REPORTABLE (37)

MUCHANETA CHATAMBUDZA
v
(1) KUDAKWASHE MURAPE (2) MARBEL TARUBVA ZVINAYE MURAPE

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, GARWE JA, MAKONI JA
HARARE, JUNE 13, 2019 & MARCH 12, 2020

L. Madhuku, for the appellant

B. Sadowera, for the respondent

MAKONI JA: This is an appeal against the whole judgment of the High Court declaring the agreement of sale between the appellant and the respondents valid and binding on the basis that the appellant had the requisite mental capacity to contract and granting the consequential relief of eviction of the appellant.

FACTUAL BACKGROUND

Prior to 26 January 2006 the appellant had rights and interest, in a property called Flat 46, Block 13 Odzi Flats, Eastlea, Harare ("the property"). She instructed Fingold Real Estate (Fingold) to sell the property on her behalf. An advertisement of the sale of the property was published in the Herald newspaper by Fingold, prompting one Abel Murape, the first respondent's father, who acted as the respondents' agent, to engage with Fingold regarding the sale. The respondents are husband and wife. The engagement resulted in an agreement of sale between the appellant and the respondents, wherein the appellant sold her rights and interest in

the property to the respondents. The agreement of sale was reduced to writing and duly signed by the appellant and Abel Murape before the estate agent and two witnesses on 26 January 2006.

It is not in dispute that the full purchase price of ($1 950 000 000.00) one billion nine hundred and fifty million Zimbabwean dollars was paid in full on the date of signature of the agreement. It was paid through Fingold, and of that amount the appellant withdrew fifty million ($50, 000 000.00).

Thereafter, the appellant together with Abel Murape, proceeded to the Ministry of Local Government and National Housing (The Ministry) for confirmation that the purchase price had been paid in full. As the property had no title deeds the parties proceeded to the City of Harare offices to effect cession from the appellant into the respondents' names.

A few days later, on 30 January 2006, and before the respondents had taken occupation, the appellant wrote a letter to the Fingold cancelling the agreement of sale. The appellant indicated that the money paid, towards the purchase price, was of no use to her. This was done notwithstanding the fact that the appellant had already withdrawn part of the money that had been paid for the property for her own use. The respondents, on 5 March 2006, instituted proceedings in the court *a quo* seeking a *declaratur* that the agreement entered into between the parties was valid, the eviction of the appellant from the property and costs of suit.

The appellant resisted the claim on the basis that, at the material time that she entered into the agreement of sale, she did not have the requisite mental capacity to contract. She pleaded in the following terms;

"1. At the material time the Defendant did not have the requisite mental capacity to enter into an Agreement of Sale since she suffers from psychiatric problems. As such, the Agreement of Sale is null and void."

Thereafter the matter was referred to trial.

PROCEEDINGS IN THE COURT *A QUO*

One of the issues for determination at trial was whether or not the appellant had capacity to enter into a valid contract.

The appellant adduced evidence from two witnesses. The first witness was one Bothwell Tawanda Chinenguo (Bothwell), son to the appellant and the second witness was Dr Sekai Nhiwatiwa, a medical doctor specialising in psychiatry.

Bothwell gave the following evidence. He was appointed *curator ad litem* of the appellant on 22 September 2016. The appellant was mentally ill and he would occasionally take her for treatment. It was because of the mental illness that the appellant left her employment around 2001. He claimed that the respondents took advantage of appellant's mental condition in buying the property at a value below the market price as the property was sold at a time when the country was facing hyperinflation. He could not comment on the appellant's state of mind at the time of the sale as he was at a boarding school.

Dr Sekai Nhiwatiwa testified that she treated the appellant from 2005. She found that the appellant suffers from 'bipolar affective disorder' the effects of which include impairment of judgment. She stated that if a patient takes her medicine properly, she could have lucid intervals and could work as a professional such as a lawyer or a doctor. She however

conceded that she could not, with certainty, state that the appellant was not lucid in January 2006 when she sold the house as she neither examined the appellant nor stayed with her. She further highlighted that the letter she had written at the time the appellant sold her property, that she was mentally incapacitated, was at the request of the appellant's son. No medical records were availed to the court to substantiate her averments.

The respondents' case was led by two witnesses namely the first respondent and Abel Murape. The first respondent was not directly involved in the transaction thus he could not comment on the mental state of the appellant as the contract was concluded by his father on his and his wife's behalf.

Abel Murape, who interacted with the appellant and with whom the appellant concluded the agreement of sale, gave the following evidence. The appellant did not show any signs of mental incapacitation during and after the sale. He accompanied the appellant to the Ministry of Local Government and National Housing and to the Municipal offices in order to effect transfer of the property. The appellant wanted to opt out of the contract because she had, unsuccessfully, requested a top up of the purchase price after she had withdrawn part of the money from her estate agents.

DETERMINATION OF THE COURT *A QUO*

The court *a quo* found that the appellant had failed to discharge the onus placed on her by law to prove that she did not have the requisite mental capacity to contract. The court *a quo* also concluded that no evidence had been led to show that the appellant exhibited signs of mental illness at the time the agreement was signed, on 26 January 2006. It further found that the evidence of the expert witness was not sufficient to prove that, at the material time, the

appellant was mentally ill. Instead her testimony was that if the appellant took her medication daily, she would be sane. She could not dispute that the appellant might have had a lucid interval at the time the agreement of sale was entered into.

The court *a quo* found as insufficient the evidence of the appellant's son who testified that the appellant was mentally ill at the time of contracting. Its reasoning was that when the property was sold, the son was away at a boarding school and could not therefore comment, with certainty, on the mental state of the appellant at the material time. Further, it found that there was no evidence to prove that the property was undervalued at the time that it was sold. As such, the argument advanced for the appellant that the respondents took advantage of the appellant to purchase the property for a sum less than its open market value could not be sustained.

The court *a quo* also reasoned that the appellant was not detained at a mental institution when she signed the agreement. Additionally, no evidence was led by persons staying with, or neighbours of the appellant from the time of advertisement of the sale to the time of signing of the agreement, on her mental state. The court believed the testimony of Abel Murape, who interacted with the appellant at the material time, that the appellant did not exhibit signs of mental illness. Thus the court *a quo* found, as a matter of fact, that the appellant had the mental capacity to contract.

GROUNDS OF APPEAL

Aggrieved by this decision, the appellant noted the present appeal on the following grounds:

1. The court *a quo* erred and misdirected itself by failing to appreciate that the defendant lacked the requisite mental capacity to enter into an agreement of sale since she suffers

from psychiatric illness and does not appreciate and understand the contractual obligations (*sic*).

2. The court *a quo* erred and misdirected itself on a point of law by failing to appreciate that a contract that was entered into by a person who lacked mental capacity to transact was null and void and of no force and effect.
3. The court *a quo* erred and misdirected itself granting an order for ejectment against the defendant and all those claiming occupation through her despite the fact that the agreement was contracted by a person who was suffering from a mental illness or incapacity at the time of contracting.
4. The court *a quo* erred and misdirected itself on points of law by failing to appreciate that the defendant at the time of the contract did not appreciate what was going on in her world of living and could not be accountable for her action whatsoever. As such, the court misdirected that by ordering that the respondents are entitled to cession of right, title and interest in Flat No 46 Block 13 Odzi Flats, Eastlea, Harare.
5. The court *a quo* erred and misdirected itself by ordering that the defendant shall pay costs of suit.

SUBMISSIONS BEFORE THIS COURT

Counsel for the appellant, Mr *Madhuku*, submitted that the court *a quo*'s misdirection was twofold. Firstly, the court acted on a wrong principle and secondly it allowed irrelevant factors to guide it in determining whether or not the appellant was *compos mentis* at the time of the sale.

As regards the contention that the court *a quo* acted on a wrong principle, Mr *Madhuku* contended that the court ought to have considered the appellant's medical history in determining the appellant's mental state rather than consider external manifestations exhibited by the appellant, at the time of signing the agreement of sale. He cited the *Executive Hotel (Pvt) Ltd v Bennett NO* 2007 (1) ZLR 343 (S) as authority for this proposition. He submitted that the court *a quo* was totally unaware of the three principles set out in the *Executive Hotel* case *supra.* Such failure was a misdirection. It erred when it ignored the evidence of the curator and the expert witness yet such evidence was sufficient for the court to determine, on a balance of probabilities, that the appellant lacked the requisite mental capacity to contract at the time of sale.

Regarding the second contention that the court *a quo* considered extraneous or irrelevant factors, Mr *Madhuku* stated as follows. The court erred in relying on the outward behaviour of the appellant which was misleading because it could be an expression of delusions caused by mental illness. *Compos mentis* is a matter of fact and the test is subjective. The court is required to determine the condition of the state of mind of the contracting party whose capacity is at issue. That the appellant approached the estate agents and caused the advertisement for the sale of the property to be published, accompanied Abel Murape to the Ministry of Local Government and National Housing, to the City of Harare offices and that she withdrew part of the money was irrelevant in determining the appellant's state of mind. Similarly, the evidence of the estate agent or the two witnesses who signed the agreement of sale, or the persons staying with or neighbours of the appellant during the relevant time could not have been decisive of the question of fact, that is, whether the appellant was mentally incapacitated.

Per contra, Mr *Sadowera*, for the respondents, argued that the court *a quo* took into account all relevant factors including the appellant's medical history in determining whether the appellant was *compos mentis* at the time of signing the agreement of sale. He argued, as a matter of fact, that no medical records were availed to the court except for the letters written by Dr Nhiwatiwa at the request of the curator to the effect that the appellant was mentally incapacitated at the time she entered into the contract. These letters could not be relied on as they were influenced by the appellant's son. In one of the letters, Dr Nhiwatiwa proceeded to comment on the circumstances surrounding the signing of the agreement of sale, thereby exceeding her bounds.

Mr *Sadowera* further submitted that Dr Nhiwatiwa's evidence was not credible in that whilst she conceded that the appellant could have lucid intervals, she did not examine the appellant at about the time the agreement of sale was signed. The curator's evidence also could not be relied on as he was not present at the time the agreement of sale was concluded. Thus he contended that the court was correct in relying on the evidence of Abel Murape who interacted with the appellant at the time the agreement of sale was signed. Counsel also asserted that in the *Executive Hotel* case *supra,* the court took into account several factors such as evidence adduced in a meeting in which the appellant attended, the terms of the agreement itself together with the appellant's medical history. He insisted that the decision of the court *a quo* could not be assailed as the court analysed the witnesses' evidence carefully and correctly applied the principles set out in the *Executive Hotel* case *supra* to the case before it.

ISSUE FOR DETERMINATION

Although the appeal raises various grounds, only one issue arises for determination in this appeal which is whether or not the appellant had the mental capacity to contract at the material time.

THE LAW

The law relating to whether a person has the mental capacity to contract is now settled. It was succinctly captured in *Executive Hotel (Pvt) Ltd v Bennett NO supra* where the court quoted with approval the remarks in *Pheasant v Warne* 1922 AD 481 at p 488 where it was held that:

> "… a court of law called upon to decide a question of contractual liability depending upon mental capacity must determine whether the person concerned was or was not at the time capable of managing the particular affair in question – that is to say whether his mind was such that he could understand and appreciate the transaction into which he purported to enter"

At p 351 A-B the court, in that case, summarised the tests to be considered in determining the existence or otherwise of *compos mentis* as follows:

"1. Was the state of mind of the contracting party whose capacity is at issue such that he was incapable of estimating what was or what was not a fair and beneficial bargain?;
2. Was the state of mind of the contracting party whose capacity is at issue such as would in common honesty not make him liable or responsible for such act or contract?; and
3. Whether the contracting party whose capacity is at issue was of such unsound mind as to be incapable of understanding and appreciating the transaction into which he purported to enter."

The court, further down on the same page, at para C, remarked:

"Prof Christie, in his book *The Law of Contract in South Africa* 3ed, commented on these three tests for determining the capacity of contracting parties and makes the following observation:

> "Remembering that the fundamental question is whether there was *consensus*, and that a negative answer to that question has the drastic result of making the contract void *ab initio*, the first of three tests – inability to weigh up a bargain – seems too lenient because such inability is consistent with mere stupidity, which is not enough. The second test, with its reference to common honesty, is a useful reminder of the policy of the law to protect the insane at the expense of other parties to contracts. The third test accords with that laid down by INNES CJ in *Pheasant v Warne* 1922 AD 481 at 488: … [quoted above].
>
> This is the test which, with slight variations of wording, has been applied in most of the cases. But it is not exclusive of other tests …""

It follows that where these requirements are absent, no consequences flow from the purported contract. This is for the reason that where capacity to contract is lacking, the resultant transaction is void for want of capacity. Voet, as quoted in The Law of South Africa by Sir J.W. Wessels Vol 1 2nd Ed at p 226 says:

> "Every act of a lunatic is null and void as having been done by a person deprived of reason."

See also *Lange v Lange* 1945 A D 332 at p 341.

It is settled law that the *onus* of proving that a transaction is invalid for want of mental capacity rests on the party alleging it. See *Pheasant v Warne supra* at p 482

The inquiry into the mental state of a contracting party is a matter of fact to be decided by the court. See *Blamire's Executrix v Milner and Wirsing* 1969 NLR 3 9. It is also settled law that when a subordinate court makes a finding of fact, an appellate court is slow to upset that finding unless that decision is grossly unreasonable. This point was underscored in *ZINWA v Mwoyounotsva* SC 28/15 where the court had occasion to comment thus:

> "It is settled that an appellate court will not interfere with factual findings made by a lower court unless those findings were grossly unreasonable in the sense that no reasonable tribunal applying its mind to the same facts would have arrived at the same conclusion; or that the court had taken leave of its senses; or, put otherwise, the decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it, or that the decision was clearly wrong."

For this Court to set aside the decision of the court *a quo*, the appellant must demonstrate that the court *a quo* made such an outrageous decision that no other right minded tribunal in the same circumstances could have made. It is not enough to merely establish that another court would have arrived at a different conclusion on the same set of facts. One must go beyond that to prove that the court making the decision had taken leave of its senses when it made the decision. This time honoured principle of law was ably laid down in *Hama v NZR* 1996(1) ZLR 664 (S) as follows:

> "In other words, the decision must have been irrational, in the sense of being outrageous in its defiance of logic or of accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion."

It becomes imperative to assess the evidence and facts placed before the court *a quo* to determine whether or not the decision of the court *a quo* that the appellant had the requisite mental capacity to contract was irrational.

APPLICATION OF THE LAW TO THE FACTS

The court *a quo* found the evidence of the two witnesses led by the appellant insufficient for it to make a determination that the appellant was not *compos mentis* when she

concluded the agreement of sale. This is in light of the concession by Dr Nhiwatiwa that the appellant could have lucid intervals, if she effectively managed her medication. It is only the persons who transacted or interacted with the appellant who could have observed the appellant's behaviour at the material time to determine whether or not the appellant was mentally capable of transacting at that time. Abel Murape who transacted with the appellant gave evidence, which the court deemed truthful, that the appellant was *compos mentis* at the time the agreement was signed. This evidence was uncontroverted. The learned author Sir J.W. Wessels *supra* in paragraph 698 at p 226 observes:

> "If a person normally a lunatic does an act, the presumption is that the act is void, but if it can be shown that he did it during a lucid interval, it will be valid.C.4.38.2; Estate Rehne v Rehne, 1930 O.P.D 80.)"

The court *a quo's* decision cannot, therefore, be faulted.

The judgment of the court *a quo* reflects that the learned judge was alive to the principles that ought to be applied when determining whether a party had no capacity to contract by reason of mental illness. I do not find Mr *Madhuku*'s contention that the court overlooked the appellant's medical history persuasive. The court considered the evidence of Dr Nhiwatiwa and correctly discounted it. It is significant to note that no medical records were placed before the court, to establish the medical history of the appellant, except for letters which were drawn at the request of the appellant's son. In one of the letters dated 20 January 2010 the Doctor stated the following:

> "I have been looking after the above named lady for over ten years now. When she sold her house in 2006 she was psychotic and did not know what she was doing. I believe the house was sold below market value. The buyer at some point knew that Muchaneta was ill but proceeded with the deal anyway. If a detailed report is needed I need time to complete it."

She conceded, during her testimony, that she did not have independent knowledge of the facts surrounding the agreement of sale as she neither examined the appellant nor lived with her. The court *a quo* cannot therefore be faulted for discounting her evidence.

Whilst medical history is vital in determining whether or not one is *compos mentis*, at the material time of signing of the agreement, other factors surrounding the transaction must equally be considered. R H Christie *supra* at p 274 puts it this way:

> "Because of the nature of the enquiry it will usually be necessary to draw inferences from the evidence, including evidence of the nature of the contract and the circumstances surrounding its making."

One such factor is the letter written by the appellant to Fingold purportedly cancelling the agreement of sale. It is common cause that the appellant authored the letter four days after the agreement of sale had been concluded and after she had withdrawn part of the purchase price. Its coherence cannot be overlooked. The relevant part reads as follows:

> "…
> The Manager
> Fingold Eastate Agent
>
> Dear Sir/Madam
>
> Cancellation of an Agreement of Sale
>
> I am cancelling this agreement of Sale because the money is of no use to me. I am cancelling the sell.
>
> Yours faithful
>
> M Chatambudza …
>
> cc: Ministry of Local Govt and Housing"

It is evident that the intention to invalidate the agreement of sale was clearly put across. She had the mind to even copy the letter to the responsible Ministry. It boggles the mind as to how the appellant was able to write such a logical letter if she was not *compos mentis*. It

appears to me that the decision by the appellant to cancel the agreement was simply an afterthought, having failed to get a top up on the purchase price.

Further, a step by step exercise of the test laid out in *Executive Hotel* case *supra* will show that the appellant's case fell short of that standard. Firstly, there was nothing placed before the court *a quo* to suggest that the appellant had no idea of what a fair and beneficial bargain would be. It was incumbent upon the appellant to demonstrate that she did not have the capacity to estimate what a fair and beneficial bargain would have been in the circumstances. An estimate of the market value of the property at the time it was sold and the purchase price that was paid would be one such factor that would establish the lack of capacity to fairly bargain for herself. No evidence was led to that effect.

Secondly, it was not proven that the appellant's state of mind, at that time, would in common honesty not make her liable or responsible for such act or contract. She had the mind to engage estate agents. She appreciated that they had to go to the relevant Ministry and other departments to effect the transfer of the property. The appellant's conduct does not justify a finding exempting her from liability. To the contrary, her conduct reasonably suggests that she was responsible for her conduct.

Thirdly, there is nothing to suggest that the appellant was incapable of understanding and appreciating the transaction to which she was a party. None of the terms of the agreement of sale was criticised as being unreasonable such that it can be said that the agreement was not the kind of agreement which an ordinary mentally lucid person would have concluded. As already alluded to above, she appreciated that she had to visit various offices to effect the transfer in terms of the agreement.

DISPOSITION

In the result, I find that the decision of the court *a quo* that the appellant had the requisite capacity to contract cannot be assailed. The appellant is challenging a factual finding of the court *a quo*. She has not demonstrated that the court *a quo* acted irrationally, illogically or unreasonably.

Accordingly, the appeal has no merit and must be dismissed.

The respondents had prayed for costs on a punitive scale on the basis that there is an element of harassment of the respondents taking into account the manner in which the appellant has conducted her case from the beginning. However at the commencement of the hearing Mr *Madhuku* advised the court that he was representing the appellant *in forma pauperis.* In view of that Mr *Sadowera* did not persist with the issue of costs on the punitive scale. He proposed that each party bears its own costs.

In the result, I make the following order;

"The appeal be and is hereby dismissed with each party to bear its own costs"

GWAUNZA: DCJ

GARWE: JA

Lovemore Madhuku Lawyers, appellant's legal practitioners

Tadiwa & Associates, respondent's legal practitioners.