

SAVANIA MAISIRI
and
SHALATI MAISIRI
versus
ABISHA MAISVA
and
NORTON TOWN COUNCIL

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 22, 23 May and 6 June, 2007

Civil Trial

Ms *Shongedza*, for the plaintiffs
Mr *Mujeyi*, for the first defendant

MAVANGIRA J: This is an application for absolution of the first defendant from the instance, at the close of the plaintiff's case. The matter was originally heard as an opposed Court Application. It was then referred to trial, the court having then found that there was a dispute of fact which could not be resolved on the papers without oral evidence being presented to the court. At a pre-trial conference subsequently held on 12 February, 2007, it was agreed that the following were the issues to be referred for determination by the trial court:

1. The determination as to who between the plaintiffs and the first defendant, is entitled to the property in issue.
2. Whether the agreement that was entered into between plaintiffs and Hasst Zimbabwe supercedes the one that first defendant entered into with Hasst Zimbabwe."

The plaintiffs aver in their declaration that they purchased an immovable property known as Stand K403 Ngoni Township, Norton, from Hasst Zimbabwe during January 2005. They also aver that consequently, they are the holders of right, title and interest in the said property as evidenced by a lease agreement dated 31 January, 2005, between them and the second defendant. They aver that despite demand, the first defendant, who resides in the same property and who alleges that he is the owner of the property in dispute, has refused to vacate the premises. They thus seek an order directing the first defendant and all persons claiming through him, to vacate the said

property, and should they fail to vacate within the given period, that the Deputy Sheriff be directed to eject them.

The first defendant on the other hand, avers in his plea that he purchased the same property from Hasst Zimbabwe, (Hasst), on 19 October, 2001 on account of his being an employee of Hasst at the time that he purchased it. He further avers that the plaintiffs hold no right, title or interest in the property in issue as their alleged or purported purchase of it was preceded by his own and thus their claim must be dismissed with costs.

The first plaintiff gave evidence for the plaintiffs to the following effect:

He was employed by Tinto Industries, which company was then taken over by Hasst. He was so employed for eight years. He was then retrenched in 1992. Whilst he was employed by Tinto Industries he was allocated No. K403, Ngoni Township, Norton and stayed there during the period of his employment. When he was retrenched, he was told to remain on the premises and continue paying rates for the house, which he did.

On 3 October, 1996 Tinto Industries wrote him a letter in which the company advised him that it had decided to sell him the house at a cost of \$20 000. At the time that he received the letter, the first defendant was also staying at the same house as Hasst's tenant.

The company had requested him to accommodate the first defendant who was then also an employee of the same company. He did not however pay for the property as Hasst refused to accept the arrangement. He however continued to reside at the property.

In 2002 he again received an offer letter for him to purchase the house but was unable to pay for it as there was an argument between him and the first defendant who was claiming that he had also paid for the same house to the company. It was also his evidence that both the company and the second defendant were not aware of this alleged payment by the first defendant. However, the offer letter referred to, dated 13 February, 2002, states that the dispute as to who should purchase the house had been decided in his favor and that the first defendant had been advised of the decision. The letter was authored by

M.M. Dzwete, Administration and Personnel Manager for Hasst. The first defendant had argued that as he was still employed by the company, he should buy the house.

Asked as to how second defendant was involved with the disposal of these houses, the first plaintiff indicated that there was a meeting in 2002 at which they met Council officials and Hasst officials, the minutes of which meeting he also produced as an exhibit before the court. As to the outcome of, or decision made at the meeting pertaining to the disposal of these houses, he said that the houses in Katanga were to be sold for \$90 000 and those in Ngoni for \$100 000.

The first plaintiff said that after he had failed to pay for the house in response to the second offer, the first defendant instituted proceedings before this court in case no.HC4518/02 for their dispute to be resolved. He said that the first defendant lost the case and he then wrote him a letter for him to vacate the house. The first defendant however refused to vacate stating that he was represented by a legal practitioner. He then advised Hasst about the outcome of the case and on 28 January, 2005, the company wrote him and told him to ensure that he brought the money to pay for the house. The plaintiffs then went and paid \$90 000 for which they were issued with a receipt. They then received from the second defendant "A LEASE WITH OPTION TO PURCHASE" which they signed as the lessees of the property in question. They continued in occupation of the property. The first defendant was, and is still occupying the property with them but stopped paying rates or any other charges for the property in 2000. He is neither paying any rentals to the plaintiffs as a tenant.

The first plaintiff said that he indicated verbally, during meetings that were held, his acceptance of all the offers made to him to purchase the house, between 1996 and 2002 as narrated in his evidence. He stated that the first defendant no longer has any right to remain at this property.

Under cross-examination by Mr. *Mujeyi*, the first plaintiff was shown Annexure 'A' to the notice of opposition filed in opposition of his court application in this matter. This is the application mentioned at

the beginning of this judgment. The said annexure is a letter dated 22 October, 2001 written by Hasst's M.M.Dzwete, Administration and Personnel Manager and addressed to the Secretary in the Ministry of Local Government and National Housing. It reads:

**"RE: DISPOSAL OF TINTO HOUSES: 1386 STAND K403
NGONI TOWNSHIP, NORTON**

This letter serves to confirm that the house on Stand K403 Ngoni Township in Norton has been sold to Abisha Maisva.

Please process lease agreement for this stand to Abisha Maisva if not already processed. He will be responsible for the payment of the land value."

The first plaintiff was asked if the said annexure does not confirm that the first defendant had bought Stand K403. His answer was that it did not. He was then referred to Annexure 'B', a receipt dated 19 October, 2001, issued by Hasst in the name of Abisha Maisva in the sum of \$115 135.50 for payment for purchase of House K403. He was asked to confirm that Annexure 'B' is a receipt dated 19 October, 2001, showing that the first defendant had paid the stated amount to purchase House No. K403. His answer was that he disputed that. He was referred to Annexure 'C', a letter dated 14 May, 1999 and addressed to himself by M.M.Dzwete. It reads:

"RE: NOTICE OF EVICTION FROM HOUSE K403

Reference is made to several correspondences in file between yourself and Hasst. Hasst Zimbabwe (formerly Tinto Industries) operations were taken over by TH Zimbabwe a wholly owned subsidiary of SMM Holdings.

Since the take-over in November, 1997, a number of operational decisions were arrived at. One such decision affects housing issues in Norton. According to our records, the house you are occupying is allocated to Mr. A. Maisva. Consequently you are being given two months notice to vacate the house by 31st July, 1999. The period of notice being 1 June 1999 to 31 July 1999. (sic).

On 31 July 1999, as you move out, our Maintenance Foreman will be on standby for a checkout report. Please contact Mr. Zinyowa on Norton 2312 to facilitate the checkout report which must be completed during your (representative's) presence.

We hope you will appreciate the reasons necessitating the move.”

After being shown the letter, the first plaintiff said that he had read and understood the letter but that he was seeing it for the first time in court as he was being cross-examined. He was asked whether his legal practitioner had not shown it to him considering that the letter has been before the court since 4 May, 2005, when the notice of opposition was filed. His answer was that he had forgotten.

The first plaintiff was again referred to Annexure ‘D’ to the notice of opposition. It is an internal memorandum from the Administration Manager of Hasst (M.M.Dzwete) to A. Maisva and headed “RE: NON PAYMENT OF RENT BY MR. MAISIRI.” The body of the memorandum reads:

“In reply to your letter we reply as follows:

1. The house was allocated to you to purchase and you have already completed the Lease forms.
2. We wrote to you stating that Mr. Maisiri should now pay rent to you.
3. The problems we will only accept from you are those related to the condition of the house. These problems should concern you and not Maisiri.

We would like to inform you for the last time that we will not entertain any problems you might have with Maisiri. It is up to you to solve those problems in ways you think warranty the situation. (sic). You have recourse to the Community Court or Police if Maisiri is giving you problems. We have no powers to tell you how you should stay at your house.

I hope this solves your problems.”

The first plaintiff was asked to confirm that the memorandum states that as at 2 September, 1997, he should have been paying rent to the first defendant. His answer was “No”. He said that he disputed this as he was the owner of the house. The first plaintiff was further directed to Annexure ‘E’, a letter dated 4 September, 1997 addressed to him by Dzwete.

The letter states:

“It is with regret that we note that you have failed to conduct yourself in a humanly manner (sic) with our Mr. A. Maisva. We

would like to remind you that we have already written to you informing you that the option to purchase Stand No. K403 Katanga, Norton was given to Mr. Maisva. That decision is final. You are hereby informed that you should with immediate effect not come to Hasst to complain about the way you are staying at the house. These problems are for Mr. Maisva to settle.

Mr. Maisva has the right to settle any problems which might arise at the house in any way he thinks fit and he does not have to consult Hasst.”

It was put to the first plaintiff that the letter shows that the final decision of the company was that the option to purchase was given to Maisva. He then answered: “I did not dispute that.” He was asked if he was seeing the letter for the first time in court. His answer was that he knows the letter.

It was put to the first plaintiff that despite his claim that he was paying rentals to Hasst, he had not produced any documents in proof thereof. His curious answer was that he was issued with receipts and that as owner of the house he was not to be told how he was to pay. He also conceded that he had omitted to produce some documents to the court.

It was put to the first plaintiff that it was during the period of time when the first defendant was, to his knowledge, mentally ill, that he applied for dismissal of first defendant’s action in case No. HC4518/02, for want of prosecution. His answer was that “nothing from him (first defendant) had succeeded and that is the reason why I applied that he move out of the house”. It was put to him that the court, in dismissing the first defendant’s claim in HC 4518/02 for want of prosecution, did not determine that he, first plaintiff, was entitled to the house in issue. His answer was that it did so determine because his name was mentioned.

When it was put to him that by leaving Hasst out of these proceedings, it was an endeavour on his part to make it impossible for the court to determine the true facts of this matter, his answer was that he was allocated the house and was “through with Hasst”, making it unnecessary for him to involve Hasst. He said that he was not aware that the first defendant had on 19 October, 2001, paid the purchase price for the house in issue.

Despite the relevant documents being shown to him, the first plaintiff persisted in his stance that Hasst did know about first defendant's payment for the house. He said that the house was not sold to the first defendant because there was then, in 2001, no agreement between Norton Town Council and Hasst for the houses to be sold. He said that he was not, however, calling any witnesses from Hasst or Norton Town Council.

The first plaintiff denied that he resisted efforts made by Hasst to move him out of the house in issue. He said that from the time that the house was allocated to him by Tinto Industries, he never moved out and that he continued staying there on the strength of a letter from the company indicating that he was to stay there until he purchased the house. He denied the existence of any agreement of sale between Hasst and the first defendant.

The plaintiffs' case was closed after this witness' evidence and the application for absolution from the instance was then made by Mr. *Mujeyi*.

In *United Air Charters v Jarman*, 1994 (2) ZLR 341 (S) GUBBAY CJ stated at 343B-C:

"The test in deciding an application for absolution from the instance is well settled in this jurisdiction. A plaintiff will successfully withstand such an application if, at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him. See *Supreme S vc Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A) at 5D-E; *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) at 158B-E."

In *Munhuwa v Mhukahuru Bus Services*, 1994 (2) ZLR 382 (H) at 383G - 384B CHATIKOBO J stated:

"... It is axiomatic that an application for absolution from the instance stands much on the same footing as an application for the discharge of an accused at the end of the State case in a criminal trial. This much is clear from the judgment of BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (A). At p5 of that judgment the learned CHIEF JUSTICE stated the test thus:

“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.”

In *Taunton Enterprises (Pvt) Ltd & Anor v Marais*, 1996 (2) ZLR 303 (H) at 313C, MALABA J stated the law thus:

“The test is whether at the close of the plaintiff’s case there is evidence upon which a reasonable man acting carefully might (not should) give judgment for the plaintiff on the issues before the court. The judicial officer is enjoined by law to bring to bear upon the evidence what the judgment of a reasonable man might be, but not what he thinks the judgment is: *Gascoyne v Paul & Hunter* 1917 TPD 170 at 173; *Myburgh v Kelly* 1942 EDL 202; *Huizenga NO v Zwinoira* 1987 (2) ZLR 276(H) at 280A - B.

In *Supreme Service Station (1969) (Pvt) Ltd* 1971 (1) RLR 1 (A), BEADLE CJ drew attention to some of the features of the application which a court should bear in mind when considering what the judgment of a reasonable man might be on the evidence adduced at the end of the plaintiff’s case. The learned CHIEF JUSTICE said the court should bear in mind that the defendant has not yet given evidence and cross-examined on it. If the plaintiff has made some case for the defendant to answer and the defence is something peculiarly within the knowledge of the defendant, justice demands that he should be heard. He pointed out that the general attitude of judges is that they should be very loath to decide upon questions of fact without having all the evidence on both sides. In case of doubt as to what the judgment of a reasonable man might be the safest course for a judge to take is that which allows the case to proceed.”

The first plaintiff’s vehement and persistent denial of the existence of an agreement of sale between first defendant and Hasst, in the face of documents indicating so, does not assist the court in determining the matter in issue. Any assumption on his part, should that be the reason, that such a stance would sway the court to determine the matter in his favor, would be highly misplaced as it only serves to cloud his claim further. It in fact appears to amount to a departure from the impression created hitherto, in which the existence of two agreements appeared to be common cause, the issue then being which of the two agreements would prevail over the other.

The first plaintiff was not a very helpful witness to the court as he clearly was not always being truthful and candid with the court. On a couple of occasions he disputed that documents filed before the court said what was stated in them in clear and unambiguous language. He adopted what could be described as a most unreasonable approach, choosing to deny that a document says what it clearly states and expecting the court to agree with him, supposedly without any clarification from the authors of the said documents. This impression is created by his clear evidence that he was not calling any witness from Hasst; that he had decided not to cite Hasst in these proceedings as Hasst no longer had a role to play in the matter after allocating the house to him and indeed the plaintiffs' case was closed after only he had given evidence. In view of the nature of the dispute, by his very action as described above the first plaintiff created a situation in which on his case as presented, the court would not be able to ascertain the truth of what happened in this matter.

It was also naïve, in my view, for the first plaintiff to claim to have seen for the first time in this court, a letter addressed to him by Hasst which clearly contradicts his story. It was particularly naïve, in my view, considering that the said letter, and all other documents on which he was questioned by first defendant's legal practitioner, were filed with this court in opposition of his court application, two years ago. His legal practitioner could not have filed the answering affidavit that he did, which affidavit was sworn to by the first respondent and which was a response to the first defendant's (first respondent's then) opposing affidavit, without bringing the letter to his attention and discussing it. The first plaintiff has clearly chosen not to be honest with the court and has given untruthful and unreliable evidence, seeking in the process, to hide certain facts from the court and to avoid explaining matters that he should have revealed and or explained at the outset.

It also cannot escape one's observation that the letter of 3 October 1996, as highlighted by Mr *Mujeyi*, in which the first plaintiff claims to have been given the first offer to purchase the house, was addressed to "The tenant" and not specifically to the first plaintiff. The first plaintiff

had been retrenched in October 1992. He did not explain the basis of his continued occupation of the house between then and 1996 when the offer was allegedly made to him. It is common cause that it was not part of his retrenchment package that he continue to stay in the house.

In my view, on the evidence before the court, it is not possible for the court, in the absence of Hasst, to make a reasonable mistake and find in favor of the plaintiffs. The case of *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor*, 1998 (2) ZLR 547 (H), cited by Ms. Shongedza, cannot be of assistance to the plaintiffs as it is not only the first defendant's explanation or evidence that will be necessary in order for the court to determine this matter but also that of Hasst. Smith J cited a case to which he was referred in an application for absolution from the instance. It is the case of *Supreme Service Station (supra)*. He quoted at 552H -553C:

"Further on, at 5-6, the learned CHIEF JUSTICE went on to say:
'Before concluding my remarks of the law on this subject, I must stress that rules of procedure are made to ensure that justice is done between the parties, and, so far as is possible, courts should not allow rules of procedure to be used to cause an injustice. If the defence is something peculiarly within the knowledge of a defendant, and the plaintiff has made out some case to answer, the plaintiff should not lightly be deprived of his remedy without first hearing what the defendant has to say. A defendant who might be afraid to go into the box should not be permitted to shelter behind the procedure of absolution from the instance. I might usefully quote here what was said by SUTTON J in *Erasmus v Boss* 1930 CPD 204 at 207:

"In *Theron v Behr* 1918 CPD 443 JUTA J at p451 states that according to the practice in this court in later years judges have become very loath to decide upon questions of fact without hearing all the evidence on both sides"

We in this territory have always followed the practice of the Cape courts In case of doubt at what a reasonable court 'might' do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed"

At p554A-B, Smith J continued:

"I granted SC Finance absolution from the instance and ordered that Trinity pays its costs. In doing so, I was very conscious of BEADLE CJ's comments in the *Supreme Service Station* case *supra*, that in case of doubt, a judicial officer should always lean on the side of allowing the case to proceed. In this case I had no doubt in the matter."

For the reasons discussed above but more importantly, the decision by the plaintiffs not to cite Hasst as a party, nor to lead evidence on their behalf from Hasst, I have no doubt in my mind on the matter. In the absence of Hasst, there can be no definitive determination of the true facts enabling the court to decide upon questions of fact. The application for absolution from the instance is therefore well grounded. Costs must follow the cause.

It is therefore ordered as follows:

1. The first defendant is absolved from the instance.
2. The plaintiffs shall pay the first defendant's costs.

Wintertons, Plaintiff's Legal Practitioners.
Lofty & Fraser, First Defendant's Legal Practitioners.