

REPORTABLE (55)

ASHANTI GOLDFIELDS ZIMBABWE LIMITED
vs
JAFATI MDALA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, HLATSHWAYO JA & GUVAVA JA
HARARE, 18 MARCH, 2014 & 3 OCTOBER, 2017

T. Magwaliba, for the appellant

G. Manyurureni, for the respondent

GUVAVA JA: This is an appeal against the entire Judgment of the High Court at Harare dated 27 August 2008.

BACKGROUND

The facts which gave rise to this matter are mainly common cause and may be summarized as follows.

The respondent was an employee of the appellant from 2003 to 2007. During this period, he resided in a house belonging to the appellant. The dispute between the parties emanates from two agreements. The first agreement was a memorandum of agreement in which

the appellant agreed to sell its houses to employees who were residing in the houses at the relevant time. The second was an agreement of lease entered into a few days after signing the first agreement, the terms of which set out the specific amounts to be paid by each employee depending on the type of house that they resided in.

The appellant contends that occupation was in terms of the lease agreement that it entered into with the respondent that was effective from 1 January 2004. It is submitted by the appellant that the terms of the agreement were subject to the respondent's continued employment. The respondent on the other hand argued that he entered into an agreement of sale with the appellant and that the lease agreement was merely a vehicle regulating how payment would be made. The respondent argued that his occupation was subject to the lease agreement as read with the Memorandum between the appellant and members of the Housing Committee. The agreement provided that the appellant had agreed to sell its houses to sitting tenants. The tenants referred to were identified in a document attached to the agreement and the respondent's name was part of the list. It was the respondent's understanding that the lease agreement operated as a lease-to-buy agreement.

It was not in dispute that in 2005 a committee known as the Housing Committee had been set up by the appellant. It was constituted of employee representatives. The committee's mandate was to advance the interests of the employees with respect to their occupation of the company houses. After the establishment of the committee, the appellant entered into negotiations with the housing committee resulting in a Memorandum of Agreement. The terms of this Memorandum read as follows:

“Ashanti Goldfields Zimbabwe agrees to dispose of its housing units situated in Chiwaridzo, Grey Line Flats and Low density to its employees who are sitting tenants effective 1 December 2003. Find the agreed prices attached.”

It was agreed that attached to this memorandum was a list of the appellant’s employees, their respective units and the purchase price for the unit they lived in. There was also a column which divided the total purchase price into instalments which would be paid on a monthly basis by each employee.

Following the Memorandum of Agreement the appellant and the respondent entered into a lease agreement. From the time the lease agreement was signed by the parties, the appellant deducted an amount in compliance with the payment method indicated in the attachment to the Memorandum of Agreement, from the respondent’s salary. These deductions were itemized on the respondents pay slip as “rent to buy.”

On 4 June 2007 the respondent’s contract of employment was terminated and on 12 of September of the same year he received a letter terminating the lease agreement and requiring him to vacate the premises by the 31 of August 2007. The respondent, believing he had paid the full purchase price by that time, refused to vacate the premises. On 17 September the respondent’s legal practitioners wrote to the appellant claiming the property in issue had been purchased and the full purchase price paid.

The appellant then sought the eviction of the respondent in the High Court. The respondent resisted the eviction and the court found in his favor and dismissed the claim, giving rise to this appeal.

The Appellant has appealed to this court on the following grounds of appeal:-

1. The Honorable Court *a quo* fundamentally misdirected itself in finding that the agreement of the 1st day of December 2003 was a valid agreement of sale.
2. The Honorable Court *a quo* further fundamentally misdirected itself in finding that the amount paid by the Respondent to the Appellant subsequent to the 9th day of December 2003 was the purchase price in respect of the immoveable property in issue.
3. The Honorable Court *a quo* further [erred] in finding that the lease agreement concluded between the plaintiff and the defendant was *void ab initio*.

THE ISSUE

The pertinent question which arises from the grounds of appeal, in my view, is whether or not the second contract which was entered into by the parties was a lease agreement in the pure sense, or a lease to buy agreement based on the memorandum of agreement.

THE LAW

It is an accepted principle of our law that courts are not at liberty to create contracts on behalf of parties, neither can they purport to extend or create obligations, whether mandatory or prohibitory, from contracts that come before them. The role of the court is to interpret the

contracts and uphold the intentions of the parties when they entered into their agreements provided always that the agreement meets all the elements of a valid contract.

This principle was set out clearly in the case of *Kundai Magodora & Ors v Care International Zimbabwe* SC 24/14 by PATEL JA when he stated the following:

“In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells v South African Alumenite Company* 1927 AD 69 at 73; *Christie: The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd v Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H.” (My emphasis)

See also *Simbi (Steelmakers) Pvt. Ltd v Shamu & Ors* SC 71/15.

WHETHER OR NOT MEMORUNDUM OF AGREEMENT WAS AN AGREEMENT OF SALE

In this case the appellant largely sought to rely on the decision in the case of *Ashanti Goldfields Zimbabwe Ltd v Clements Kovi* SC 7/09. The facts of that case are very similar to the ones *in casu*. Kovi was also an employee of the appellant. He was employed in June of 1990 and resigned in March of 2007. He alleged that he entered an agreement of sale with the appellant being the very same Memorandum of Agreement referred to as the first contract *in casu* signed by the Housing Committee. His case also had a lease agreement signed pursuant to the Memorandum and Mr. Kovi’s name appeared on the list that specified the amounts payable on a monthly basis per employee attached to the Memorandum.

In the *Kovi* case, however, the appellant never deducted money from the Kovi's salary as "rent to buy". The court on appeal in that case therefore determined that;

"It is difficult to understand how the Memorandum of Understanding can be said to be an Agreement of Sale. What is clear is that the Appellant was offering the houses to the sitting tenants who were its employees. There is nothing to show that the Respondent took up the offer At best the document can only be read as showing who occupied which house and the price they could pay if they accepted the offer to purchase."

In my view this is what distinguishes this case from the *Kovi* case. There was no indication that Kovi accepted the offer to purchase the property in question from the appellant. No money was deducted from his salary in terms of the lease agreement. This view remains unimpeachable and is supported by the case of *Hativagoni v CAG SC 42/15* wherein the parties entered into what they called an "Irrevocable Memorandum of Understanding." In the *Hativagoni* case, the court *a quo* accepted there was no valid contract of sale as the Memorandum of Understanding was merely a vehicle through which an agreement would be concluded. Its exact sentiments were as follows:

"This scenario is distinguishable from a contract of sale subject to a suspensive condition which comes into effect on fulfillment of a specified condition. In this case, there was no contract of sale entered into as envisioned."

In the *Hativagoni* case (*supra*), as to the legal effect of such agreements GOWORA JA concluded as follows:

"In this jurisdiction, it is settled law that agreements akin to the one *in casu* are not enforceable primarily due to the uncertainty which accompanies such contracts ...

In *Premier, Free State and Ors v Freedom Free Estate (Pvt.) Ltd 2000 (3) SA 413 (SCA)*, the court held:

“An agreement that parties will negotiate to conclude another agreement is not enforceable because the absolute discretion is vested in the parties to agree or disagree.”

These authorities are on all fours with the *Kovi* case where all the parties did was to agree that they may enter into an agreement at a later date. There was nothing done by either party to bring into operation the Memorandum of Agreement. In the present case the parties went further than to merely sign the memorandum of understanding. The respondent signed the lease agreement in an effort to bring the memorandum into operation. The appellant went on to effect deductions on the respondent’s pay-slip in accordance with the agreement. The respondent’s pay slip was endorsed ‘rent to buy’ against the deductions made. Clearly, in my view, there can be no greater indication than that there was acceptance of the offer and the parties had come to an agreement on lease-to-buy terms in accordance with the Memorandum.

It seems to me that the deductions betrayed a clear intention on the part of the appellant to uphold the contract of sale as envisioned by the agreement of 1 December 2003. I am persuaded that this is the correct position by the case of *Hoffmann & Carvalho v Minister of Agriculture* 1947 (2) SA 855 (J) at 860 where PRICE J stated that,

“Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he intended ...” (My emphasis)

The intentions of the parties are clear and the reasoning of the court *a quo* cannot be faulted.

The Memorandum of Agreement in my view constitutes a valid contract of sale as all the elements for a valid contract are met. These were set out in the case of *Warren Park Trust v Pahwaringira & Ors* HH 39/09 as follows:

“It is trite and a matter of elementary law that the essential elements of a valid contract of sale comprise:

Agreement (*consensus ad idem*) as to:-

1. the thing sold, the (*merx*) and
2. the price of the thing sold, the (*pretium*).”

In other words a contract of sale comprises three essential elements, that is to say:-

- “1. an agreement between the parties to buy and sell.
2. an agreement on the thing or commodity sold known as the *merx*.
3. an agreement on the price known as a *pretium*”

These elements were met in that there was an understanding that the appellant was undertaking to sell the property to its employees. The Appellant entered into negotiations with the Housing Committee whose sole purpose was to protect the housing rights of its employees. The appellant took the negotiations seriously enough to have the undertaking committed to writing and sworn to by the Financial Director when he affixed his signature. Why then would they purport to enter an agreement with the Housing Committee if they were of the opinion that they had no authority to represent the employer? What then was the intended effect of the entire process if the understanding was, in their mind, of no effect? If the appellant is to persist with the argument, it can only be construed as contracting in bad faith and as stated in the above cases,

courts are not there to absolve one party of its obligations to another particularly where the other party contracted in good faith and carried out its side of the agreement.

R. H. Christie in his book, *Business Law in Zimbabwe*, at p 67, has this to say:

“The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and if this principle were not upheld any business enterprises would become hazardous in the extreme. The general rule, sometimes known as the caveat subscriptor rule is therefore that a party to a contract is bound by his signature, whether or not he has read and understood the contract...and this will be so even if he has signed in blank...or it is obvious to the other party that he did not read the document”. (My emphasis)

This principle has been upheld in a *plethora* of Zimbabwean case authorities and forms an accepted rule in practice. In the case of *Muchabaiwa v Grab Enterprises (Pvt) Ltd* 1996 (2) ZLR 691 (SC) the court stated at 696B:

“The general principle which applies to contracts, and commonly designated as *caveat subscriptor*, is that a party to the contract is bound by his signature, whether or not he has read or understood the contract, or that the contract was signed with blank spaces later to be filled in. Expatiating on this principle is *National and Grindlays Bank v Yelverton* 1972 (1) RLR 365 (G)@ 367; 1972 (4) SA 114 (R)@ 116G-H, DAVIES J cited with approval the following statement by INNES CJ in *Burger v Central South African Railways* 1903 TS 571 and 578 (decided before the promulgation of s 6 of the General Laws Amendment Act):

“It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature.”

The other requirements for a valid contract of sale were met in that the attachment to the Memorandum of Agreement specified the property with respect to each employee (being the *merx*) and the “purchase price.” It went so far as to break down the amount to be paid in installments which was the amount later deducted as “rent to buy” as reflected on the respondent’s pay slip which was authored by the appellant.

WHETHER OR NOT THE LEASE AGREEMENT WAS A LEASE IN THE STRICT SENSE

It was the appellant's assertion that the second contract was a lease agreement in the strict sense and that the respondent was wrong to interpret it to be a lease to buy agreement. On this basis the appellant in their heads of argument address the matter of "unilateral mistake" which they claim was made by the respondent. The appellant argued that the respondent could not claim this defense because the agreement was "comprehensive and in writing."

The requirements for this defense to succeed are stated in National and *Grindlays Bank Limited v Yelverton* 1972 (1) RLR 364 @364H where it says:

"...for the defense of *Justus error* to succeed he must prove that the error was reasonable and justifiable and on a material matter"

I am inclined to agree with the appellant that there was no *justus error* in this case but for different reasons. Unilateral mistake occurs where one party enters a contract motivated by a material and genuine mistake but the other party is clear on the import of the contract being entered into. It would be more readily sustainable if the appellant had alleged mutual mistake which is defined by *R.H Christie* in *Business Law in Zimbabwe* as a situation where each party mistakenly thinks the other is agreeing with his version or understanding of the contract.

In casu, both parties allege to have entered the contract on the basis of a material error in fact. One thought it was a lease agreement while the other thought it was essentially a

contract of sale. Therefore, such conduct does not amount to *justus error* but to a mutual mistake which may be said to result in the absence of consensus *ad idem* which would vitiate the contract.

The appellant contends it was a lease agreement in the strict sense. However, it perplexes the mind why the respondent would seek to enter a lease agreement about a week after he has acquired the right to purchase the property?

The respondent has justified his reasoning for his belief and substantiated it with evidence.

The critical clauses of the lease agreement suggest the appellant knew exactly what it was drafting and that this was in no way a lease agreement in the strict sense but completely dependent on the earlier memorandum.

a) Section 2.4 of the contract states that

“Upon the lessee opting to pay the deposit, the balance outstanding shall be spread over the lease period as indicated in 1.1.” (My emphasis)

In making rent payments there is no “balance” to be paid. Monthly payments of an agreed amount are paid without paying a deposit which has a balance spread over a period. This section in my view aptly describes an instalment sale. It only makes sense if interpreted to mean the balance of the purchase price in the “rent to buy” agreement as supported by the evidence of the Respondent. In my view the interpretation that the appellant seeks to place on the agreement clearly leads to an absurdity and that could not have been the intention of the parties.

Even if the contract could be said to be vague, it is trite that in such circumstances it would be interpreted against the party who drafted it. However, I am not persuaded that this is the situation in this case.

An examination of s 3.2 of the lease agreement clearly illustrates this point. It reads as follows:

b) Section 3.2 of the contract relates to a “purchase price”:

“the rentals paid by the lessee in terms hereof shall be taken into account and be deducted from the amount due in respect of the purchase price determined in accordance with the provisions of Clause 3.1 ...”

It is clear that the respondent was not contracting with the intention of leasing the property but in enforcing the agreement of sale. Such an interpretation was accepted by the appellant when it deducted the amount as “rent to buy”. To now claim that they had no intention to sell the property in question to the respondent is clearly absurd.

The rationale applied in the *Kovi* judgment was that at most the Memorandum constituted an offer which was not accepted. *In casu*, the conduct of the appellant in the drafting of the “lease agreement” and effecting deductions to respondent’s salary made the sale *perfecta*.

DISPOSITION

On this basis I am of the firm view that the court *a quo* was correct in dismissing the appellant’s claims. If anything, the court *a quo* may have been lenient in giving the appellant the benefit of the doubt with respect to its feigning ignorance as to the true import of the contracts it

entered into. This conclusion is based on the fact that the deductions made from the respondent's salary were clearly marked "rent to buy." There was no mistake of any sort. Both parties knew the import of the contract they signed. Therefore, any ambiguities existent in the contract being called a "Lease" Agreement should be interpreted against the appellant by application of the *contra proferentem* Rule.

The evidence as a whole in my view leads to one logical conclusion; that the appellant was well aware of what it was doing when it entered into the contracts and the legal consequences thereof. This appeal is therefore nothing more than an attempt to depart from a valid and legally binding agreement. Courts frown upon attempts to skirt one's legal obligation and it is therefore proper that the appellant be made to pay the respondent's costs.

Accordingly, I make the following order:

1. The appeal be and is hereby dismissed.
2. The appellant shall pay the respondents costs of suit.

ZIYAMBI JA: I agree

HLATSHWAYO JA: I agree

Magwaliba & Kwirira, appellant's legal practitioners

Manyurureni & Company, respondent's legal practitioner