

DAY-SIBBS JOSIEL MUKWEVHO

Versus

ALBERT SIBANDA

And

SONENI SIBANDA

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 25 JANUARY & 1 FEBRUARY 2007

S Mazibisa, for applicant
J Dhlamini, for respondents

Opposed Court Application

KAMOCHA J: On 27 January 2004, the parties entered into an agreement of sale in terms of which the applicant sold to the respondents stand number 4082 Gwabalanda Township, Bulawayo. There is a dispute as to what the purchase price of the property was. But a close look at the agreement of sale itself shows that “The purchase price shall be \$19 000 000,00 (nineteen million dollars only), the sum of which shall be paid on the 27th January 2004, direct to the seller.”

The figure nineteen was later altered in long hand to read \$40 000 000,00. A black pen was used to alter the figure 19 but the “9” is clearly visible inside the zero of figure 40. The alteration to say the least was so clumsy that it could not mislead anybody because the amount in words remained unaltered, it still reflected “(nineteen million dollars only)”.

The applicant wanted the court to believe that the purchase price was \$40 000 000,00 but the respondents only managed to pay \$27 000 000,00 leaving a short fall of \$13 000 000,00. Applicant alleged that the respondents failed to pay the

outstanding amount until he had to put them *in mora*. Parties had to enter into another agreement entitled “Acknowledgment of debt” which read in part:

“And whereas the purchaser do hereby undertakes to pay the balance of \$13 000 000,00 as follows:-

- (1) amount of \$10 000 000,00 by Monday the 15th March 2004;
- (2) that the purchaser shall pay the balance of \$3 000 000 by Friday the 19th March 2004, and should he fail to pay the amount of \$10 000 000 by the 15th March, 2004, the sum of \$13 000 000 becomes due and payable and shall attract interest of 45% per month, and the purchaser shall be given up to the 31st day of march 2004 to settle same, failing which the seller shall refund the amount of \$27 000 000 paid to him by the purchaser and cancel the agreement.”

I pause to observe that this purported agreement is not dated and it is not clear when exactly it was allegedly concluded. Only two of the three parties to the main agreement allegedly entered into an acknowledgment of debt. Soneni Sibanda the 2nd respondent was not privy to the acknowledgment of debt so she is not bound by its terms. The applicant alleged that the respondents failed to pay the \$13 million by 31 March 2004 resulting in him having to cancel the agreement and tendered the \$27 million the respondents had already paid.

He now seeks an order from this court confirming the cancellation of the agreement of sale. He further seeks the eviction from the property of the respondents and all those claiming through them.

Finally, he prays for an order for payment of costs on an attorney-client scale.

The respondents vigorously opposed the application. Their story is that the purchase price was \$19million which they paid upon signing of the agreement. They were also advised by the applicant’s erstwhile legal practitioners that they would have to pay money for stamp duty and capital gains tax due to the Zimbabwe Revenue Authority. They were not aware at that stage that those charges were the

responsibility of the seller. They ended up paying an extra \$8 million. All in all they paid the applicant \$27 million which is in fact common cause. They deposited the money into the applicant’s bank account at the Jewel Bank. \$21 million was paid on 23 February 2004 and \$6 million on 27 February 2004.

The respondents averred that it was never agreed that the purchase price was \$40 million. They denied owing a balance of \$13 million. Instead the applicant owes them a sum of \$8 million.

It was their assertion that the applicant had a change of heart and started to suggest that the purchase price had to be re-negotiated upwards to \$40 million. The 1st respondent alleged that he had been approached by the applicant who told him that his wife and relatives had accused him of selling the property at an unreasonably low price and suggested that the property price should be \$40 million. The 1st respondent alleged that the applicant said he would cancel the agreement of sale and evict the respondents if 1st respondent did not sign the acknowledgment of debt. The 2nd respondent added that they were living in perpetual insecurity due to the applicant's alleged violent behaviour. To make things worse their maid was contemplating resigning from her job as most of the times applicant found her at the house. She claimed that it was as a result of threats of violence and physical harm to the 1st respondent that he signed the acknowledgment of debt. He had to sign it to save his life which was under real threat from the applicant – a military man holding a high rank within the Zimbabwe National Army.

The respondents filed of record a genuine and original agreement of sale reflecting the purchase price as \$19 million. They then concluded that the agreement of sale filed by the applicant was clearly forged and moved that the court should not accept it. I agree. That explains why the applicant did not dispute it in his answering affidavit. Even Mr *Mazibisa* appearing for the applicant did not address the issue in his submissions to the court. In the result I make a specific finding that the applicant forged the agreement of sale that he filed. I further find that the purchase price was \$19 million. It is common cause that the purchase price was paid in full.

I am also inclined to accept the respondents' story that 1st respondent was forced to sign the acknowledgment of debt. The applicant threatened to harm the respondents.

In his answering affidavit the applicant stated that the initial understanding between the parties was that he would get \$40 million cash but the agreement would read \$19 million and the balance would be paid to him in cash. He claimed that that arrangement was aimed at reducing the transfer fees, capital gains tax and stamp duty payable by the parties. That assertion is vehemently denied by the respondents. If that was the case the agreement of sale would have reflected the purchase price as \$40 million. There would have been no need for the applicant to forge it clumsily as he did. The story about the parties trying to cheat the Zimbabwe Revenue Authority is clearly an after thought on the part of the applicant due to pressure from his wife and relatives who felt that the property was sold at a very unreasonably low price. It is hereby rejected.

The applicant forged the document which he filed of record as the agreement of sale albeit clumsily. He was untruthful about the parties wanting to cheat ZIMRA. This is a proper case, in my view, where he must be visited with punitive costs so as to discourage him from his dishonest tendency in future.

Consequently, in the light of the specific findings I have made I would dismiss this application with costs on an attorney and client scale.

Messrs Cheda & Partners, applicant's legal practitioners
Lazarus & Sarif, respondents' legal practitioners