PHILLIP TSAMWA
versus
NDODA HONDO
and
THOMAS KOBO MUNEMO
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAVANGIRA J.
HARARE 7, 8, 9, 14, 15, 19, 28 May and 25 June 2008

Civil Trial

Miss. T. Gonese for the plaintiff
Mr. C. Chipere for the 1st and 2nd defendants

MAVANGIRA J: The plaintiff's claim as amended is for:

> "Transfer of subdivision of Lot 1 of Lot 310 Block B Hatfield Estate upon payment to the defendants of the balance of the purchase price being the sum of $50 million. Alternatively, damages in the sum of the purchase price of 2000 square meters of land in the same locality as Hatfield, as at the date of judgment."

The plaintiff's claim emanates from an agreement of sale that was executed on 14 May 2004. The agreement reflects that it was executed by and between Ndoda Hondo and the plaintiff. It reflects that Ndoda Hondo sold to the plaintiff a certain piece of land, held by him under Deed of Transfer no. 3144/81, situate in the district of Salisbury called Lot 1 of lot 310 Block B Hatfield Estate measuring five thousand three hundred and seventy nine (5379) square meters.

The issues referred for determination at trial were listed as:

1. What were the terms of the agreement entered into between the plaintiff and second defendant?
2. Whether or not the plaintiff discharged his obligations in terms of the contract.
3. Alternatively whether the plaintiff breached the agreement.
4. Whether the plaintiff is entitled to the relief he seeks as amended.

In December 2005 when the plaintiff issued out summons, he cited one defendant, Ndoda Hondo. In April 2007, he then applied for the joinder of Thomas Kobo Munemo as second defendant. He indicated in his application that it had since emerged that contrary to his earlier belief that the names Ndoda Hondo and Thomas Kobo Munemo referred to one and the same person, he had since ascertained that the names refer to two different people. The order of joinder was granted on 28 June 2007. When the plaintiff subsequently gave evidence before this court, he

stated that the person with whom he entered into the agreement claimed that the name 'Ndoda Hondo' was his Chimurenga war name. In addition, that he used the name interchangeably with the name 'Thomas Kobo Munemo'.

The defendants on the other hand maintained that the two names relate to them as two different individuals and that the two of them are brothers. From the documentary exhibits produced before the court it is also apparent that in an application for summary judgment filed by the defendants in the Magistrates Court in January 2006 in a related case, they sued as first and second applicants respectively. Furthermore, in proceedings before this court, two individuals, each answering to one of the two names gave evidence as the two defendants. It was clear that the two names refer to two different people. Clearly, therefore, if not in 2006 during proceedings before the Magistrates Court, then certainly in April 2007 when the plaintiff applied for the joinder of the second defendant in the instant proceedings, the plaintiff became aware and certain that the two names refer to the two different people now before this court as defendants. Significantly too, according to the plaintiff's founding affidavit in that application the two 'turned up at court on 26 February 2007', the date on which the matter had been set down. In her closing submissions, Ms *Gonese* for the plaintiff submitted that the plaintiff's contention was that the two names, insofar as the agreement in issue is concerned, refer to the same person. She urged the court to find in favour of the plaintiff on this aspect. In my view, such a finding would be untenable on the evidence before this court and in the circumstances related above.

The clear position emerging from the evidence placed before the court is that there are two defendants before the court. The property in question is registered in the name of the one defendant. The plaintiff entered into an agreement of sale in relation to the said property with the other defendant who is not the registered owner of the property. Whilst the agreement of sale purports to have been signed by the registered owner who is in fact the first defendant, the fact is that the signature was appended not by him but by the second defendant. The second defendant appended a signature falsely purporting to show the agreement as having been signed by the first defendant. He did not, as he could have done, sign in his own name on the basis of the power he would purportedly derive from the special Power of Attorney.

In his plea the first defendant denied entering into an agreement with the plaintiff. He claimed to have no knowledge of the sale in question stating that although the property was registered in his name it belonged to the second defendant who was unable to have it registered in his name as he was not the holder of an identity document at the relevant time of the registration. He also claimed that he did not know whether the second defendant had sold the property. In his evidence before this court, he gave a different story stating that he was aware of the sale and had signed a Special power of Attorney to enable the second defendant to do as he wished with his property.

The defendants have also contented that the plaintiff breached the agreement by failing to pay the agreed deposit of $15 000 000 upon signing the agreement and also by failing to make all payments through Messrs Kwenda & Associates, Legal Practitioners. The plaintiff contended on the other hand that there was no time period stipulated or agreed upon for the payment of the deposit. Furthermore, that it was the defendant who in fact breached the agreement by failing to tender transfer within six months of the agreement.

The evidence led before this court shows that the agreement of sale was, as recorded therein, made by and between the plaintiff and the second defendant. The agreement was however in relation to a property registered in the name of the first defendant. The first defendant is not a party to the agreement of sale. The second defendant said that he was asked by one Mashonganyika to sign the agreement as 'Ndoda Hondo' and he did so. The first defendant said that although it is registered in his name, the property actually belongs to the second defendant.

On 16 June 2000, the first defendant signed a Special Power of Attorney in favour of the second defendant nominating and appointing him to act as his agent 'in all transactions concerning the property known as 50 Alexandra Drive Hatfield Harare. It also 'declared' the second defendant the 'sole signatory on all the papers concerning the sale of Number 52 Alexandra Drive, Hatfield, Harare' on his behalf. The two paragraphs of the 'Special Power of Attorney' refer two to different properties as described above.

Despite the realisation of the true position as conceded by the plaintiff and the fact of the joinder of the second defendant about a year before the hearing of this matter, the plaintiff did not make any amendments to his pleadings. No cause of action is averred or established in his Declaration in respect of the second defendant. Rather, the plaintiff kept insisting when giving evidence, that the second defendant had stated that he used the two names interchangeably. However, despite becoming alive to the reality of the two names representing two people by 26 February 2007, it appears the plaintiff did not thereafter reflect on the impact of the revealed position on his claim as framed. Ms *Gonese* submitted that whilst it would have been have been prudent for the plaintiff to amend his pleadings, particularly his Declaration, the court should proceed to consider the matter on the basis of the evidence placed before it.

A number of preliminary questions arise as to the validity of the agreement placed before the court. Is the agreement valid and binding despite the fact that it was not signed by the person it purports to have been signed by? What is the effect, if any, of the Special Power of Attorney on the signature appended not by the first defendant but by the second defendant, on the agreement? If the agreement is binding did any of the parties breach it and if so, to what effect?

It does also appear however, that before any of the above questions are determined or considered, there is a more fundamental aspect that needs to be determined. The pre-amble to the agreement of

sale reflects that as at the time of the sale a subdivision permit was not yet in place. The seller had applied to the City of Harare for the approval of the subdivision. He undertook that the subdivision permit would be ready in not more than six months from the date of agreement. Section 39 of the Regional, Town and Country Planning Act, [*Chapter 29:12*] provides as follows:

"**39 No subdivision or consolidation without permit**

(1) Subject to subsection (2), no person shall—
(*a*) …
(*b*) enter into any agreement—
(i) for the change of ownership of any portion of a property; or
(ii) …;
except in accordance with a permit granted in terms of section *forty:*

When the court raised this issue with the parties after both had closed their cases, the defendants contended that the agreement does not fall foul of s.39 of the Regional, Town and Country Planning Act because its enforcement was sought after the issuance of a subdivision permit. Ms *Gonese* submitted that the section is applicable only when no application for a permit has been made. *In casu*, an application had been submitted to the local authority. The subdivision was thus not merely in the contemplation of the parties. She submitted that this distinguished the case from the *X-Trend-A-Home (Pvt) Ltd v Gulliver Consolidated & Anor* 2000 (2) ZLR 348. She submitted that should the court find that the section is applicable in this matter she would urge the court to exercise its discretion and do justice between man and man. She further submitted that the passages highlighted to her by the court from MCNALLY JA's judgment do not reflect the *ratio decidendi* of the judgment but are only *obiter dictum*.

In *X-Trend-A-Home (Pvt) Ltd v Gulliver Consolidated & Anor* 2000 (2) ZLR 348 (SC) at 349H - 350A MCNALLY JA stated that:

> "It is desirable to eliminate any uncertainty which may exist as to the state of the law in relation to transactions involving portions of land which are not yet subdivided."

and at 350B:

> "It is necessary then , squarely to face the question: 'Does s.39 of the Regional, Town and Country Planning Act [*Chapter 29:12]* prohibit persons from entering into an agreement for the change of ownership of any portion of a property, even where the agreement is made, expressly or impliedly, conditional upon the obtaining of a permit for subdivision of that portion?"

He then found, at 355B:

> "…the statute no longer speaks of 'a sale'. It uses the much wider expression 'agreement for the change of ownership'. The agreement with which we are concerned is clearly 'an agreement for the change of ownership' of the unsubdivided portion of a stand. What else could it be for? **Whether the change of ownership is to take place**

> **on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited"** (emphasis added).

Ms *Gonese* submitted that the *ratio decidendi* of the case is the following passage at 355C-D:

> **"**The evil which the statute is designed to prevent is clear. Development planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say 'but I have already entered into conditional agreements; major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial subdivision or development' **"**

I do not find persuasive Ms *Gonese's* submission that MCNALLY JA's statements highlighted above at 349H, 350B and 355B are only *obiter dicta.* The learned judge of appeal was determining the very question that he had set out to decide. He was eliminating any uncertainty which may have existed as to the law in relation to transactions involving portions of land which are not yet subdivided. This is clearly indicated and reflected in the stated passages amongst others. In any event, the language of the statute in s.39 is peremptory and admits of no relevant exception to its applicability. Even on an application of the passage at 355C-D, the fact of development planning being the function and duty of planning authorities remains pertinent. The submission of the application for a subdivision permit is no guarantee as to its success. The planning authority should not have its hands forced. The issuance of the permit after the agreement had already been entered into cannot have any legal effect on the validity of the agreement insofar as compliance with the Act in question is concerned. It is the state of affairs prevailing at the time that the parties entered into the agreement, in relation to the existence or otherwise of a subdivision permit, that is relevant.

On the evidence before this court, the fact is that at the time the parties entered into the agreement, there was no subdivision permit in existence. An agreement made in such circumstances is what the section in question prohibits. Any purported agreement for the change of ownership of a portion of a property is therefore null and void *ab initio* by virtue of the provision in s.39 (1) (b) (i). It follows therefore, in my view, that the agreement in this matter is null and void *ab initio*. In *In re An Arbitration Between Mahmoud and Ispahani* [1921] 2 KB 716 at 724 Bankes L.J. stated:

> "…The order is a clear and unequivocal declaration by the Legislature in the public interest that this particular kind of contract shall not be entered into. The respondent had a licence; the appellant had no licence. The respondent contends that, as he had a licence, the appellant cannot be heard to say that in the circumstances he had not a licence. I cannot assent to that proposition. I do not think there is any authority for it, and **as the language of the order clearly prohibits the making of this contract, it is open to a party, however shabby it may appear to be, to say that the Legislature has prohibited this contract, and therefore it is a case in which the Court will not lend its aid to the enforcement of the contract**.

The decision of MCCARDIE J. in *Brightman v. Tate* [1919] 1 KB 463 at 467 has been cited, where in the early part of his judgment he referred to statements of the law upon the point by very learned judges. He referred to the language of Holt C.J. in *Bartlett v Vinor*, Carth. 251, 252; and also to the statement of Lord Ellenborough C.J. in *Langton v Hughes* 1 M. & S. 593, 596 – namely, that:

> **"what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject matter of an action."** (emphasis added).

In *York Estates Ltd v Wareham* 1950 (1) SA 125 at128 LEWIS A.C.J. stated:

> "The Court has no equitable jurisdiction to grant relief to a plaintiff seeking to enforce a contract prohibited by law. See *Mathews v Rabinowitz* (1948 (2), S.A.L.R. 876 (W.L.D.)). **In fact the Court is bound to refuse to enforce a contract which is illegal even though no objection to the legality of the contract is raised by the parties.** See Cape Dairy and General Livestock Auctioneers v Sim (1924, A.D. 167). Furthermore the Court will not enforce such a contract even though the plaintiff is innocent and the defendant is setting up his own illegality. See *R. Mahmoud and Ispahani* (1921 (2) K.B. 716). …
>
> **The fact that the Minister's approval to the subdivision was subsequently given before the plaintiff sought to enforce the contract is immaterial.** It is not alleged that after obtaining the Minister's approval a new contract was entered into. In the *Cape Dairy v Sim* case which dealt with an illegal sale of cattle on a Sunday, it was sought to rely on ratification of the sale made on the following Thursday. Innes C.J., observed at p. 170: **there can be no ratification of a contract which is prohibited and made illegal by statute.**" (emphasis added).

Ms *Gonese* also submitted that should this court find that the agreement is illegal it should exercise its discretion to do justice between man and man and enforce it. In support of such an approach she cited the following cases: *Matsika v Jumvea Zimbabwe Ltd & Anor* HH9/2003; and submitted that the court therein decided to enforce an illegal contract to do justice to the parties. She submitted that in *Nyamweda v Georgias* 1988 (2) ZLR 422 (SC) the court enforced a contract that was *in pari delicto* in order to do justice. In *Georgias v Nyamweda*, MCNALLY J.A. stated at 427C: "The reasoning in Dube's case must prevail." In *Dube v Khumalo*, S.C. 103/86 GUBBAY J.A. stated at p7 of the cyclostyled judgment:

> "I turn then to consider whether the plaintiff's claim for relief, based as it is upon an agreement which involved a conspiracy to defraud the Municipality, should be entertained."

He proceeded at p9:

> **"In this case, so it seems to me, the plaintiff was not seeking to <u>enforce</u> an illegal agreement**. That agreement had been performed. It had achieved its purpose – the Municipality was defrauded. In consequence of it the defendant had acquired rights in

> respect if Stand No. 70769 without incurring any corresponding disadvantage. She had given no value for them. The plaintiff paid for their acquisition and continues to do so. And it was the official recognition that those rights vested in him and not in the defendant that he sought from the court a quo; in other words, the recovery of those rights from the defendant.
>
> In my view the refusal to accord the plaintiff that relief allowed the defendant to be unjustly enriched at his expense. See *Padayachey v Lebese* 1942 TPD 11; *Albertyn v Kumalo and Others* 1946 WLD 529; *Roots (Central Africa) (Private) Limited v Mundawarara and Another* 1973 (1) RLR 57 at 61A-B; *Osman v Reis* 1976 (3) SA 710 (C) at 712H." (emphasis added).

Unlike the situation in *Dube v Khumalo* (*supra*), the plaintiff herein seeks to enforce an agreement specifically prohibited by law. The authorities already discussed above are clear on this. The courts cannot accede to such a request. The case cited is therefore distinguishable. The court cannot lend its aid to the enforcement of the contract.

In view of the above, it therefore becomes unnecessary for this court to determine neither the issues that were referred to trial nor those that arose or emerged from the evidence placed before this court.

The plaintiff's claim cannot therefore succeed in the circumstances. Costs will follow the cause. In the result it is ordered as follows:

The plaintiff's claim is dismissed with costs.

Kwenda & Associates, plaintiff's legal practitioners.
Mtombeni, Mukwesha, Muzawazi & Associates, defendants' legal practitioners