

**NAISON CHAGARA GONOUYA**

**Versus**

**SHADRECK HUKUIMWE**

**And**

**JUSTICE MUNYAMANA**

**And**

**BULAWAYO CITY COUNCIL**

IN THE HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 19, 20, 21 MAY 2009 AND 29 JULY 2010

*B Ndove*, for plaintiff

*G Nyathi*, for 2<sup>nd</sup> defendant

No appearance for 1<sup>st</sup> and 3<sup>rd</sup> defendants

Civil Trial

**KAMOCHA J:** The plaintiff's claim in this matter was for:-

- “(a) An order compelling 2<sup>nd</sup> defendant to sign all necessary cession documents kept at 3<sup>rd</sup> defendant's offices and transfer the rights, title and interest on stand number 30583 Entumbane, Bulawayo from his name to the names of plaintiff or his nominees for the reason that the property was actually bought by plaintiff from 1<sup>st</sup> defendant and only transferred into 2<sup>nd</sup> defendant's names for convenience due to the then prevailing restrictive regulations by 3<sup>rd</sup> defendant. The property actually belongs to plaintiff who obtained it for value from 1<sup>st</sup> defendant. Despite lawful demand to effect transfer, 2<sup>nd</sup> defendant has unreasonably refused, neglected or failed to effect the property (*sic*) into plaintiff or his nominees' names.
- (b) An order that 2<sup>nd</sup> defendant be evicted by the Deputy Sheriff from stand number 30583 Entumbane, Bulawayo and that plaintiff or his nominees be given vacant, peaceful and undisturbed possession of same.

- (c) An order that 2<sup>nd</sup> defendant be ordered to pay costs of suit at attorney-client scale.”

In his declaration the plaintiff stated that he purchased house number 30583 Entumbane, Bulawayo “the property” from Shadreck Hukuimwe – the first defendant in 1986 for a sum of \$3 000,00 (old currency). Since he had paid the purchase price in full he was given vacant and peaceful possession of the property that same year.

Instead of occupying the property himself, the plaintiff allowed one Joseph Mahlatini to do so. Mahlatini occupied the property on condition that he paid municipal rates and paid for electricity that he consumed.

The plaintiff at that stage had already acquired another property, within the Bulawayo Municipal area, which had been registered in his name. He, therefore, could not have another property registered in his name as the prevailing Bulawayo Municipal regulations prohibited individuals from having more than one property registered in their names.

Mahlatini and Justice Munyamana – the second defendant were workmates at Datlabs and they still were, at the time of the trial of this matter. Munyamana was Mahlatini’s superior at work but they were friends. On the recommendation of Mahlatini the plaintiff agreed with Munyamana that the property would be registered in Munyamana’s name. Munyamana was married and his marriage certificate was used to effect the transfer of the rights, title and interest into Munyamana’s name from Hukuimwe for no value at all. The parties did that because Munyamana was one of the plaintiff’s friends whom he trusted.

Munyamana did not have a house of his own as a good gesture the plaintiff allegedly allowed him to occupy house number 33578 Entumbane, Bulawayo which was one of the plaintiff’s houses. He occupied it rent free. All he did pay for was electricity he consumed and municipal rates.

Trouble started on 27 February 2006 when plaintiff suggested to Munyamana that he should start paying rentals in respect of house number 33578 Entumbane which he occupied. A figure of \$1 500,00 (old currency) per month was suggested.

On 11 March 2006, Munyamana allegedly used his authority at work over Mahlatini. He intimidated him and managed to evict him from house number 30583 Entumbane, Bulawayo. He claimed that the house was his since it was registered in his name. He then allegedly took unlawful occupation of the house himself when he had no right at all over the property. He allegedly wanted to unjustly enrich himself at the expense of the plaintiff who purchased the property from Hukuimwe.

When called upon to vacate the property and transfer it into the plaintiff's name or his nominee, Munyamana refused and claimed that he was the one who had bought the property from Hukuimwe. The plaintiff averred that Munyamana was just being dishonest and untrustworthy.

Although Munyamana was married and was on the waiting list for a house in the Municipality of Bulawayo, he had no money to purchase a house. The property in issue was merely registered in his name in trust and he would be advised later to transfer it into the plaintiff's nominee at a convenient time. The period of the trust was not specified.

In his plea Munyamana stated that the plaintiff did not have a marriage certificate and was not on the waiting list for a house in the Municipality of Bulawayo.

He averred that after the plaintiff had purchased the house from Hukuimwe, he was under pressure from Hukuimwe who wanted to transfer the house to him. Plaintiff approached Mahlatini who personally knew Munyamana. He had knowledge that Munyamana had a marriage certificate and was on the waiting list for a house in the Municipality of Bulawayo.

Sometime in February 1988 the plaintiff, Mahlatini and Munyamana met at Save The Nation where the following was verbally concluded:-

- (a) Plaintiff made an offer to sell the house number 30583 Entumbane, Bulawayo to the second defendant for the sum of \$3 000,00.
- (b) Second defendant accepted the plaintiff's offer.
- (c) The house was transferred to the second defendant's names.

The defendant alleged that he attempted to pay the purchase price to the plaintiff on numerous occasions but the plaintiff kept on postponing the dates for payment. He felt that the plaintiff was in fact bent on frustrating him and made it impossible for him to fulfill his contractual obligations. He concluded that the plaintiff was acting in bad faith but all the same he himself was willing to pay the purchase price together with interest at the prescribed rate.

He vowed to hold the plaintiff to the February 1988 verbal contract and that he would counter claim for an order for specific performance.

He denied that the meeting of 27 February 2006 was for discussing rentals. His story was that he had gone there to pay the purchase price to the plaintiff. To his surprise the plaintiff sought to unilaterally cancel the verbal agreement. Plaintiff did not end there, he even purported to treat the defendant as his tenant. Defendant, of course, refused to accept that.

He denied ever evicting Mahlatini and, instead, alleged that Mahlatini voluntarily vacated the house. He then lawfully occupied his own house. He was merely enforcing their

verbal agreement which the plaintiff purported to unilaterally cancel. He alleged that the issue of unjust enrichment did not arise at all as the property was lawfully his. He reiterated that his occupation of it was meant to enforce the verbal agreement between the parties.

In conclusion he prayed that the plaintiff's claim be dismissed with costs and that plaintiff be ordered to accept the purchase price together with interest at the prescribed rate.

When the parties attended a pre-trial conference before a judge they agreed on, and formulated, the issues for the trial court as follows:-

- “(1) Whether plaintiff's claim against 2<sup>nd</sup> defendant is prescribed in terms of the law.
- (2) Whether there is an agreement of sale of rights, title and interest in stand number 30583 Entumbane, Bulawayo between plaintiff and 2<sup>nd</sup> defendant.”

At the trial the defendant moved that the court deals with his special plea which he had filed in terms of order 21 rule 137(1)(a) of the rules of court in the hope that the matter would be disposed at that stage if the plea in bar succeeded.

The defendant submitted that the plaintiff's claim was prescribed by operation of law in that:-

- (a) Title in respect of house number 30583 Entumbane, Bulawayo was passed to him on 11 February 1988; and
- (b) The plaintiff did nothing to claim from him the title for the said house for 19 years.

Further, it was contended that on receipt of the special plea the plaintiff was required to file an answer to the special plea in bar either denying that prescription applied or joining issues. That was not done and the inference to be drawn was that the plaintiff had admitted that his claim had prescribed. Moreover, the plaintiff had done nothing to interrupt the prescription. Consequently the plaintiff's claim was prescribed in terms of section 15(d) of the Prescription Act [Chapter 8:11].

The plaintiff on the other hand contended that the house was registered in the defendant's name in trust. Indeed the transfer was effected on 11 February 1988 on condition that when the plaintiff's nominee was available the property would be transferred into the name of the nominee who was the plaintiff's son. Transfer was only going to be due when the son attained majority. He only became a major in 2006. That, accordingly, was the time that transfer was due.

The plaintiff went on to submit that defendant did not live in the said house from the time it was registered in his name in trust until 2006 – a period of 18 years. In conclusion plaintiff submitted that the plea in bar was devoid of any merit and must fail with costs.

After the parties had made their submissions the court dismissed the plea in bar with costs. The court found that prescription only started to run when the plaintiff's nominee i.e. son attained majority in 2006 and summons was instituted on 8 march 2007.

Thereafter defendant through his legal representative sought leave to appeal against the court's ruling. The application was opposed on the basis that it was frivolous and vexatious. Needless to say that the court found it to be devoid of any merit and dismissed it.

The plaintiff called two witnesses to support his story after he himself had given evidence.

His evidence was that he was a businessman in Bulawayo who lived at 64 St Albany Drive, Parklands. He knew the 1<sup>st</sup> defendant prior to this case as he as a best friend of his elder brother's son. Both used to work for Power Sales. He also knew the 2<sup>nd</sup> defendant prior to this case as they were friends who grew up together in Bulawayo. Plaintiff was also a friend of Mahlatini who happened to be the best friend of the 2<sup>nd</sup> defendant - Munyamana.

Sometime in 1986 plaintiff bought the house at the centre of this dispute i.e. house number 30583 Entumbane, Bulawayo from Hukuimwe – the 1<sup>st</sup> defendant. In 1988 Hukuimwe wanted to transfer the house from his name to that of the plaintiff. However, the plaintiff happened to be on the waiting list for a house in the up-market – eastern suburbs of Bulawayo. City Council policy at that time did not allow anybody to own two properties under its jurisdiction. In the light of the problem that he was facing he spoke to his friends and requested that if he could use the name of anyone amongst them who did not have a house within the Municipality of Bulawayo. Mahlatini informed him that Munyamana had a registered marriage but did not have money to buy a house. He was, therefore, suitable to assist plaintiff.

The plaintiff, Mahlatini, Mauchaza and Munyamana then held a meeting whereat it was agreed that the house would be registered in Munyamana's name. They also agreed that the house would later be registered in the name of the plaintiff's son when he attained majority. The house was accordingly registered in Munyamana's name on 11 February 1988 on that understanding. He held the house as a trustee.

Mahlatini took occupation of the house after its registration into Munyamana's name. Munyamana lived in Luveve where he was renting a house. In 1997 Munyamana sent word to plaintiff via Mahlatini to the effect that he needed accommodation. The plaintiff decided to

allow Munyamana to occupy one of his houses in Entumbane – house number 33578 Entumbane. The spare room of that house was occupied by a tenant. Munyamana had preferred to occupy the whole house as he said he had a big family and suggested that the tenant occupying the spare bedroom should vacate it. The plaintiff did not accede to Munyamana's request and told him that he still needed rentals from that tenant. He went on to offer him to stay in the house rent-free but he would only pay for the water and electricity that he consumed. He said Munyamana did not appear to be happy with the offer. He complained that since he had helped the plaintiff by having one of his houses registered in his name he deserved a better deal from plaintiff but the plaintiff stood his ground.

Munyamana remained disgruntled during his stay at house number 33578 Entumbane. At one time he demanded to move to house number 30385 Entumbane on the grounds that he had assisted plaintiff to have it registered in his name but still got no joy.

Matters came to a head in 2006 when plaintiff requested Munyamana to start paying rent for the portion of house number 33578 which he occupied. Munyamana then proceeded to house number 30385 Entumbane which was occupied by Mahlatini and another tenant and evicted them. He literally removed their belongings from the house and placed them outside and took occupation of the house with his family. Plaintiff tried to talk to Munyamana but all his efforts were in vain.

Plaintiff denied ever selling the house to Munyamana. He never refused to accept any purchase price. That did not happen at all. The house was never sold to Munyamana.

The plaintiff was cross-examined at some length but stuck to his story. When it was suggested to him that the defendant would not sacrifice his being on the waiting list for the sake of the plaintiff's minor child his reply was that the defendant had told him that he had no money to buy a house at that stage but if he had raised some money at some stage plaintiff would have looked for somebody else to assist him like what Munyamana did. Further when it was put to him that he refused to accept the purchase price he was emphatic that the suggesting was not true. He expressed a laughter and surprise when it was put to him that he had offered the house for sale at the meeting held in February 1988 attended by Mahlatini. When asked why he was laughing he retorted that the suggestion was a complete lie. When it was repeated that plaintiff had in fact offered the house for the sum of \$3 000,00 he challenged Munyamana to either produce a written agreement or call witnesses to support his assertions. Plaintiff gave his evidence in a straight forward fashion and was not shaken under cross-examination. He is worth to be believed.

His evidence was corroborated on all material points by the two witnesses he called. Rendy Mauchaza is a friend of both the plaintiff and Munyamana. They grew up together. They used to play soccer together and went out drinking together and they still do so.

Mauchaza told the court that he was present when plaintiff bought the said house from Hukuimwe but the house could not be registered into the name of the plaintiff as he did not have a registered marriage then. It was his evidence that plaintiff approached his friends and asked if anyone of them had a registered marriage. Mahlatini recommended that Munyamana's marriage certificate could be used since he himself was not using it at the time. The arrangement was that when the plaintiff's son attained majority the house would be transferred from Munyamana's name to the son's name. Munyamana merely held the house as a trustee pending plaintiff's son becoming a major.

He alleged that plaintiff never sold the house to Munyamana. He claimed that if that had happened he would have known about it as the plaintiff and him were best friends. They even shared secrets. It, therefore, came as a shock to hear that Munyamana was claiming to have bought the house from the plaintiff and had even gone to the extent of evicting Mahlatini therefrom. He could not understand why Munyamana did that when the plaintiff had provided him with accommodation when he was in need. He finally emphasized that if there had been any sale of the house between plaintiff and Munyamana he would have certainly known about it as both men were his friends. This witness gave his evidence well and was not shaken under cross examination. He was a credible witness.

The second witness was Joseph Mahlatini whose evidence was substantially the same as that of the plaintiff and Rendy Mauchaza. He grew up with plaintiff and Munyamana and they were also his friends. Munyamana was his superior at Datlabs where they have been workmates from as far back as 1972 to date.

While he confirmed that the house was registered in Munyamana's name in trust he denied that it was later sold to Munyamana. He said none of his two friends ever told him about the sale of the house. He lived in the house from the time plaintiff bought it from Hukuimwe in 1986 until he was evicted by Munyamana in 2006 but was never told, during that 20 year period, that Munyamana had bought it. All he knew was that it had been registered in Munyamana's name in trust. Mahlatini was also a credible witness. He is worth to be believed.

The defendant gave evidence and called his wife to support his case.

His testimony was that he lived at the house in question. He explained that by 1988 he already had four children. His friend Joseph Mahlatini approached him and told him that plaintiff was selling the said house. He was not interested in the house because:-

Firstly, he was on the waiting list for a house with the City of Bulawayo on the Glencara scheme which offered five roomed houses;

Secondly, he had no problem with accommodation; and

Thirdly, he had no money to buy that particular house.

He told Mahlatini to convey his response to the plaintiff. But to his surprise Mahlatini returned with the same offer from the plaintiff. According to him the reason why plaintiff persisted with wanting to sell the house to him was that Mahlatini was aware that he had a marriage certificate and was on the waiting list for a house with the Municipality of Bulawayo.

When he asked why the plaintiff was persistent with the offer, Mahlatini allegedly revealed that plaintiff had bought the house when he did not have the necessary documents required by the City Council. He said the plaintiff was under pressure because he owned two houses in the Municipality of Bulawayo which had threatened to repossess one of the houses if he did not dispose of it before the end of February 1988. He said he was touched by the plaintiff's plight and did not want the plaintiff to lose both the house and his money.

He then went with Mahlatini to Save The Nation which is the plaintiff's business. While they were there plaintiff pleaded with him to get to his rescue by buying the house in question from him. He agreed.

A verbal agreement of sale of the house was concluded. The purchase price was \$3 000 – the same amount he had bought it for from Hukuimwe two years earlier. The sale was an instalment one although the instalments were not stipulated. The terms were very generous since the plaintiff allowed him to pay any amount he could afford at a time. It never occurred to him that the agreement could be breached since plaintiff was his good friend. The parties then allegedly agreed to allow Mahlatini to stay in the house until defendant saw it fit for him to take occupation.

The house was accordingly registered into his name because he had bought it. He was not a trustee. He denied that the arrangement was that the house would be transferred into the plaintiff's son on attaining majority. He went on to state that although plaintiff was his friend he would not have sacrificed his children's accommodation for the unborn child of the plaintiff. He said only a mad person would do that.

Defendant also denied staying in house number 33578 Entumbane rent free. He denied ever evicting Mahlatini from the house in question and alleged that he vacated the house voluntarily by arrangement.



As far as the paying of the alleged installments was concerned it was his evidence that he had tried to make payment several times but the plaintiff initially said it was too early for the payment. When he tried to do so on subsequent occasions he was told to wait.

He finally invited the plaintiff and Mahlatini to his house in 1996. The plaintiff still refused to receive part of the money in the presence of his wife (Munyamana's). Plaintiff was so disrespectful that he even refused to take a seat at Munyamana's house.

Munyamana fared very badly under cross-examination. It came out in cross-examination that when the plaintiff's legal practitioners wrote to him on 4 January, 2007 he went to seek legal advice at the Bulawayo Legal Project Centre and handed the letter to the legal practitioners who replied as follows on 15 January 2007:-

"According to our consultant's instructions, in around February 1988, Mr Gonouya approached him and advised him of sale of house number 30563 Entumbane (*sic*) which he had failed to purchase, as he could not meet City Council requirements.

Our consultant received a loan of \$1 765,24 as purchase price of the house from Gonouya and proceeded to buy the house from Shadreck Hukuimwe. Our consultant was aware that he was indebted to Mr Gonouya and tried on several occasions to repay him. We note with regret that the loan claim has since prescribed."

Munyamana denied giving his erstwhile legal practitioners those instructions. He was clearly being untruthful. As can be seen from the letter, he also told lies to the lawyers about buying the house from Hukuimwe and borrowing \$1 765,24 from the plaintiff to pay for the house.

Similarly the story he told the court that he bought the house from plaintiff is also false. It is also not true that the house was registered in his name because he had bought it. The truth is that it was registered in his name in trust as testified by the plaintiff and his witnesses. Equally false therefore, is his story that he and plaintiff had entered into a verbal agreement of sale of the house. There was no such agreement whatsoever. Furthermore, his story about the instalments and plaintiff refusing to receive such instalments is clearly false. His whole defence is predicated on lies and must accordingly be rejected and so is his counter claim which must fail.

He called his wife as a defence witness but she did not take his case any further. This court accepts the well given evidence of the plaintiff and his witnesses. The court makes a specific finding that Munyamana held the house as a trustee and that it was going to be transferred into the name of the son of the plaintiff when he attained majority.

As regards costs I find that this is a proper case for the court to award punitive costs. It was because of Munyamana's unbridled lies that this unnecessary litigation was instituted. He firstly alleged that plaintiff's claim was prescribed when the debt only became due in 2006. Secondly, he alleged that there was a verbal agreement of sale by instalments when that was not true. The plaintiff is entitled to recover his costs in full.

In the result I would grant the plaintiff's claim in terms of the draft order at page 1 of this judgment and dismiss the second defendant's counter-claim on an attorney and client scale.

*Maronedze, Mukuku, Ndove and Partners*, plaintiff's legal practitioners  
*Sansole and Senda*, 2<sup>nd</sup> respondent's legal practitioners