999 the plaintiff came with MaMhlanga. MaMhlanga introduced the plaintiff as the man from whom she had bought the house. The plaintiff sought that he (i.e. first defendant) transfer the disputed property into MaMhlanga's daughter's name. He refused and reminded the plaintiff that he was a simple lodger. The plaintiff then undertook to evict MaMhlanga from the property but he was surprised to receive a letter from the plaintiff's legal practitioners initiating these proceedings. I hold the view that the first defendant was shaken under cross-examination. He did not seem to take any direct interest in the property over a long period of time. He did not view the property over a number of years. For several years he did not take any steps to evict the occupants. He did not demand rent. Even on his own version he told the plaintiff to vacate in 1982, 1983 and 1985 but did not take legal steps to evict the plaintiff and those claiming through him. He sat back for around

fifteen (15) years and only issued summons for eviction after he became aware of these proceedings by the plaintiff. This does not depict conduct consistent with that of a landlord or an individual who retains a vested interest in a particular property. The only reason available for the first defendant's inaction is the fact that he knew that he no longer owned the property in question. In his own words MaMhlanga told her in 1994 that she had purchased the property in dispute. Why would such a revelation not prompt him to institute proceedings to assert his right?

From the foregoing it is clear that the plaintiff discharged the onus on him. He has proved his case on a balance of probability on the existence of an agreement of sale between him and the first defendant. He has shown that he has met all his obligations in terms of the agreement.

Accordingly, I order as follows:

- (a) That the first defendant be compelled to apply to the second defendant for its consent to the cession and transfer of the first defendant's rights, title and interest in 2467 New Magwegwe, Bulawayo to the name and title of the plaintiff.
- (b) That failing by the first defendant to comply with paragraph (a) the Deputy Sheriff of Bulawayo is authorised to sign all documents and forms required by the second defendant in his stead.
- (c) That the first defendant bears costs of this suit.

Marondedze, Nyathi, Majome & Partners, plaintiff's legal practitioners
Webb, Low & Barry, first defendant's legal practitioners