

**JULIUS MPOSELWA**

**Versus**

**LEOCHIWE TRADING (PVT) LTD t/a KALAMBEZA SAFARIS**

**And**

**NOREEN SIBANDA**

**And**

**BENSON SIYAWAREVA**

**And**

**DIRECTOR OF HOUSING – VICTORIA FALLS**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO, 31 MAY 2010, 24 NOVEMBER 2014, 19 FEBRUARY,  
15 APRIL & 24 SEPTEMBER 2015

**Judgment**

*Ms C. Mudenda* for plaintiff

*L. Nkomo*, for 2<sup>nd</sup> & 3<sup>rd</sup> defendants

No appearance for 1<sup>st</sup> and 4<sup>th</sup> defendants

**NDOU J:** This matter has a disturbing chequered history characterised by dalliance. The parties commenced their legal battle in the Magistrates' Court. I will not deal with what transpired at the lower court suffice to say that on account of the lack of jurisdiction the matter ended up in this court. In this court, the matter commenced as a court application wherein the plaintiff, as the applicant, sought an eviction order against the first, second and third defendants as first, second and third respondents respectively. The Director of Housing of the Municipality of Victoria Falls was cited as the fourth respondent.

As the application proceedings progressed the parties accepted that there were disputes of fact which could not be resolved on the papers without hearing oral evidence and the matter was converted to trial proceedings. On 20 August 2009 plaintiff filed a notice of withdrawal of his claim against first defendant, thereby leaving the proceedings between him and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

### **Issues for trial**

At the centre of the dispute between the parties are two agreements. First, a written agreement entered into by the plaintiff and the first defendant on 19 November 1997. While the agreement is titled “MEMORANDUM OF AGREEMENT OF SALE”, it is clear from a perusal of the terms and conditions thereof and it was common cause between the parties during trial, that that agreement is in fact a cession. The agreement will accordingly be referred to as “the cession agreement” in this judgment. Second, another written agreement entered into by the first defendant ad the second and third defendants. While this agreement is also titled “MEMORANDUM OF AGREEMENT OF SALE”, it is clear from a perusal of the terms and conditions thereof, and it was common cause between the parties during the trial, that the agreement is in fact a further cession. This agreement will accordingly be referred to as “the further cession agreement” in this judgment.

At the commencement of the trial the legal practitioners of the parties confirmed the agreed issues for trial as the following.

- (a) Whether the cession agreement between plaintiff and the first defendant in terms of which the plaintiff ceded to the first defendant his rights and interests in stand number 5551 Mkhosana Township, Victoria Falls is valid.
- (b) Whether the further cession by first defendant to second and third defendants of its right and obligations is valid.

- (c) Whether the plaintiff is entitled to evict 2<sup>nd</sup> and 3<sup>rd</sup> defendants from stand number 5551 Mkhosana Township, Victoria Falls in light of the alleged cancellation by the plaintiff of the cession agreement between him and the first defendant.

### **Plaintiff's case**

The plaintiff was the sole witness in support of his case. His oral evidence may be summarised in the following manner. He commenced his testimony by stating that the cession agreement that he entered into with the first defendant was not proper because at the time it was concluded he did not have a title deed to the disputed property. He stated that prior to concluding the cession agreement with the first defendant, he had borrowed some money from the first defendant, represented by M. Giering and had failed to repay the money. He said that he had first wanted to lease the disputed property to the first defendant but the first defendant was not interested in leasing hence the conclusion of the cession agreement. The agreed consideration for him to cede his right and interests in the disputed property to the first defendant was the sum of Z\$37 000,00 together with repayment of the mortgage bond over the property which was the sum of Z\$69 122,24. He said after the cession had been concluded the first defendant, through Mr Giering, indicated to him that it was no longer interested in the cession agreement and sought cancellation of same and demanded repayment of the money first defendant had paid to him. He said he was compelled by first defendant's demand for repayment of the money which the first defendant had paid to him pursuant to the cession agreement to look for the money which he managed to raise by February 2002. He paid the first defendant the sum of Z\$58 000,00.

Prior to repaying the money to the first defendant he had met with the second and third defendants in November 2001 who told him that they had paid Z\$18 000,00 to Mr Giering and they wanted refund from him before vacating the immovable property in dispute. He together with second and third defendants then met Mr Giering and at the alleged meeting second defendant demanded payment of Z\$100 000,00 from him and Mr Giering. He said he sold his

tractor and raised the Z\$100 000,00 and paid the total of Z\$158 000,00 to Mr Giering on 25 February 2002. After paying the Z\$158 000,00 to Mr Giering on 25 February 2002 the Special Power of Attorney to pass transfer which had been granted by the plaintiff to first defendant pursuant to the cession agreement entered into in November 1997 was cancelled by drawing lines across and signing on it. According to him, the cession agreement was no longer effective from that date. On 29 February 2002 he applied for the mortgage clearance certificate from the Zimbabwe Building Society (“ZBS”) with a view to applying for the title deed to the immovable property on 17 May 2002. After obtaining the title deed he demanded that the second and third defendants vacate the property and when they refused he instituted the court application for an eviction order in the Victoria Falls Magistrates’ Court. He said he first saw the further cession agreement between the first defendant and the second and third defendants during the proceedings in Victoria Falls Magistrates’ Court on 16 and 19 September 2003. The application for eviction failed and he appealed against the judgment to this court. This court, on appeal remitted the matter to the Magistrates’ Court for a fresh hearing. That hearing was held and the Magistrates’ Court ruled in favour of the second defendant and ordered him to transfer ownership to second defendant. He again appealed to this court against the judgment of the Magistrates’ Court. This court again remitted the matter back to be heard before a different magistrate. Thereafter the second and third defendants approached him seeking to have an out of court settlement by buying the immovable property from him. The negotiations did not yield any result. Under cross-examination he said that he had received Z\$37 000,00 as part of the purchase price which was in the sum of \$69 122,24. The latter amount was due in 1999. He said that the money that the second and third defendants were paying to Mr Giering was rent. Mr Giering was supposed to pay the mortgage. According to him, second and third defendants were occupying the property as tenants. In other words, he confirmed that it is true that the second and third defendant were paying off the mortgage bond over the property from the time they took occupation. He said the second and third defendants’ paying-off of the mortgage bond was as good as Mr Giering who was obliged to pay-off the mortgage bond in terms of the cession agreement before it was cancelled. He said that the ownership of the immovable property in

dispute belongs to him because after the cession agreement between him and the first defendant there was no transfer of ownership to the first defendant and he had cancelled the cession agreement. Under cross-examination he conceded that he entered into the cession agreement with first defendant on 19 November 1997 and the agreement binding on him. The basis of his claim is that he cancelled the cession agreement on 25 February 2002. He confirmed that he knew that the second and third defendants were in occupation of the immovable property in dispute since 1998. He conceded that the cession agreement between him and the first defendant did not have any clause barring the first defendant from further ceding its rights and obligations to another person. He conceded that he would not have any reason to challenge the further cession by the first defendant to the second and third defendants of the rights and obligations under the cession agreement had he been aware of it prior to 11 November 2001. He said he only made two payments to ZBS to clear the balance of the mortgage bond in March 2002 as he was pushing to obtain title deed to the immovable property. The two instalments he paid to ZBS to clear the balance of the mortgage bond were refunded to him by the second and third defendants through payment into court of the sum of Z\$91 300,00 as ordered by the Victoria Falls Magistrates' Court. He also stated that he tried to enter into an agreement of sale of the property with some other person after he obtained the title deed.

### **Second and third defendants' case**

The second and third defendants opened their case by calling one Hartman Otto Giering to testify. His testimony may be summarised in the following manner. At the material time he used to work for the first defendant as a managing director. The second defendant was employed by first defendant in the accounts department. The plaintiff was employed by the Municipality of Victoria Falls. He said the plaintiff approached the first defendant offering to cede to the first defendant for value his rights and interests in the immovable property in dispute. The first defendant was in need of accommodation for its staff and it accepted the plaintiff's offer. A written cession agreement was drafted and signed by the parties. Shortly thereafter the first defendant discovered that the plaintiff did not have the title deed to the property yet and it was

not clear when the title deed will be processed. The first defendant decided to withdraw from the cession agreement. Before the first defendant could cancel the cession agreement, the second defendant expressed interest in acquiring the property with the consent of the plaintiff. The plaintiff agreed and offered to approach the Municipality of Victoria Falls to have the documentation in relation to the property changed from his name to that of the second defendant. With the consent of the plaintiff, the first defendant entered into a written agreement with the second and third defendants on 8 April 1998 in terms of which it assumed or ceded to second and third defendants its rights and obligations under the cession agreement with the plaintiff. After further ceding its rights to the second and third defendants, the first defendant never at any stage approach the plaintiff seeking to cancel the cession agreement entered into on 19 November 1997. He said that he did not recall the plaintiff repaying the money that had been paid by the first defendant to him pursuant to the cession agreement. He, however, recalled that the plaintiff at some stage paid to his wife money in Zimbabwe Dollar currency which was for a debt that he owed to the first defendant. He did not recall ever seeing the document titled “MEMORANDIUM (*sic*) OF WITHDRAWING A SALE AGREEMENT”. He, however, recognized the document titled “SPECIAL POWER OF ATTORNEY” and confirmed that on 25 February 2002 the plaintiff came to him demanding that he should cancel that document. He said two reasons compelled him to endorse the document “Cancelled”. Firstly, the Special Power of Attorney had become irrelevant in 2002 as the first defendant had further ceded its rights to the second and third defendants in April 1998. Second, the plaintiff was threatening him and his family. As a result these threats he was coerced into endorsing “Cancelled” on the document. He said the plaintiff started threatening him and his family during the period from 2001 to 2002. During the said period the plaintiff had made efforts to sell the immovable property in dispute to two other persons.

Under cross-examination, he stated that the first defendant operated as a company from 1995 to 1999. He said that the first defendant did not have a special resolution to enter into the cession agreement only that him and his wife trusted each other as it was a small family company.

The second defendant, Noreen Sibanda also testified. Briefly she stated that she was employed in the accounts department of the first defendant as from 1995. She got to know of the cession agreement between the plaintiff and first defendant because she is the one who wrote the cheques payable to the plaintiff. A few weeks after the cession agreement had been concluded Mr Giering, on behalf of first defendant was unhappy with the cession because he had found out that the immovable property did not have a title deed at that stage. The first defendant engaged the plaintiff on the issue of lack of title deed. The plaintiff did not have the money to refund the first defendant. It is at this stage that she got into the picture, so to speak. She expressed interest in acquiring the disputed property and she expressed here interest to the first defendant. The first defendant arranged a meeting where the three parties *viz*, the first defendant, the plaintiff and her met and she was shown all the documentation relating to the cession agreement by the first defendant and the plaintiff. The parties agreed that the first defendant will further cede its rights under the cession to her and she will refund the expenses incurred by the first defendant pursuant to the cession agreement. With the consent of the plaintiff, the first defendant, through Mr Giering, drafted a written agreement dated 8 April 1998 in terms of which it further ceded its rights under the cession agreement to her and her husband, the third defendant. The further cession was signed by the parties thereto. She said that she and her husband paid back the first defendant the money which it had paid to the plaintiff pursuant to the cession agreement and thereafter assumed the rights and obligations of the first defendant under the cession agreement. Part of the consideration payable under the cession agreement was that the mortgage bond over the property be paid off and thereafter the plaintiff would obtain the title deed and then transfer ownership of the property from his name to that of the second and third defendants. After the further cession of rights agreement was signed on 8 April 1998, the plaintiff took second and third defendants to the Municipality of Victoria Falls to change the documentation of the property in dispute from his name to that of the second defendant. At the Victoria Falls municipality they were advised that the only way to speed up the transfer process was to pay-off the mortgage bond over the property quickly so that the title deed can be processed. The plaintiff also took them to the ZBS to obtain the mortgage payment plan as all the mortgage

documentation was in the plaintiff's name. She and her husband started occupying the property in dispute as from 1 March 1998. The plaintiff assisted her and her husband to have water and electricity connected to the property as all the documentation relating to the property was in his name. In 2002 the plaintiff started causing problems by demanding that she and her husband surrender back to him the property in dispute. The plaintiff became a nuisance, threatened them, became violent and caused the water and electricity to be cut off by the service providers in order to make the occupation of the property unbearable to her and her family. She started to see people coming to view the property at the instance of the plaintiff. She and her husband, through their lawyers, sought an out of court settlement on a without prejudice basis but the plaintiff was not amenable. She indicated that she and her husband had in fact started paying off the mortgage bond over the property upon taking occupation and they paid on a fast-track basis to clear the mortgage and get transfer of ownership from the plaintiff to their names. She later discovered that the plaintiff had in 2002 paid off the balance of the mortgage bond without their knowledge and they reimbursed him the sum of Z\$91 300,00 through the Victoria Fall Magistrates' Court on 21 October 2004. She denied the plaintiff's claim that she and her husband occupied the property in dispute as tenants because the plaintiff knew from the time they took occupation that the first defendant had further ceded its rights and obligations under the cession agreement to them and they were to pay-off the mortgage bond over the property and thereafter get transfer of ownership to their names from the plaintiff. She stated that the cession agreement between the plaintiff and the first defendant did not prohibit the first defendant from further ceding its rights and the first defendant further ceded its rights on 8 April 1998 and thereafter the first defendant could not in 2002 purport to cancel the cession agreement between it and the plaintiff. She said that she recalled that sometime in 2002, Mrs Giering called her to her house. When she got there she found the plaintiff present. The plaintiff was purporting to refund the money paid to him by the first defendant pursuant to the cession agreement in 1997. She refused to accept the purported refund of the money because she had almost finished paying off the mortgage bond and the further cession rights had not been cancelled. She stated that the plaintiff had no right to seek her eviction from the property in dispute because the plaintiff is aware that it is her and



husband who paid off the mortgage bond over the property, which was the purchase price of the property from ZBS. She said the plaintiff has the obligation to transfer ownership of the property to her and her husband's names pursuant to the cession agreement with first defendant, which the first defendant further ceded to her and her husband. She said the plaintiff wants to unjustly benefit from a property he did not pay for. She said that the claim for eviction ought to be dismissed and the plaintiff be directed to transfer ownership of the property from his name to that of her and her husband. The third defendant also testified. He primarily confirmed what his wife, second defendant said.

### **Finding of fact**

My finding on the evidence of the witnesses is the following.

I am satisfied that Mr Giering gave a credible account of what transpired. He gave a credible account on why he signed or endorsed "Cancelled" on the document titled "Special Power of Attorney". In a nutshell he said he was coerced by the plaintiff to do so. He described the threats directed to him and his family. His evidence was generally corroborated by that of Noreen Sibanda who also gave a credible account of what transpired. She gave a credible account of how she and her husband ended up paying off the mortgage bond over the property in dispute. Benson Siyawareva also gave credible testimony and confirmed what Mr Giering and second defendant said.

The plaintiff did not impress as a witness in court. It is not clear why the second and third defendants would be ones responsible for repayment of the ZBS loan if there was not further cession to them. He tried to give the impression that they were tenants in the property in question. But this does not add as there is no evidence of a lease between the parties. I am satisfied that plaintiff's evidence is devoid of truth.

These findings of facts do not necessarily resolve the legal issues raised by the facts of this matter I will not deal with the legal issues. In my view, the evidence on record, both oral

and documentary, shows that that cession agreement entered into by the plaintiff and first defendant on 17 November 1997 was at all material times valid and binding on these parties. In *General Principles of Commercial Law* (3<sup>rd</sup> Ed) Juta & Co. Ltd, 1997, by P. Havenga, *et al* at page 111 it was stated:-

“The rights flowing from a contract are personal rights ... Like any other asset in a person’s estate, a personal right is capable of being transferred. The transfer of a right by agreement is known as cession. The person who transfers the right is called the cedent and the person to whom it is transferred, the cessionary ... Cession is thus an agreement between the holder of a right ... and a third party ... to the effect that the third party shall hence forth be the holder of the right. In other words, it is an agreement by which a personal right is transferred to another creditor. Cession is not a means of terminating an obligation, since the original obligation continues to exist. Neither does it create new obligations. The debtor merely has to perform a new creditor” – see also *Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A); *Botha v Fick* 1995 (2) SA 720 (A) and *The Law Contract*, Butterworths 1994 at page 99.

In light of the above legal position, the cession agreement concluded on 19 November 1997 the plaintiff was the cedent and first defendant the cessionary, while ZBS remained the debtor. The plaintiff had personal rights over the property in dispute after it was allocated to him as a beneficiary under the Project Management and Turnkey Projects/USAID Housing Scheme. The substance of the plaintiff’s personal right was to take occupation of the property and to demand transfer of ownership after paying off the mortgage bond over the property to ZBS. Further, the plaintiff’s personal rights in the property in dispute did not arise from any agreement with the Municipality of Victoria Falls. A letter written by the Municipality of Victoria Falls to Messrs Coghlan and Welsh Legal Practitioners dated 18 November 2004 makes it clear that there was never a lease agreement between the Municipality of Victoria Falls and the plaintiff in respect of the property in dispute. This is significant in that it places this case outside the category of typical cases involving lease-to-buy agreements with local authorities which usually contain clauses prohibiting cession of rights by the lessee – buyer without the written permission of the lessor – seller the *pactum de non cedendo*. There being no *pactum cedendo*, the plaintiff was free to conduct the cession agreement with the first defendant on 19 November 1997. The

plaintiff did not show that the cession agreement is invalid. Further, the plaintiff's contention that he purportedly cancelled the cession agreement on 25 February 2002 at the instance of the first defendant in itself shows that the plaintiff accepts that the cession agreement was at all material times valid. Otherwise the plaintiff could not purport to cancel an invalid agreement. So the cession agreement between the plaintiff and first defendant dated 19 November 1997 is valid. In light of this finding the first defendant was free to further cede its rights thereunder to the second and third defendants in the manner it did on 8 April 1998. In relation to the further cession agreement the first defendant becomes the cedent and the second defendant became the cessionaries, while the plaintiff and ZBS remained the debtors.

“Cession may be regarded as the opposite of delegation, as it involves the substitution of a new original creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same. The different can be summed up by saying that duties can be delegated with creditor's consent but rights can generally be ceded without the debtor's consent. The debtor's consent is not generally necessary because it makes no difference to him whether he pays the cedent or the cessionary. Cession is not regarded as a form of notation, because the original contract continues and only the creditor is changed.” – per Christie *The Law of Contract, supra* at page 99, see also *Business Law in Zimbabwe*, Juta and Co 1995/1996 by R. H. Christie at pages 114-5.

The significance of this legal position about cession is that it renders inconsequential the plaintiff's allegation that he did not consent to and did not know about the further cession by the first defendant of its rights under the cession agreement to second and third defendants on 8<sup>th</sup> April 1998. Be that as it may, I have already made a finding of fact that the cumulative weight of evidence given by defendants' witnesses overwhelmingly shows that on a balance of probabilities, the plaintiff knew and consented to the further cession of rights by the first defendant to the second and third defendants. The cession agreement between the plaintiff and the first defendant did not have a clause prohibiting further cession of rights by the first defendant. In my view, nothing turns on the plaintiff's contention that he was not party to the further cession and did not append his signature thereto. The further cession between the first defendant and second and third defendants is therefore valid. In light of the above findings the

HB-180-15  
HC 303-07  
X REF HC 93-03

plaintiff has no legal right to evict the second and third defendants. Accordingly, the plaintiff's claim for eviction of the second and third defendants is dismissed.

According to the clauses 5 of the joint pre-trial conference memorandum dated 21 July 2009 the issue is "whether or not the second defendant is entitled to take transfer of the property ..."

The problem I have is that there is no formal counter-claim filed by the plaintiff. Even in the face of such an issue agreed to by the parties, there must be a basis for this court to make such an order. The counter-claim is such a foundation and without it, it is incompetent for me to make such an order.

It is accordingly ordered that:

1. The plaintiff's claim for an eviction order against the second and third defendants and all those claiming occupation of stand 5551 Mkhosana Township Victoria Falls, be and is hereby dismissed.
2. The plaintiff pays the costs of suit.

*Messrs Mudenda Attorney, plaintiff's legal practitioners*  
*Dube & Company Legal Practitioners, 2<sup>nd</sup> and 3<sup>rd</sup> defendants' legal practitioners*