

REGINA NGWENYA

Versus

GEORGINA NDLOVU

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 7, 8 FEBRUARY 2006 & 13 JUNE & 22 NOVEMBER 2007

S S Mlaudzi for the plaintiff

S S Mazibisa for the defendant

Application for absolution from the instance at the close of plaintiff's case

NDOU J: The plaintiff is employed in South Africa but her children reside in Zimbabwe in the custody of her sister. The plaintiff and defendant are cousins. What seems to be common cause or at least beyond serious dispute is that the plaintiff "owned" a house where her sister Bertha and her children stayed known as stand 58329/3 Mabutweni. The defendant was on a waiting list of the City of Bulawayo to be allocated a stand in Nkulumane high-density suburb under the so-called "shell houses" scheme whereby the "purchaser" was allocated a stand with a shell house on it. The shell house comprised a walled structure with no doors (including door frames) and windows (including window frames). The person allocated such a shell house was required to complete it into a house. The defendant was allocated shell house known as 13412 Nkulumane in 1991. This property is subject matter of these proceedings. A deposit of \$450 was required for her to take up the offer she did not have the money. The deposit was eventually paid by Bertha. The crucial issue is whether Bertha was paying on behalf of the plaintiff in form of some swop arrangement between the parties, or she was lending the money to the defendant. According to the plaintiff she paid this amount and paid for other fittings viz doors and windows etc through Bertha. She was doing this pursuant to a swop

agreement which entailed her completing the Nkulumane house and swoping it with the defendant for her Mabutweni property. The defendant's case on the other hand is that Bertha advanced the money to her as a loan and that she later paid back the amount. She disputes the existence of a swop agreement. What is however, common cause is that the plaintiff expended sums of money for the outstanding fittings, improvements and City Council loan repayments. The defendant's plea makes this concession. What the plaintiff is claiming is the transfer of the Nkulumane property to her names against the transfer of the Mabutweni property from her names to those of the defendant. In the alternative, the plaintiff claims reimbursement for the sums she expended on the Nkulumane property. This application for absolution from the instance at the close of plaintiff's case is primarily based on the fact that the summons does not disclose cause of action. Obviously if there was no cause of action the defendant should have excepted to the summons. Her failure to do so estops her from raising it now in this kind of application. I have heard the testimonies in support of the plaintiff's case. The question, therefore, is, at the close of plaintiff's case is there a *prima facie* case against the defendant? In other words, is there such evidence before this court upon which a reasonable man might, not should, give judgment against the defendant? – *Gascoyne v Paul & Hunter* 1917 TPD 170 at 171; *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR I (A) at 5; *Mazibuko v Santam Insurance Co Ltd & Anor* 1982 (3) SA 125 (A); *Munhuwa v Mhukahuru Bus Services* 1994 (2) ZLR 382 (H); *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A); *Sithole v P G Industries (Pvt) Ltd* HB-47-05 and *Moyo v Knight Frank & Anor* HB-87-05.

In casu, the evidence led for the plaintiff and the abovementioned admissions by the defendant clearly evince that the plaintiff expended substantial amounts of money in the

Judgment No. HB 118/07

Case No. HC 2951/97

X Ref HC 5258/98

acquisition and construction of the Nkulumane property. Was this mere generosity between cousins? With this kind of evidence the plaintiff has established a *prima facie* case against the defendant.

Accordingly, the application for absolution from the instance at the close of plaintiff's case is dismissed.

Samp Mladzi & Partners, plaintiff's legal practitioners
Cheda & Partners, defendant's legal practitioners