

JOICE MURERA TENDAYI  
**versus**  
BULAWAYO GLASS AND ALLIED PRODUCTS (PVT) LTD  
and  
INVY MASHAVIRA  
and  
BULAWAYO CITY COUNCIL

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 19, 20 JUNE 2018 AND 28 JUNE 2018

### **Civil Trial**

*S Chamunorwa* for the plaintiff  
*B Dube* for the 1<sup>st</sup> defendant  
*K Ngwenya* for the 2<sup>nd</sup> defendant  
3<sup>rd</sup> defendant in default

**MATHONSI J:** The bone of contention between the parties is an undeveloped stand being Stand No 14316 Selborne Brooke in Bulawayo which is located at a part of Bulawayo under development into a residential suburb. It appears common cause that the area in question falls under the municipal jurisdiction of the City of Bulawayo, cited herein as the third defendant, which allocated it to the first defendant, a land developer of note, in terms of an arrangement by which the first defendant would service it into residential stands. Those stands would be sold by the first defendant which has the exclusive right over them, to home seekers. When that occurs, the first defendant would have the exclusive right to second a purchaser of a stand to the City of Bulawayo, which would then enter into an agreement of sale with the purchaser on certain terms and conditions, the final relationship over the stand being that between the City of Bulawayo and the purchaser recommended by the first defendant.

The plaintiff instituted an action against the defendants seeking an order confirming an agreement of sale which she entered into with the first defendant on 8 August 2014, directing the first defendant to sign all documents necessary to effect transfer of stand No. 14316 Selborne

Brooke, Bulawayo (the stand) to herself, for the eviction of the second defendant from it and costs of suit. She pleaded that she had entered into an agreement of sale with the first defendant involving the stand on 4 August 2014 in terms of which she purchased it for \$16000-00 payable by an initial deposit of \$8000-00 upon the signing of the agreement and thereafter \$3000-00 payable at the end of August 2014. The balance of \$5000-00 was to be paid in monthly instalments of \$1000-00 over a period of 5 months.

She averred that in pursuance of the sale agreement she paid to the first defendant the sum of \$12000-00 but when she tendered the balance of \$4000-00 the first defendant refused to accept it, instead it purported to cancel the sale on 13 April 2016 after it had sold the same stand to the second defendant. The latter took occupation of the stand but his own sale agreement is not valid. The plaintiff prayed for the grant of an order aforesaid. Both the first and second defendants entered appearance to defend and filed pleas to the claim.

The first defendant admitted entering into a sale agreement with the plaintiff as alleged but averred in its plea that the terms were that right, title and interest in the stand would pass to the plaintiff upon full payment of the purchase price but the plaintiff breached the agreement by failing to tender full payment. Instead the first defendant paid part of what was due in kind, that is in the form of a motor vehicle a Nissan Primera registration number ABY 8135 registered in the name of a third party and worth \$6000-00. In addition, part of what the plaintiff paid was in the form of loans with usurious interest which were credited to the plaintiff's account as part of the purchase price. As the plaintiff failed to produce authority to sell the motor vehicle and the sum of \$2000-00 was unlawful interest, the plaintiff failed to honour her part of the agreement. As a result no binding sale agreement was concluded between the parties.

For his part the second defendant averred that he is an innocent third party who purchased the stand from the estate of the late Zenzo Mandundu represented by an administrator of estates Ester Kelli on 3 July 2015 for a purchase price of \$18000-00 which was duly paid. Upon purchasing the stand he was referred to the first defendant for purposes of transferring the stand into his name. In order to facilitate a swift transfer, the first defendant prepared a further sale agreement between it and the second defendant which more or less ratified the initial one between himself and the estate of the late Zenzo Mandundu. As a result, the stand was transferred to him and he claims title to it by virtue of a written sale agreement signed by himself

and the third defendant. The late Zenzo Mandundu had bought the stand from the first defendant on 3 February 2011 and fully paid for it, much earlier than the purported sale between the first defendant and the plaintiff.

The parties identified a total of eight issues for trial when they held a pretrial conference before a judge but in my view the issues are very narrow indeed. They are:

1. Whether the late Zenzo Mandundu had, during her lifetime, lawfully purchased the stand from the first defendant on 3 February 2011.
2. If she did, whether after her death her estate still held the stand which it could lawfully sell to the second defendant on 3 July 2015 and the validity of that agreement.
3. Whether the first defendant could lawfully sell the stand to the plaintiff on 4 August 2014 and the validity of that agreement.
4. The legal implication of the third defendant entering into an agreement of sale with the second defendant.

In my view the above four issues speak to and condense the eight issues identified by the parties for trial. A resolution of the four issues in question effectively resolves all the eight issues set out in the parties' joint pretrial conference minute. A total of four witnesses testified at the trial starting with the plaintiff herself who did not call a witness. Next was Sipho Mhlanga, a director of the first defendant, who was the only witness for the first defendant. He was followed by the second defendant who also called Ester Moyo (nee Kelli) to testify on his behalf.

The essence of the plaintiff's testimony is that she entered into a written agreement of sale with the first defendant on 4 August 2014 in terms of which she bought the stand for \$16000-00 which was payable in instalments over a period of time. She had paid a total of \$12000-00 when the first defendant's representative reneged and refused to accept the balance of \$4000-00. The reason for refusal was that he then wanted to increase the purchase price to \$18000-00 but she refused. The plaintiff flatly denied that part of the purchase price was paid in the form of a motor vehicle or a loan and interest set off. She maintained that the agreement with the first defendant is binding and she holds the latter to it. She tenders the balance of \$4000-00 upon transfer. She however confirmed that she was a complainant in the criminal prosecution of the first defendant on a charge of fraud.

The first defendant's case is not as simple. Siphon Mhlanga testified that indeed the first defendant is a land developer in the business of buying large tracts of land from the municipality in terms of a special arrangement in which the Municipality releases the land to it for servicing and development into small residential stands. In terms of that arrangement it is the first defendant which has the exclusive right to sell the stands to home seekers after which its sale agreement with the purchaser is forwarded to the municipality in a process of handing the purchased stand back to the municipality. It is only through that process that the purchaser can then sign a sale agreement of the purchased stand with the municipality thereby becoming the lawful holder of the right, title and interest in the vacant stand. The purchaser would then develop the stand on terms set by the municipality.

Mhlanga admitted that on 3 February 2011 Zenzo Mandundu purchased the stand from the first defendant and paid the full purchase price. This was in terms of a sale agreement signed on that date. Much later she relocated to Gweru and lost interest in developing that stand and in fact requested the first defendant to resell the stand for her and refund her the purchase price whenever it was able to. Mhlanga also admitted being contacted by Ester Kelli, of Moshel Executors and Trust (Pvt) Ltd who had been engaged by Mandundu's daughter who was the beneficiary of Mandundu's estate. He confirmed that Kelli had instructions to sell the stand. The first defendant had then offered to buy it back and in fact paid a sum of \$4000-00 for the stand before the agreement was cancelled as the beneficiary wanted the purchase price in full and at once.

Mhlanga stated that he had in fact purported to sell the same stand to the plaintiff but had to cancel the agreement after the plaintiff failed to meet her part of the bargain. He confirmed that subsequent to that the plaintiff preferred charges of fraud against both himself and the first defendant alleging that they had sold the stand twice. They were prosecuted at the Bulawayo magistrates court. While he was acquitted the first defendant was convicted and sentenced to a fine of \$500-00 which has been paid. In addition, the first defendant was ordered to pay restitution of \$12000-00 to the plaintiff which, although it was tendered, the plaintiff refused to accept it insisting on enforcing what was found to be a fraudulent sale agreement.

This witness stated that when the estate late Mandundu sold the stand to the second defendant he had happily facilitated the transfer of the stand from the first defendant, it being

common cause that after Mandundu purchased the stand, she had not taken transfer. The facilitation process involved the preparation of a new agreement, this time between the first defendant and the second defendant, an agreement which he called a technical one given that no money exchanged hands even though it provides that the purchase price was \$18000-00 and he even issued a receipt in that amount. He said this is done because the municipality does not accept any other sale except one between the first defendant and a purchaser.

I found Mhlanga to be a dodgy character indeed and a suspect witness. This is because the explanation for his decision to sell the same stand in August 2014 which he had already sold to Mandundu in February 2011 is unbelievable. I am not persuaded that Mandundu had given Mhlanga or the first defendant authority to sell her stand. It is not likely that she would have allowed them to pay her as and when they were ready when she was in the process of developing another stand in Gweru and would have wanted the money for that purpose. Mhlanga's story gets even more muddled when he says that he had offered to buy the same stand back from the estate upon being approached by Kelli in December 2014. If it had already been offered for resale during the lifetime of Mandundu, why was it offered to him for purchase after her death and why did he not offer to buy it back during Mandundu's lifetime? It is an incredible story.

This is a witness who, when he was cornered by the police who were investigating the plaintiff's complaint of fraud, instructed his then legal practitioners, Lunga Gonese, to write an undated letter to the officer in charge of fraud squad in Bulawayo giving a completely different explanation as he defended the charge. The letter reads in pertinent part:

- “a) The first question to look at is whether or not our client had authority to sell or resell the stand to complainant after initially selling the same to the late Mandundu. The answer is in the affirmative. The late Mandundu approached our client during her lifetime and advised that she was relocating from Bulawayo to another town and was no longer interested in the stand, and that she wanted it sold and she be refunded her money. A cessation agreement was done and signed by both parties. See an attached copy. A cessation agreement means she has relinquished her interest in the stand. She was also paid a sum of US\$4000-00 as advance before the stand was resold. At resale all the proceeds were paid to the beneficiaries through the executor and no deduction were made or refund made to our client by the Estate of the late Mandundu. We stress this to demonstrate that our client has been honest and has not been selfish.”

All this is blue lies. We know of course that no “cessation agreement” was ever signed by Mandundu because the first defendant failed to produce it at the trial when it was demanded. We know that the late Mandundu was never paid \$4000-00 during her lifetime and that the first defendant did not refund the beneficiaries at all. What is true is that Kelli, acting on behalf of Primrose Chiyembekedzo Ngondo, the daughter of the late Mandundu, is the one who was paid \$4000-00 by Mhlanga acting on behalf of the first defendant as he tried to buy the stand back. This was long after Mandundu had died. We know again that the money was retained by Kelli on behalf of Ngondo because the first defendant owed the estate more money in respect of other transactions. Clearly therefore Mhlanga cannot be relied upon at all.

In fact, it is for that reason that the criminal court convicted the first defendant of fraud. In doing so it drew the following conclusion in its judgment contained in the first defendant’s bundle of documents, exhibit 2;

“Even (after) the sale of the stand by the Executor of the late Zenzo Mandundu in 2015 the buyer was then referred back to the accused persons (the 1<sup>st</sup> defendant and Mhlanga) who were the developers and the owners who had sold the stand to the late Zenzo for the change of ownership considering that the late Zenzo Mandundu had not yet effected change of ownership. The accused persons (gladly) assisted the buyer because they knew (pretty) well that the stand had been sold to the (late) Zenzo Mandundu (who) had (every) right at law to dispose of the said stand. It is therefore (clear) that at the time the stand was sold to Joice Tendai the accused persons had no right to (sell) the stand as it had already been sold to the late Zenzo Mandundu, the accused were like selling the same stand twice to different buyers. Clearly the accused misrepresented to Joyce Tendai causing her to suffer actual prejudice of \$12 000.”

In my view the above reasoning by the trial magistrate is sound indeed. More importantly, Mhlanga was found, on good ground, to be dishonest. Therefore where his evidence is at variance with that of other reliable witnesses, I prefer the other evidence.

The second defendant also gave evidence, most of which was corroborated by his witness, Ester Kelli. He stated that he responded to a newspaper advertisement flighted by an estate agent Brian Muzanenhamo for the sale of a vacant stand. Muzanenhamo took him to Ester Kelli with whom he concluded a sale agreement on 3 July 2015 in terms of which he purchased the stand for \$18000-00. He had been informed that Kelli was the executrix of the estate late Zenzo Mandundu, Mandundu having previously purchased the stand from the land developer, the first defendant, by agreement prepared by CB Richard Ellis on 3 February 2011. The second

defendant drew attention to a non-variation clause 12.0 of the CB Richard Ellis agreement in making the point that even if Mhlanga had subsequently been given authority to sell the stand such would have been invalid. The clause reads:

“12.0. Any variations in the terms and conditions of this Agreement as may be agreed upon between the parties shall be in writing and shall be signed for and on behalf of the parties, otherwise the same shall be of no force or effect.”

He also made reference to clause 3.1 of his agreement with Kelli which provides:

“3.1 Transfer  
The seller shall effect transfer of the stand to the buyer through the land developer Mr Mhlanga C/o Bulawayo Glass & Allied Products (Pvt) Ltd. The purchaser shall pay transfer costs and the seller shall pay City Council bills.”

He stated that in pursuance of that provision, after paying the purchase price in cash, he proceeded to the offices of the first defendant demanding transfer. It was the first defendant's initiative to prepare another sale agreement within him even though he did not pay any money to the first defendant. The said agreement was signed on 3 July 2015, the same day he had bought the stand from Kelli. Mhlanga had explained to him that it was just a formality designed to facilitate the smooth and speedy transfer of the stand into his name. This was because the municipality only recognized the first defendant as the official seller of the vacant stands in Selbourne Brooke.

After signing that second agreement the second defendant says he took it to the third defendant's offices where it was approved. As a result, the stand was transferred into his name as signified by the agreement entered into between himself and the third defendant on 9 July 2015. As things stand now, the third defendant which holds real rights in the stand, has transferred all rights, title and interest in it to him. According to him it is no longer possible for that transaction to be reversed, the third defendant having seen it fit to transfer the stand to him.

As I have said, most of what the second defendant said was corroborated by an impressive witness, Ester Moyo (nee Kelli), a deceased estate administrator at Moshell Executors & Trust (Pvt) Ltd who was granted a special power of attorney by Primrose Chiyembekedzo Ngondo, the appointed executrix and beneficiary of the estate late Mandundu, to administer the estate and sell the stand. Kelli confirmed that the stand belonged to the estate which had however not taken transfer. She stated that when she intimated to Mhlanga that she had

instructions to sell the stand, Mhlanga had not contested that at all. Instead he had offered to buy the stand and even made a down payment of \$4000-00. Unfortunately Primrose was not willing to do any business with Mhlanga or the first defendant because they already owed her late mother more money. She instructed Kelli to confiscate whatever money the first defendant paid to set off what it already owed.

She later entered into a sale agreement with the second defendant on the understanding that the first defendant would facilitate transfer to the purchaser as it was only the first defendant which had the exclusive right to transfer the stand to any purchaser. This was with the knowledge and consent of the first defendant. Although the stand belonged to the estate she did not deem it necessary to obtain the consent of the master in terms of section 120 of the Administration of Estates Act [Chapter 6:01] because the property was still in the name and control of the land developer, the first defendant. Significantly the witness stated that at no time did the estate authorize the first defendant to sell the stand and when the transaction with the second defendant was concluded she was not aware that the first defendant had previously purported to sell the stand to the plaintiff. As I have said, I found this witness to be impressive indeed. She was confident, candid and clear in her presentation. I accept her evidence in its entirety.

I now come to the issues that have to be determined by this court. The first issue is whether the late Zenzo Mandundu had purchased the stand during her life time. All the evidence led during the trial points to the existence of that sale agreement which was signed on 3 February 2011. It confirms that the full purchase price was paid thereby concluding the sale. The written agreement had provisions for its cancellation and a non-variation clause precluding any variation not reduced to writing. *Mr Chamunorwa* for the plaintiff submitted that the non-variation clause is irrelevant to the resolution of this dispute because the plaintiff is not relying on a variation but on a cancellation of the CB Richard Ellis agreement which cancellation gave the first defendant authority to sell the stand to the plaintiff in August 2014. In my view it is unnecessary to engage in such deliberations.

I say so because there is no reliable evidence to the effect that the sale agreement was ever cancelled or varied. The plaintiff was not privy to the agreement between Mandundu and the first defendant. In fact she never knew it existed at all. She was adamant that she was never

appraised of the interests of Mandundu when he purported to buy the stand. What is therefore obvious is that the issue of the first defendant having been allowed to resell the stand by Mandundu only comes from the first defendant itself through its extremely unreliable witness, Siphon Mhlanga, who has given several versions of what transpired. The first defendant itself is a convicted felon having been found guilty by the criminal court of fraud relating to the sale of the stand to the plaintiff following a successful prosecution. The whole story about Mandundu relinquishing the stand for resale is an elaborate lie. I conclude therefore that indeed Mandundu purchased the stand and I also answer the question posed by the second issue, namely whether her estate held the stand on 3 July 2015, in the affirmative. Clearly therefore the estate, as it held the stand, could lawfully sell it to the second defendant as it did on 3 July 2015.

*Mr Chamunorwa* for the plaintiff submitted that the agreement between the estate and the second defendant was invalid firstly because Kelli represented herself as the executor of the estate in the agreement when the person issued with letters of administration was Primrose. Secondly, given that the stand belonged to a deceased estate, there was need to secure the consent of the Master of the High Court in terms of section 120 of the Administration of Estates Act [Chapter 6:01]. The uncontested evidence of Kelli is to the effect that she acted in terms of a special power of attorney granted to her by the appointed executrix. It has not been suggested that it was incompetent for Primrose to delegate her authority as executrix to Kelli by special power of attorney. The first leg of *Mr Chamunorwa's* submission in that regard is of no moment at all.

Regarding the section 120 authority I think the context of that provision has generally been misunderstood. It provides:

“If, after due inquiry, the master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.”

There is authority to the effect that the section requires that the duly appointed executor should seek the authority of the master should it become necessary to dispose of immovable property belonging to the estate otherwise than by public auction. See *Chinogurei v Chiseko and Another* HH 201-12. Kelli explained why she did not seek the authority of the master by saying

that the stand was not registered in the name of the estate and that it is the land developer which had the exclusive rights to transfer the property. In my view the explanation given makes sense. But I would not uphold the argument of invalidity for a different reason. It is that the case before me is not the enforcement of the agreement between the estate and the second defendant. What is sought in this action is the enforcement of an agreement of sale entered into between the plaintiff and the first defendant. Whether the sale between the second defendant and the estate is impugned or not would not validate the sale entered into between the first defendant and the plaintiff. I therefore find it unnecessary to go beyond merely finding that the estate could lawfully sell the stand to the second defendant at the time.

It brings me to the issue of whether the first defendant could lawfully sell the stand to the plaintiff in August 2014. I think that issue resolves itself really. This is because the moment a finding is made that the stand belonged to the estate and that the first defendant was not authorized to sell the stand by the estate, as I have already found, it must therefore follow that the agreement of sale of the plaintiff could not possibly be valid. This stems from the fact that the law jealously protects the right of ownership and the correlative right of the owner over his or her property. See *Oakland F Nominees (Pty) Ltd v Gelria Mining Investments Co Ltd* 1976 (1) SA 441 (A) at 452A. The same point was meticulously stated by the learned author R H Christie in his book *Business Law in Zimbabwe*, (2<sup>nd</sup> ed, Juta & Co Ltd, Cape Town 1998) at pp 149 - 150:

“An owner whose property has been sold and delivered without his consent remains the owner, as the seller cannot pass ownership that was not his. The true owner can bring a vindicatory action to recover his property from anyone, including a *bona fide* buyer, in whose hands he finds it. The general rule that the seller can give no better title than he has operates in favour of the true owner, unless the purchaser proves that the true owner is estopped from denying the seller’s authority to sell.”

See also *Mashave v Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 438C.

It has always been a celebrated principle of our law that no one can transfer any greater right than he himself possesses. It means that where a person who is not the owner and possesses no mandate to do so, like the first defendant in this case, purports to sell or transfer property such a sale or transfer is a nullity. See *Zavavava & Another v Tendere & Others* 2015 (2) ZLR 394 (H) 398E. The first defendant could not lawfully sell the stand to the plaintiff in

August 2014 because it had already been sold to the estate. The sale agreement in question was invalid.

*Mr Chamunorwa* submitted that if everything else fails, I should find that this was a case of a double sale in that according to Mhlanga the late Mandundu had during her life time surrendered the stand to the first defendant for re-sale. The latter proceeded to sell to the plaintiff and as such when the second defendant purported to purchase the same stand in July 2015 that was a second sale. The plaintiff's agreement of August 2014 ranks superior in terms of time and should override the one of July 2015. That argument suffers still-birth because I have already made a finding that the first defendant could not lawfully sell the stand to the plaintiff in August 2014 as it belonged to the estate late Mandundu.

Even if one were to proceed from the premise that a double sale exists, the law relating to double sales does not favour the plaintiff at all. The law was seminally expressed in the case of *Crundall Brothers (Pvt) Ltd v Lazarus N.O and Another* 1991 (2) ZLR 125 (S) at 132 F-G, 133 A-C as:

“Finally, this court's decision in *Madan supra*, confirmed at page 10 (*Madan v Macedo Heirs & Another* 1991 (1) ZLR 295 (S)), that the traditional approach was to be maintained. This approach was set out as follows by Professor Mckerron in (1935) 4 SA *Law Times* 178 and repeated with approval by Professor Burchell in (1974) 91 SALJ 40:

‘It is submitted that where A sells a piece of land first to B and then to C – and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court would decree specific performance—the rights of the parties are as follows:

- (1) ----
- (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of the sale or at the time he took transfer, of the prior sale to B and B's only remedy is an action for damages against A.

If however, C had knowledge at either of these dates, B, in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C's only remedy is an action for damages against A.”

*Mr Ngwenya* for the second defendant submitted that the second defendant was an innocent third party who purchased the stand in good faith without any knowledge of the plaintiff's interest. I am prepared to accept, for purposes of the application of the law of double sales to the facts of this case, that the sale agreement between the second and third defendants

constituted transfer of what were in fact personal rights in the stand as opposed to real rights which were retained by the third defendant. To that extent, the second defendant having entered into the sale and taken transfer without notice of the plaintiff's rights—he says he only learnt of the plaintiff's claim after transfer when he had already taken possession and was developing the stand—acquired an indefeasible right to the stand because of his lack of knowledge of the plaintiff's claim.

In my view that also resolves the fourth issue relating to the legal status of the second defendant's agreement with the third defendant. As I said it gave the second defendant an indefeasible right over the stand. It would be imprudent in the extreme to try to impugn that agreement. I conclude therefore that in the circumstances the plaintiff's only available remedy is a claim for damages against the first defendant. She has already made significant progress along that route given that she successfully prosecuted the first defendant for fraud and part of the sentence imposed was an order of restitution of the sum of \$12000-00 she paid.

Regarding the issued costs, I agree with *Mr Chamunorwa* that even though unsuccessful the plaintiff should not be visited with the costs of suit. This is because the chief culprit who brought the parties to court is the first defendant. I must indeed express the court's displeasure at the first defendant's criminal conduct of selling a stand belonging to a deceased estate the way it did. It must bear the costs.

In the result it is ordered that:

1. The plaintiff's claim is hereby dismissed.
2. The first defendant shall bear the costs of suit.

*Calderwood, Bryce Hendrie and Partners*, plaintiff's legal practitioners  
*Lunga Gonese Attorneys*, 1<sup>st</sup> defendant's legal practitioners  
*T J Mabhikwa and Partners*, 2<sup>nd</sup> defendant's legal practitioners