

ERNEST TEKERE
versus
PRECIOUS SIHLE SIBANDA
and
SHERPERD CHIPADZA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 20 MARCH 2018 AND 29 MARCH 2018

Civil Trial

J Sibanda for the plaintiff
T Dube for the 1st defendant
S Chamunorwa for the 2nd defendant

MATHONSI J: The plaintiff is a businessman of note. Apart from running a security company known as Homeguard Security Services (Pvt) Ltd, he also runs a money-lending micro-finance concern called Lien Enterprises which he says is involved in giving small loans of up to \$500-00 although his personal assistant, Miriam Masuku, says at some stage it advanced a loan of \$1500-00 to the first defendant, which she never paid back. He has sued the defendants in his personal capacity, initially for an order declaring the sale agreement between them involving stand number 1701 Kumalo Township portion of stand number 4125 Bulawayo Township (the property), null and void and directing the first defendant to transfer the property instead to himself. In the event of the first defendant's failure to comply the plaintiff would want the sheriff of the court to do the honours.

At the commencement of the trial, Mr *Sibanda* who appeared for the plaintiff, applied to amend the plaintiff's claim. Instead of seeking a declaration that the agreement of the defendants is null and void, the plaintiff sought an order that his agreement of sale with the first defendant involving the same property takes precedence over that between the defendants. Although the amendment was opposed by both defendants on the ground that it introduces a new cause of

action, I granted it as I was of the view that it did not and that no prejudice would be suffered by the defendants as a result of the amendment.

In his declaration the plaintiff made the averments that he had, on 3 August 2010, entered into a written agreement of sale with the first defendant in terms of which the first defendant had sold the property to him for a sum of \$24000-00. He averred further that in terms of that written agreement the purchase price was payable by a deposit of \$10000-00 paid on 22 July 2010 (before the sale agreement was concluded), with the balance being paid in monthly instalments of \$5000-00. He averred that he was however able to pay the balance earlier than agreed and then allowed the first defendant to continue in occupation of the property as a tenant paying rentals of \$100-00 per month which the first defendant failed to pay.

The plaintiff made the further averment that it was an implied term of the sale agreement that transfer would be effected on a future date to be agreed between the two of them but before such transfer the first defendant purported to sell the property to the second defendant who took occupation of the property. As the agreement between himself and the first defendant takes precedence over that of the defendants the plaintiff prayed for the grant of an order aforesaid.

The suit was contested by both defendants. In her plea the first defendant denied that the document she signed with the plaintiff was a sale agreement, averring that it was in fact a loan agreement disguised as a sale. The plaintiff, according to the first defendant, lent and advanced to her a total sum of \$12500-00 which was paid in certain instalments, at an interest rate of 35% per month. She denied receiving \$24000-00 from the plaintiff maintaining that she could not have sold the property at the time in her personal capacity or in any capacity whatsoever because it was jointly owned by her late parents. She could not sell what she did not own and denied leasing the property from the plaintiff.

The first defendant admitted selling the property to the second defendant about March or April 2014 in her capacity as the executrix of the joint estate of her parents, with the consent of both the Ministry of Local Government, Public Works and National Housing (the Ministry) and the Master of this court, after which the second defendant took occupation of it. Significantly the first defendant's plea is silent as to whether the loan of \$12500-00 was ever repaid and if so when that was done.

The second defendant pleaded that at the time of the purported sale between the plaintiff and the first defendant, the latter did not have the right of ownership which she could lawfully sell to the plaintiff. Before purchasing the property, the second defendant averred, he had done due diligence and satisfied himself as an innocent third party that he could lawfully purchase it more particularly in that the Master of the court authorized the sale. As an innocent third party, the balance of equities favours the upholding of his own sale agreement especially as his agreement complied with the law as opposed to the plaintiff's which is unenforceable at law.

The second defendant averred further that after paying the purchase price of \$41000-00 to the first defendant as agreed, money raised from the sale of a house he owned then, he took occupation and proceeded to effect improvements on it at a cost of \$10645-15.

The amendment effected by the plaintiff at the eleventh hour upset the issues for trial which had been settled by the parties at a pretrial conference held before a judge. In light of the amendment, the main issue to be determined is whether the agreement between the plaintiff was a sale and whether it is enforceable at law. As a follow up to that, the issue of whether the second defendant should be evicted from the property also arises.

Three witnesses testified for the plaintiff starting with the plaintiff himself whose testimony it was that he knew the first defendant as a business woman in town after she had been introduced to him by a person called Masuku. It is the first defendant who had approached him offering the property for sale. He stated that they agreed on a purchase price of \$24000-00 which, although very low for a property located in Kumalo Bulawayo, was fair and reasonable because the property needed renovations. The wooden floor had been eaten by termites. The plaintiff produced a memorandum of agreement signed by the parties on 3 August 2010 stating that it is the agreement for the sale of the house. The said agreement reads in relevant part:

“The sellers (sic) own a certain piece of land situated in the District of Bulawayo also known as number 21 Tedder Avenue Kumalo, Bulawayo, comprising of a three bed-roomed (sic), dinning, lounge and kitchen under asbestos sheets with an outside cottage, fenced and gated.

The purchase price to the seller by the purchaser for the property shall be the sum of twenty four thousand dollars (USD 24, 000).

Payable in the following manner

- (a) A deposit sum of ten thousand United States dollars (US\$ 10000) has been paid this 22 day of July 2010.

- (b) Further payments shall be made at five thousand dollars (USD 5000±) on a monthly basis.
- (c) Title deeds will be handed over on final payment.
- (d) Should the seller wish to purchase back the property, an interest of 35% will be levied on sums paid.
- (e) Should the seller wish to purchase the property after repairs have been done, the repair rates will be included at 35% interest on sums paid.
- (f) The purchaser shall pay for the change of title deeds cost and transfer fees.” (The underlining is mine)

The plaintiff stated that he was aware that the property belonged to the first defendant's parents as he knew her father the late national hero Gordon Tapson Sibanda but he agreed to purchase it from the first defendant because she was the beneficiary to their joint estate. He stated that the first defendant was “their heir apparent.” After paying for the property he allowed the first defendant to remain in occupation as she did not have anywhere else to go even though she, by then, had \$24000 to her credit. He produced two letters written by him on Homeguard Security (Pvt) Ltd letter head to the first defendant, the first one dated 16 November 2010 and the second more than a year later on 3 December 2011, as proof that the first defendant became a tenant of his after the sale.

The letter of 16 November 2010 reads:

“RE: NOTICE TO TENANTS

In view of the agreement of sale dated 28 October 2010 we hereby give you notice to vacate number 21 Tedder Avenue by the 31st of November 2011. Please note that in the interim you will be required to pay rentals to the sum of USD 100 per month. You will also be expected to pay for Zesa usage and City Council water, excluding rates.”

The plaintiff did not explain why it took him more than three months from 3 August 2010, the date of the written agreement relied upon, to give notice to vacate, a notice of more than twelve months for that matter, given that the first defendant was required to vacate on 31 November 2011 (note that November ends on 30 not 31). Neither did he explain why the sale agreement which was allegedly signed on 3 August 2010, had metamorphosed to that of 28 October 2010 leaving one wondering how many agreements of sale the parties signed.

What the plaintiff did say though is that first defendant never paid a single cent towards rentals. That however did not stop him extending the tenancy more than a year later on 3 December 2011 when he again wrote a letter to the first defendant in the following:

“RE: NOTICE TO TENANTS

Further to the meeting held on 03 December 2011 between yourself and Mr Tekere, please note that your stay at number 21 Tedder Avenue Kumalo has been extended to 31 November 2012 with the same terms and conditions as per letter dated 16 November 2011 (*sic*), which refers that in the interim you will be required to pay rentals to the sum of USD 100 per month. You will also be expected to pay Zesa usage and City Council water, excluding rates.”

As to why the plaintiff was being so generous to the first defendant he did not explain. In fact there is a lot that the plaintiff did not explain. He did not explain why, in the agreement he says he drafted, the first defendant was given as the owner of the property when she was not. He did not explain why, if indeed this was a genuine sale, he inserted clauses (d) and (e) in the agreement giving the first defendant, as the seller, the option to buy back the property. According to him, those clauses were inserted in order to discourage the first defendant from buying the property back by virtue of the usurious interest imposed.

That explanation simply does not make sense. It is not within human experience and expectation that a person who is buying a property for his son who was anxious to move in, as the plaintiff claimed, would agree to a clause allowing the seller to buy the property back no matter the oppressive terms of repurchase. Neither does it happen that a purchaser who has paid the full purchase price would still allow the seller to remain in occupation of his house for over two years without paying rent and would not be bothered to even taken transfer of the house. The evidence of the plaintiff suggests that what brought him and the first defendant together was something other than a sale agreement. The first defendant has pleaded that it was a loan agreement.

When the plaintiff’s attention was drawn to handwritten endorsements on the sale agreement showing that a sum of \$12500-00 was received, signed for by the first defendant and witnessed by an employee of his, he flatly denied that anything of the sort ever happened. He disowned those endorsements. This is the first of several points of divergence between the plaintiff and his witnesses. Miriam Masuku, the plaintiff’s personal assistant, confirmed that indeed those endorsements were made by herself in the presence of both the plaintiff and the first defendant each time the first defendant was given money.

The second is the plaintiff's complete denial that the first defendant was given a loan by himself something which Masuku again confirmed. The latter testified that she was indeed given a loan of \$1500-00 on 22 July 2010 which she never paid back. According to Masuku that money was never paid back but was taken as part of the purchase price for the property. Of course Masuku had her own problems in her spirited effort to support her boss's case. In her evidence, she referred to figures of money given to the first defendant as purchase price which did not add up to \$24000-00. Even more, finding herself unable to prove the payment of \$10000-00 towards the purchase price, Masuku lamely suggested that the receipt is represented by the first defendant's signature on the sale agreement. That, coming from a witness who was meticulous with securing the signature of the first defendant for every penny paid to her, is a joke. Nothing more needs be said about that. There was simply no payment of \$10000-00 especially as on the very same date that it was allegedly paid Masuku testified that only \$1500-00 was given to her as a loan.

Vincent Mpala did not help the plaintiff's case either. His evidence was that he had been engaged by the plaintiff to fumigate "his house", the property, twice a year for three years during which he would meet the first defendant who lived at the property. It is extremely unhelpful as it does not prove anything.

After the close of the case for the plaintiff Mr *Chamunorwa* for the second defendant made an application for absolution from the instance. He submitted that the evidence led on behalf of the plaintiff does not prove a *prima facie* case upon which the second defendant could be called upon to answer because there is nothing to suggest that the plaintiff and the first defendant entered into a valid agreement. This is so because the agreement of 3 August 2010 was entered into with the first defendant in her personal capacity when it is common cause that not only did she not own the property, she was then not the executrix of the joint estate and there was no consent of the Master to the sale. He relied on the authority of *Muchini v Adams* 2013 (1) ZLR 67 (S) to make the point that any disposal of property belonging to a deceased estate without compliance with the Administration of Estates Act [Chapter 6:01] (the Act) is invalid.

Mr *Chamunorwa* submitted further that it is common cause that the sale agreement between the defendants was not only clothed with the authority of the Master given in terms of section 120 of the Act but also with the written consent of the Ministry in whose name the

property is registered. For that reason the validity of that agreement cannot be questioned. On the other hand none of that occurred in respect of the plaintiff's agreement. It therefore cannot be valid and as it is invalid it cannot take precedence over a valid agreement.

Mr *Sibanda* for the plaintiff submitted that a case has been made for the defendants to answer because, to the extent that the section 120 authority was given for the sale involving the defendants after the agreement was signed, it means that the two agreements rank at par as agreements entered into prior to consent being granted. For that reason, the plaintiff's, as the first one should be upheld. Except of course that consent or authority was never granted for the plaintiff's agreement. Mr *Sibanda* did not address the lack of consent from the Ministry.

The test for an application for absolution from the instance is settled in this jurisdiction and has been discussed in a number of authorities but the *locus classicus* which has been followed by courts in Zimbabwe is *Gascoyne v Paul and Hunter* 1917 TPD 170 where at 173 DE VILLIERS JP laid out the test as:

“At the close of the case for the plaintiff, therefore, the question which arises for consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff? ---. The question therefore is, at the close of the case for the plaintiff, was there a *prima facie* case against the defendant --- in other words, was there such evidence before the court upon which a reasonable man might, not should, give judgment against (the defendant).”

That passage was quoted with approval in *Supreme Service Station (Pvt) Ltd* (1969) v *Fox and Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A). See also *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S) at 94; *Nestroros v Innscor Africa Ltd* 2007 (2) ZLR 267 (H) at 268 E-H; *Manyange v Mpofo and Others* 2011 (2) ZLR 87 (H) at 93 G-H, 94A; *Efrolou (Pvt) Ltd v Muringani* (2) 2013 (1) ZLR 309 (H) at 316 D-E.

In *Supreme Service Station*; *supra* BEADLE CJ expressed the view at 5 B-D:

“Once it is accepted that a judgment which a court ‘might’ give may differ from that which it ‘ought’ to give, it is clear that the judgment which it ‘might’ give and which differs from the judgment which it ‘ought’ to give must be an incorrect judgment. As a matter of logic, therefore, in considering what a reasonable court ‘might’ do, allowance must be made for its making and giving an incorrect judgment ---. The test therefore boils down to this: Is there sufficient evidence on which a court might make a reasonable mistake and give judgment for the plaintiff? What is a reasonable mistake in any case must always be a question of fact, and cannot be defined with any greater exactitude than

by saying that it is the sort of mistake a reasonable court might make – a definition which helps not at all.”

It is true that in practice the courts are loath to decide upon questions of fact without hearing all the evidence from both sides and are usually inclined to proceed with the trial. It is however equally true that there is no wisdom in proceeding with the trial when clearly nothing the defendant will say in his or her defence will change the set of facts established at the close of the case for the plaintiff, facts which, by all means, may never result in the court finding for the plaintiff. Logic would seem to dictate that when that state of affairs has been reached, the court must save time by granting absolution.

What is clear so far is that the plaintiff has not been able to establish that the agreement that he had with the first defendant was that of the sale of the property and that he paid the purchase price. I have already stated that what was proved to have been paid to the first defendant on 22 July 2010 was a sum of \$1500-00 endorsed in an agreement the plaintiff chose not to produce. It was also shown that a sum of \$12500-00 was paid to the first defendant which she says in her pleadings was a loan.

Everything in fact points to the existence of a loan. By his own admission, the plaintiff was a loan-shark though he prefers to call his business Lien Enterprises Micro-Finance. The agreement relied upon allowed the first defendant to purchase the house back suggesting that it was not a final sale agreement even by its own wording. By Masuku’s own admission the agreement in question incorporated a loan of \$1500-00 advanced to the first defendant. Therefore there is no way a reasonable court might find from the evidence led that there was a valid sale agreement.

The plaintiff’s problems do not end there. It is common cause that the house is registered in the name of government under the Ministry and was in the process of being acquired by the first defendant’s parents who held it by virtue of an agreement of sale, clause 19 of which precluded them from alienating it without prior written consent of the Ministry. It reads:

“19. The purchaser shall not part with possession of the property or any part thereof nor cede nor assign nor hypothecate this agreement or any rights hereunder to any person without the previous consent in writing of the Ministry of Public Construction and National Housing.”

When the plaintiff's agreement was concluded, no such prior written consent had been obtained. So even assuming that it was a sale, it would still be invalid by reason that it was in breach of clause 19.

More importantly, the sale, if a sale it was, did not comply with the provisions of the Act given that what was sold was property belonging to deceased estates. No evidence whatsoever was led to even begin to suggest that the sale met the requirements of section 41 of the Act, that is, that it was "absolutely necessary" to undertake it, or indeed that any of the other provisions of the Act were met. In *Muchini v Adams, supra*, ZIYAMBI JA ruled that the Act prohibits the distribution of a deceased estate by persons other than executors. At 72 D- G, the learned Judge of Appeal remarked;

"I agree with the submissions by Ms *Mahere* that the intention of the legislature in enacting section 42, and indeed section 41 of the Act, was to protect the position of beneficiaries and, I would add, creditors of a deceased person pending the administration of the estate and that were the court to sanction the disposal of an estate asset in circumstances such as the present, it would bring about the very situation which the legislature sought to prevent thereby causing prejudice to both the beneficiaries and creditors of the estate. The clear intention as expressed in the Act, and in particular the sections thereof quoted above, is to prohibit the distribution of a deceased estate by persons other than executors. Further, the authority to dispose of certain assets of a deceased estate before the appointment of an executor is strictly limited to the circumstances set out in section 41. In the present case it would have to be shown that the sale of the property was *absolutely necessary* for the subsistence of the family. The use of the word *absolutely* is significant and is indicative of a higher standard than mere necessity."

Mr *Sibanda* suggested in leading evidence from the plaintiff that the first defendant was appointed executrix of Gordon Tapson Sibanda's estate on 17 November 2009 before the agreement of sale with the plaintiff was concluded in August 2010. In my view, even if that were so, that does not detract from the fact that the sale remained invalid. This is because the property was jointly owned by Gordon Tapson Sibanda and his wife Mary Sibanda (nee Murara) who died on 2 June 2009 after she had already inherited her late husband's portion. The first defendant was only issued with letters of administration for the latter estate on 20 July 2011 long after she had purportedly sold the whole property to the plaintiff. By virtue of the law, she could not do so.

In the circumstances, the inescapable conclusion is that there is no evidence led so far upon which a reasonable court might find for the plaintiff for the relief that he seeks. There is therefore merit in the application for absolution from the instance.

In the result, it is ordered that;

1. Absolution from the instance is hereby granted to the first and second defendants
2. The plaintiff shall bear the costs of suit.

Job Sibanda and Associates, plaintiff's legal practitioners
James Moyo-Majwabu and Nyoni, 1st defendant's legal practitioners
Calderwood, Bryce Hendrie and partners, 2nd defendant's legal practitioners