

EPHRAIM B CHIKWAYA

Versus

EZWENI NKALA

IN THE HIGH COURT OF ZIMBABWE
CHEDA & NDOU J J
BULAWAYO 12 JULY 2004 AND 12 OCTOBER 2006

S S Mlaudzi, for the appellant
J Dhlamini, for the respondent

Criminal Appeal

NDOU J: This is an appeal against a decision of a Bulawayo magistrate sitting in the Civil Court. The court *a quo* granted an order of ejectment against the appellant with costs. The brief facts are that the parties entered into an agreement of sale of stand 1355 New Magwegwe, Bulawayo. The relevant part of the agreement is the following:

- “1. The seller (appellant) hereby sells to the purchaser (respondent), who hereby purchases stand number 1355 New Magwegwe Township, Bulawayo being a residential house hereinafter referred to as the “property”.
2. The purchase price of the property is the sum of \$50 000,00 (fifty thousand dollars).
3. Mode of payment
 - (a) The purchaser shall pay cash the sum of \$40 000,00 (forty thousand dollars) upon signing of agreement.
 - (b) The purchaser agrees that the seller shall be paid the purchase price before the actual registration and transfer by the Municipality of Bulawayo.
 - (c) The seller hereby acknowledges receiving the amount of \$40 000,00 by signing this agreement of sale.
 - (d) The purchaser shall pay the balance of \$10 000,00 (ten thousand dollars) in monthly instalments of \$750,00 starting end of September 1998, until the whole balance is paid ...

7. Occupation

The seller shall give vacant possession of the property to the purchaser on or before the 1st December 1998 ...

10. Transfer

Transfer of the property to the purchaser shall be done upon the full payment of the purchase price by the purchaser through the Tshabalala Housing Office with a written consent from the Municipality of Bulawayo.

11. Breach

If the purchaser fails to pay the purchase price in terms of clause 3, the seller shall be entitled to cancel the agreement upon one calendar months written notice to the purchase and to enforce any other right the seller may have at law.”

It is common cause that the appellant ceded his right, title and interest to the respondent in April 1999. Notwithstanding his current position that he signed the agreement out of stupidity and that he was not paid in full, the appellant did not take any steps at all to reverse the agreement up to 27 October 1999 when the respondent issued out summons in this matter for ejection. Neither did the appellant file a counter claim to reverse the sale.

The respondent’s case was simply that he paid the purchase price in terms of the agreement hence the cession of the property to him by the appellant. Having performed in terms of the agreement he expected the appellant to vacate in terms of the agreement. These proceedings were necessitated by this failure to vacate by the appellant. The appellant’s case is that the respondent was supposed to pay \$50 000 “in cash” [Clause 3, *supra*, does not support this averment]. His case was that the respondent paid \$26 000,00 “in small amounts spread over a period” and failed to pay the balance of \$24 000,00. The respondent testified in the court *a quo* that he paid the

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respondent, through his appointed agent, the sum of \$40 000,00 in a lump sum and the balance of \$10 000,00 in instalments of not less than \$750,00 per month as agreed upon in the agreement. This version was supported by Zolile Sigidi, who not only assisted the appellant in this matter, but also represented him in proceedings in respect of the upliftment of the caveat placed on the property. The appellant paid the said agent for the latter services. Zolile Sigidi further testified that after the demise of law firm Brassel Sigidi & partners, the appellant paid him a visit at his place of abode and tried to elicit his support to avoid delivery of the disputed property by falsely alleging that the respondent had not paid the full purchase price. This latter piece of evidence was not challenged under cross examination (although Mr Mlaudzi, in his heads of argument says he did). The trial magistrate made several findings of fact. I will focus on two relevant ones. First, he believed the testimony of the respondent and Zolile Sigidi. Second, he found that the appellant and his wife were untruthful. He gave detailed reasons in support of these findings of fact. The assessment of the credibility of witnesses is the province of the trial court. This appellate court will not interfere unless there is something grossly irregular in the proceedings to warrant such interference – *R v Dhlumayo & Anor* 1948 (2) SA 677(A); *S v Mlambo* 1994(2) ZLR 410 (S) at 413; *Soko v S* SC-118-92. The evidence adduced by the respondent is consistent with probabilities. The fact that the appellant ceded his rights, title and interest in the property in April 1999 is consistent with having received payment in

terms of clause 3 of the agreement. Further, he did not thereafter seek to cancel the agreement on account of the alleged breach for several months thereafter. He had not done so at the time proceedings in the court a quo commenced. He did not file a claim in reconvention. He only raised the issue of the breach when the present

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eviction proceedings were brought against him. He only raised the issue of payment after the demise of his erstwhile agent. The finding that Brassel Sigidi & Partners were acting on appellant's behalf cannot be faulted either. The conduct of appellant was rightly held to be consistent with a party who had received the purchase price but was trying to renege from the agreement on account of greed. He did not even tender the amount he allegedly received during the trial in court. He has, in his own version, kept more than half of the purchase price and still remained in occupation of the premises.

Further, by consenting to cession of the property, the appellant impliedly accepted and agreed that the respondent had in fact paid the entire purchase price as provided for in the agreement. By not taking any steps to reverse the cession the appellant had accepted that the cession was lawfully taken and he is consequently bound by his implied ratification of his agent's action in facilitating the transaction – *Reed N O v Sagers Motors* 1970(1) SA 521 (RAD); *Senior Service (Pvt) Ltd v Nyoni*. 1986 (2) ZLR 293 (SC) and *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480; [1964] I ALL ER 630 (CA) at 644.

From the above, it is clear that the appeal is devoid of merit. Accordingly, the appeal is dismissed with costs on legal practitioner and client scale.

Cheda J I agree