

INNOCENT HLAMBELO

Versus

THANDIWE THEBE

And

STEPHEN GONYE

And

REGISTRAR OF DEEDS

And

THE MASTER OF THE HIGH COURT OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 4 AND 28 NOVEMBER 2024

Civil Trial

H. Shenje, for the plaintiff
T. Ndebele, for the first defendant
No appearance for second, third and fourth defendant

KABASA J: The plaintiff issued summons on 5 April 2022 in which he sought the following relief:-

- “(a) An order for the setting aside of the transfer of the immovable property known as stand 1356 Cowdray Park Bulawayo from the 2nd defendant purportedly to one Mlamuleli Somfula Thebe (deceased) in terms of Deed of Transfer No. 1131/20 dated 31st December 2020 on the basis that the said transfer was premised on fraud.
- (b) An order, consequent to the above declaring the property to be transferrable from 2nd defendant to the plaintiff in terms of the order granted under Case No. HC 325/21.
- (c) An order for the costs of suit as against the 1st defendant on a punitive scale of legal practitioner and client.”

The basis of the claim as elaborated in the plaintiff's declaration was that on 14 January 2002 the plaintiff entered into an Agreement of Sale with 2nd defendant for house No. 1356 Cowdray Park Bulawayo. Under HC 325/21 the plaintiff sought an order confirming the 2002 agreement and an order compelling 2nd defendant to transfer the property to plaintiff. Under case No. 328/21 plaintiff sought an order at the Magistrates Court for the eviction of first defendant from the same property. Plaintiff obtained a default judgment but that was not executed due to the existence of an application for stay of execution premised on a Deed of Transfer No. 1131/20 which Deed of Transfer was obtained through fraud as there was no valid Agreement of Sale between 2nd defendant and Mlamuleli Somfula Thebe. Mlamuleli Somfula Thebe had no Agreement of Sale with plaintiff as purported under HC 1243/20 as at 31 December 2020 the date of transfer of the property Mlamuleli was deceased. The plaintiff is therefore entitled to transfer of the property on the basis of the Agreement of Sale between the plaintiff and 2nd defendant. 1st defendant caused the property to be transferred in favour of Mlamuleli knowing full well Mlamuleli had no legal right to receive transfer.

Only the first defendant defended the action and in her plea stated that plaintiff entered into an Agreement of Sale with 2nd defendant. Under HC 325/21 1st defendant was not a party to the proceedings but later sought and obtained a stay of execution. Mlamuleli purchased the said property from plaintiff who had earlier purchased it from 2nd defendant and consent to transfer the property from 2nd defendant to Mlamuleli was sought from the Bulawayo City Council and duly granted. 1st defendant was not a party to the HC 1243/20 proceedings. However the transfer process from 2nd defendant to Mlamuleli commenced before Mlamuleli's death, payment of the requisite fee was the only outstanding issue.

The plaintiff sold the property to Mlamuleli and so cannot claim a property he sold.

Following the closure of pleadings the parties attended a pre-trial conference at which the following issues were referred for trial:-

1. What the whole nature of the transaction between the parties that is, Stephen Gonye, Innocent Hlambelo and Mlamuleli Somfula Thebe was concerning Stand 1356 Cowdray Park, Bulawayo.
2. Whether there was cancellation of the Agreement of Sale between Stephen Gonye and Innocent Hlambelo and pursuant thereto, whether there was an Agreement of Sale between Stephen Gonye and Mlamuleli Somfula Thebe.

3. Whether there was an Agreement of Sale between Innocent Hlambelo and Mlamuleli Somfula Thebe.
4. Who, between the parties, is legally entitled to the property in issue.

The onus to prove all the issues was placed on the plaintiff.

At trial, the plaintiff and 2nd defendant testified and the plaintiff's case was subsequently closed. The 1st defendant testified and a lawyer who was present on the day plans to sell the property by 2nd defendant to a different buyer were scuttled also testified.

Plaintiff's Case

The plaintiff's evidence was to the following effect: On 14 February 2002 he entered into an Agreement of Sale with 2nd defendant and bought 1356 Cowdray Park for \$40 000. He paid a deposit of \$20 000 and moved into the house where he stayed for a year. He then moved out to make way for 1st defendant who was 2nd defendant's girlfriend. The 2nd defendant would pay him "whatever amount" once in a while as rentals. He refused to pay the balance of \$20 000 until the 2nd defendant cleared his mortgage liability. In 2010 he agreed with 2nd defendant to sell the property so he could get a refund of his \$20 000 since the title deed to the property could not be located. In 2020 2nd defendant advised him he was selling the property and they went to see lawyers. 1st defendant was also called to the lawyer's offices and the sale did not go through as it turned out that there were documents indicating that the property had been transferred to 1st defendant's husband. He then decided to institute the present proceedings.

I must say that the innocence of this witness is in his name only and does not extend further than that. He did not impress as an honest witness. Although he sought to portray himself as illiterate, literacy had nothing to do with the manner in which he conducted himself. This is so because he said he bought the property on 14 February 2002. He paid \$20 000 of the \$40 000 purchase price. He stayed in the property for a year before he acceded to 2nd defendant's request to have his girlfriend stay in that property. There was no agreement as to the terms of her stay. The 2nd defendant would "once in a while" give him "whatever amount" as rentals. If he considered the property as his pending the payment of the balance of \$20 000 why would he not have an agreement regarding 2nd defendant's girlfriend's occupancy of this property? Why would 2nd defendant pay erratic unspecified amounts as rentals to a buyer who was yet to pay the full purchase price? Eight years later the plaintiff says he agreed that

the property be sold so he gets his \$20 000 back because the title deeds to the property could not be found.

If that was the reason behind the decision to sell the property, was the next purchaser's fate going to be different? How was the title deed snag going to be circumvented? If there were means to so circumvent that title deed issue, why did the plaintiff not seek that that be done as 8 years had already lapsed with him getting erratic unspecified rentals for a property he considered as his?

From 2010 until 2020 the plaintiff said even the erratic rentals had stopped. In 2020 he then learnt of the sale and transfer to 1st defendant's husband and that is when he decided to take action.

At the lawyer's offices he saw declarations from 2nd defendant and 1st defendant's deceased's husband, which declarations were in pursuance of transfer of the property from 2nd defendant to 1st defendant's names.

On his part he never paid the balance of \$20 000. That notwithstanding, he wants transfer of the property into his name ostensibly because the \$20 000 must have been offset over the period the 1st defendant has been in occupation of the property.

He obtained an order under HC 325/21 against the 2nd defendant but such order has not been executed. In any event 2nd defendant cannot be compelled to transfer a property to which he holds no title as title is in 1st defendant's husband's name. For 17 years he was content to sit back and not enforce his purported rights over the property.

I pose all these questions just to show that the plaintiff's story has so many holes which all point to his lack of credibility.

The 2nd defendant who chose not to defend the matter but to shore up the plaintiff's case did not fare any better.

His evidence was that he sold the property to the plaintiff for \$40 000 and only \$20 000 was paid. The agreement was that the plaintiff would pay the balance at a stipulated time. If he failed he was going to grant him more time to look for the money. The balance was never paid.

The property is now registered in 1st defendant's husband's name but he never sold the property to him. He never signed the ZIMRA declaration forms as the seller and such declarations are fraudulent. He only saw the documents pertaining to the transfer of the property at Lazarus and Sarif Legal Practitioners after he had been directed to them by CABS when he was seeking the upliftment of a caveat which had been placed on the property.

He was seeking to get the title deed to the property as he had agreed with the plaintiff to sell the property. Such sale was meant to allow him to get what was due to him and for plaintiff to also get what was due to him.

The declarations which the parties were referring to were not produced in evidence. The documents which were being referred to were not tendered in evidence. The parties however were in agreement that such documents existed. Title is in 1st defendant's husband's name and such title was obtained after all ZIMRA formalities were done with 2nd defendant and first defendant's husband signing the relevant declarations as between seller and purchaser.

If the plaintiff paid \$20 000 of \$40 000 why would the 2nd defendant expect to be paid his dues and plaintiff also paid his dues. What dues would be due to the plaintiff when it was him who had to pay the outstanding \$20 000? Why did the two want to sell the house and share proceeds between them?

It is important to note that the 2nd defendant wanted to sell the property when he, plaintiff and 1st defendant's wife were called to Lazarus and Sarif. The sale was stopped because the contents of the file pertaining to that property did not support the story as given by the 2nd defendant.

This witness was abrasive and chose to hide behind "I know nothing about that" when confronted with questions which sought to show that he was being economical with the truth.

One cannot simply say these documents are fraudulent and leave it there? Why are they fraudulent? Is the signature appearing thereon not yours? Why do you say it is not yours?

The 2nd defendant sought to suggest that the 1st defendant was his girlfriend even at the time her husband was still alive and they had a love child together. However the child is said to be 13 or 14 years now in 2024. This would mean that child was born in 2011, years after the 1st defendant's husband had died. This lends credence to the 1st defendant's evidence that

the 2nd defendant sought to endear himself to her as a ploy to take advantage of her and this was after her husband's death.

I was not impressed with both the plaintiff and 2nd defendant. Their unreliability as witnesses was in stark contrast to the 1st defendant and her witness's reliability as witnesses.

1st Defendant's Case

After the plaintiff closed his case, the 1st defendant testified. She narrated how the plaintiff approached her late husband selling the property in question, 1356 Cowdray Park. They bought the property but later discovered that it was not registered in plaintiff's name but 2nd defendant's. This is the reason why all paperwork was then done as between her late husband and 2nd defendant. At ZIMRA 2nd defendant suggested that the date of purchase be backdated to 1998 so as to avoid paying huge amounts in tax.

When it came to transfer of title she pestered 2nd defendant to pay off his debt with CABS so the title deed could be released.

She only became friends with 2nd defendant in 2010 after her husband's death. The 2nd defendant must have decided to get close to her in an attempt to take advantage of her and she had to approach Lazarus and Sarif when the plaintiff and 2nd defendant were threatening her in a bid to get her to move out of the property in question.

The Agreement of Sale for the property was between her late husband and the plaintiff. Efforts were made by 2nd defendant to try and stop transfer of the property into her husband's name to no avail. The property was transferred on 31 December 2020. She had been failing to transfer the property earlier due to the loan that 2nd defendant had for which he had used the property as collateral.

She never had a relationship with 2nd defendant when she was still married.

The witness gave her evidence well. I got the distinct impression that she was relating what she could recall to the best of her ability.

Her husband died on 18 December 2003. The child who the plaintiff said was sired by 2nd defendant with 1st defendant was so sired after the 1st defendant's husband's death. The portrayal that 1st defendant was having an illicit affair which saw her being moved into the property was shown to be a false narrative.

The 1st defendant's version was supported by the documents the parties agreed existed, the declaration as between seller and purchaser, the consent from council for transfer of the property from 2nd defendant to 1st defendant's husband's name, the ZIMRA payments and the title deed which is in the 1st defendant's husband's name. The paper trail lends credence to the 1st defendant's version.

Not only was the 1st defendant a credible witness but her evidence was supported materially by the lawyer who was present when 2nd defendant's attempts to sell this property to some other person were scuttled.

Ms Lusinga was a lawyer at Lazarus and Sarif when in 2020 2nd defendant came to their offices with potential buyers of the property in question. When the file was retrieved the paper trail showed that 2nd defendant had sold the property to the plaintiff who had in turn sold it to 1st defendant's husband. 1st defendant was then called to the lawyer's offices and a meeting was held where plaintiff, 1st defendant, 2nd defendant and the potential buyer of the property were present. At that meeting the plaintiff stated that he had sold the property to 1st defendant's husband. As a result the 2nd defendant's attempts to sell the property ground to a halt and the potential buyer was dismissed.

Ms Lusinga has no direct interest in this matter. She got involved in her professional capacity and only related that which she was aware of and nothing else. Her presence in court at some stage of the proceedings did not detract from her credibility.

This is hardly an issue of her word against the plaintiff's. She is a lawyer whose involvement stemmed from the fact that they had the file relating to the property in question a fact alluded to by the 1st defendant who engaged the law firm following threats issued to her by plaintiff and 2nd defendant over this property.

The plaintiff had categorically denied selling the property to 1st defendant's husband ostensibly because he had no title to the property yet *Ms Lusinga* confirmed that at the meeting held at the lawyer's offices the plaintiff confirmed that he had sold the property.

Such sale would have been in tandem with what plaintiff and 2nd defendant had agreed on that the property be sold so plaintiff would be refunded the \$20 000 he had paid as deposit for the property.

Whether the plaintiff went behind the 2nd defendant's back and pocketed the proceeds he got from 1st defendant's late husband is not 1st defendant's problem. The fact is plaintiff sold that property to first defendant's husband and 2nd defendant who had title came in to do the needful so transfer could be effected into 1st defendant's husband's name.

Ms Lusinga's testimony put paid to the false narrative peddled by plaintiff and 2nd defendant. This testimony corroborated the 1st defendant's assertion that the 2 men sought to take advantage of her husband's death.

THE LAW

He who alleges bears the onus of proof. (*Pillay v Krishna* 1946 AD 946, *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A)). The plaintiff was not able to prove that the title 1st defendant's husband holds is a fraud. The transaction between the plaintiff, 2nd defendant and 1st defendant's late husband was clarified by 1st defendant and supported by the paper trail and *Ms Lusinga's* evidence. The plaintiff bought the property from 2nd defendant, failed to pay the full purchase price, sold the property to 1st defendant's husband so he could get his \$20 000 back. The first issue is therefore resolved against the plaintiff.

The second issue is subsumed in the first issue. The plaintiff confirmed he sold the property to Somfula Mlamuleli Thebe. The Agreement of Sale was therefore not between 2nd defendant and Mlamuleli. 2nd defendant however signed the necessary documentation to facilitate transfer into Mlamuleli's name. Mlamuleli came in as an innocent purchaser. 2nd defendant would not have signed the necessary documents had he been averse to the sale. Such sale was as per their, i.e. 2nd defendant and plaintiff's agreement that the property be sold so plaintiff gets his \$20 000 back.

In *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) the Supreme Court had this to say:-

“The registration of rights in immovable property in terms of the Deeds and Registries Act [Chapter 139] is not a mere form. Nor is it simply a device to confound creditors or the tax authorities it is a matter of substance. It conveys real rights upon those in whose name the property is registered.”

When the property was registered in 2nd defendant's name he had such real rights over it. When he transferred title to the 1st defendant's husband's name, such real rights vested in the 1st defendant's husband.

“The registration of title in one’s name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever.” (*Afro-Chem Dealers (Pvt) Ltd v Gomo & Ors* 2009 (1) ZLR 255.

The real right *in casu* vests in the 1st defendant’s husband’s estate and by extension to whosoever will be awarded the house in the distribution account, following such beneficiary’s subsequent receipt of title after following due process.

The plaintiff sought to impugn the title and the law provides for that. (*Ishemunyoro v Ishemunyoro & Ors* S 14-19, *CBZ Bank Ltd v Moyo & Anor* S 17-18). The issue is has the plaintiff succeeded in impugning the title in issue? All he did was make bald unsubstantiated claims of fraud but that is hardly proof of such averment.

The plaintiff asserted that the 2nd defendant and 1st defendant are out to rob him and that is why title was transferred behind his back. This does not make much sense regard being had to the fact that he is the one who sold the property to 1st defendant’s husband. By doing so he must have appreciated that title would then go to that buyer. He had decided to opt that the property be sold because he believed the title deed was nowhere to be found. He therefore appreciated that when a buyer buys an immovable property they get title to it. Why would he not have expected the buyer to get title in the circumstances?

The 2nd defendant cannot transfer title that he does not have. He relinquished it when he passed it to the 1st defendant’s husband at the time he went through the process which facilitated such transfer.

The plaintiff can therefore not seek transfer from 2nd defendant. In any event why would he seek transfer when he admitted he never paid the full purchase price?

I must say the declaration and the issues referred for trial could have been more elegantly couched. They left a lot to be desired.

That notwithstanding, the plaintiff failed dismally to discharge the onus placed on him on all the issues. Granted the proof is on a balance of probabilities.

In the *Civil Practice of the High Courts of South Africa, 5th ed*, the authors Herbstein and Van Winsen at p 891 thereof state:-

“The phrase ‘burden of proof’ refers to the onus which rests on a litigant to establish the factual basis for a claim or defence. The factual basis must be established as a matter of probability, or as often expressed as requiring proof on a “balance of probabilities”, but that should not be understood as “requiring that the probabilities should do no more than favour one party in preference to the other. What is required is that on a preponderance, it is probable that the particular state of affairs existed.”

What is the “more natural or plausible conclusion from amongst several conceivable ones?” (*Govan v Skidmore* 1952 (1) SA 732 (N).

I would say the 1st defendant’s narrative as supported by *Ms Lusinga* is the more plausible and the probabilities of the matter weigh in her favour.

The plaintiff therefore failed to prove his case in support of his claim. His claim can therefore not succeed.

As regards costs, costs are in the discretion of the court. I am not persuaded that the plaintiff’s conduct is deserving of censure. A case for punitive costs has not been made. I must point out that counsel for 1st defendant did not submit closing submissions by the date they were due. A whole week lapsed before such submissions were filed and so this judgment was written without the benefit of the submissions. Counsel could have made a case for punitive costs but that opportunity was not taken.

With that said, I make the following order:-

1. Plaintiff’s claim be and is hereby dismissed.
2. The plaintiff shall pay costs at the ordinary scale.

Shenje and Company, plaintiff’s legal practitioners
Lazarus and Sarif, 1st defendant’s legal practitioners

