NATIONAL HOUSING CONSTRUCTION

And

TAKEMORE ZIBONDA

Versus

TSHANEHO MOYO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE and KABASA JJ
BULAWAYO 20 & 30 SEPTEMBER 2021

Civil Appeal

T. Masiye-Moyo, for the appellants
D. Sibanda, for the respondent

KABASA J: This is an appeal against the whole judgment of the Magistrates' Court allowing the respondent's claim wherein she sought the eviction of the 2nd appellant from an immovable property known as house number 6209 Phase Two Garikayi/Hlalani Kuhle, Gwanda.

The background facts are these:

The respondent issued summons seeking the eviction of the 2nd appellant from the above mentioned immovable property. The respondent's claim was premised on the assertion that she was the legal owner of the immovable property, having purchased it from the 1st appellant on 11th December 2006. The 1st appellant had obtained the land upon which the immovable property was constructed from the Ministry of Local Government, Public Works and National Housing (MLGPWNH). Sometime in 2012 the respondent had noticed that the 2nd appellant was developing the stand and upon confronting him was advised that the stand had been sold to the 2nd appellant. However, records at the Ministry of Local Government, Public Works and National Housing and the Municipality of Gwanda showed that the respondent was the *bona fide* owner of house number 6209 Phase Two Garikayi, Gwanda.

The 2nd appellant challenged the respondent's claim on the basis that he had also purchased the stand from the 1st appellant and expressed amazement at the fact that the respondent had kept quiet since 2012 when she said she

observed that he was developing the stand. He therefore prayed for the dismissal of the respondent's claim.

The 1st appellant was not a party to the proceedings until it sought and was granted joinder making it the second defendant. After it was joined to the proceedings it raised the defence of estoppel on the basis that the respondent's contract had been cancelled. The respondent's contract having been cancelled and her contribution refunded, she was therefore not the rightful owner of the property and she became aware that the 2nd appellant had been allocated the stand but took no action.

The 1st appellant's defence of estoppel was raised as a preliminary point. It was dismissed and the matter was referred to trial on the following issues:

a) Whether or not the plaintiff is a *bona fide* owner of stand number 6209 Phase Two Garikayi /Hlalani Kuhle, Gwanda.
b) Whether or not the agreement of sale entered between the plaintiff and 2nd defendant was not cancelled.
c) Whether or not 1st defendant is not a bona fide purchaser of stand number 6209 Phase Two Garikayi/Hlalani Kuhle, Gwanda.

At the trial the respondent testified that in January 2006 she went to the 1st appellant's offices after being directed to them as they were selling stands. She chose a 4 roomed house which was priced at $340 million. She paid $130 million as deposit and the balance was payable over 12 months. She completed a registration form and paid $1 million administration fee. She was based in South Africa so subsequent payments were made through her sister. She was finally informed that $1 080 000 was now the outstanding balance and she duly paid it. No construction was going on at the stand. She eventually came to Zimbabwe and signed a memorandum of agreement of sale. Trouble started when she was later told she still owed $350 million and that the stand had been re-possessed and sold to someone else. She was later offered another stand at Maphisa and yet another in Gwanda but she rejected both offers.

The agreement of sale she signed was tendered into evidence, so was the registration form and the receipts of the payments she made. An agreement of lease with option to purchase between the Ministry of Local Government and the respondent and a confirmation of ownership of stand 6209 from the Municipality of Gwanda with the respondent named as the beneficiary were also produced as exhibits.

The respondent was the only witness whilst for the 1st and 2nd appellants, one Socks Ncube and the 2nd appellant testified. Mr. Ncube testified to the effect that the respondent was allocated a stand and construction thereon was to be funded by her through the provision of building materials. The stand belonged to the 1st appellant obtained through the MLGPWNH. The respondent was supposed to pay $350 million in total but she failed to make all payments. Prices kept escalating due to inflation resulting in a 300% increment which was communicated to the respondent. Her failure to pay resulted in the cancellation of the agreement and this was in November 2006. The respondent was refunded her payments. She however entered into a new agreement on 11th December 2006 and signed an acknowledgment of debt on 11th December 2006. She was now buying a new property worth $4+ million. She however paid nothing. Stand 6209 was then allocated to 2nd appellant.

The 2nd appellant also testified that he bought stand 6209 Garikayi which had a structure at slab level. He built it up to roof level and it is now a complete house which was completed in 2016.

In assessing the evidence led, the court *a quo* held that there was no evidence of a double sale, the respondent paid for the stand upon which a 4 roomed house was constructed by the 1st appellant. There was no evidence of cancellation of the agreement between respondent and 1st appellant and no evidence that 2nd appellant bought the same stand. The respondent had therefore proved her case on a balance of probabilities and was entitled to judgment. Judgment was then entered in her favour for the eviction of the 2nd appellant from house number 6902 Phase Two Garikayi, Gwanda.

Dissatisfied with this decision, the 1st and 2nd appellants appealed. They attacked the court a quo's decision on the following grounds:

1. The court *a quo* erred in both fact and in law in that it having accepted the agreement of sale as having formed the basis of the contract of the parties, it nonetheless failed to find that the respondent had failed to honour the terms of the agreement and therefore that the respondent's claim for eviction was incompetent, she not having fulfilled the terms of the written document which she admitted to having signed.
2. The court *a quo* misdirected itself both in fact and in law in finding that the respondent had overpaid the purchase price when in fact the respondent admitted to the fact that after signing the agreement of sale in October of 2016, of the purchase price of $4 430 000, she only paid $1 080 000 and nothing further.

3. The court *a quo* grossly misdirected itself on the question of fact and law in that it deployed the terms contained in the registration form to the contract of sale and resultantly reached the conclusion that the respondent had fully paid the purchase price when such deployment was irrational and impermissible.
4. The learned magistrate in the court *a quo* erred both in fact and in law in holding that the 2nd appellant had not purchased the property when in fact from the pleadings and the evidence there was no contestation of the issue and when in any event, the respondent would not have been privy to the transactions as would have occurred between the 1st and 2nd appellants.

I propose to deal with each ground of appeal in turn:

1. Did the court *a quo* err in granting the respondent's claim for eviction in light of the evidence led

I must say the way in which this ground was developed and argued as per the appellants' heads of argument brought in a new twist relating to whether the respondent could seek eviction when she was not the owner of the property.

I am however of the considered view that the issue of ownership was the basis of the claim from the onset as the respondent sought to evict the 2nd appellant on the premise that she is the legal owner of the immovable property.

One becomes a legal owner after purchasing and getting title of the property. So, whilst the first ground of appeal did not articulate the aspect of ownership in the manner it was articulated in the heads of argument, I do not view this as delivering a fatal blow to this ground of appeal.

That said, the first issue is whether the evidence proved that the respondent purchased the contentious immovable property?

The receipts which the court a quo relied on as proof that the respondent overpaid, were dated from January to November 2006. The agreement of sale upon which the respondent's claim rested was dated 11th December 2006. In it the respondent acknowledged that the property was being sold for $4 430 000 and the deposit was $1 080 000 leaving a balance of $3 350 000. The property was at window level and failure to abide by the terms of the agreement entitled the seller to cancel the agreement and refund the buyer whatever payments had been made.

The respondent accepted that she signed this agreement of sale. She however said she did not read it. Therein lies the problem.

This agreement of sale is divorced from the receipts the court *a quo* relied on as proof that payments were made in full, with overpayment at that.

The 1st appellant explained that whatever had occurred before 11th December 2006 was overtaken by events and the parties entered into a new agreement, which agreement is embodied in exhibit 3.

A reading of this agreement of sale is at variance with the court *a quo's* findings. The receipts the court a quo relied on were payments made before the agreement of sale of 11 December 2006 was signed. It is to this agreement that the court looks in order to determine the parties' contractual relationship.

Counsel for the respondent argued that the court should ignore this agreement and consider the receipts, ostensibly because the agreement of sale was entered into after the payments reflected on the January – November 2006 receipts.

In *Ashanti Goldfields Zimbabwe Limited* v *Mdala* SC-60-17, a case counsel for the appellants referred the court to, GUVAVA JA had this to say:

> "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 him. 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."

The contract embodied in the agreement of sale produced in evidence in the court *a quo* cannot be interpreted in any other way but that the respondent entered into an agreement of sale wherein she was to pay $4 430 000 but only paid $1 080 000 as deposit. By her own admission she did not pay the balance of $3 350 000.

The fact that she signed the agreement without reading the contents does not change the fact that this is the contract upon which she deems herself entitled to evict the 2nd appellant.

GUVAVA JA in the *Ashanti Goldfields* case *(supra)* quotes from R. H. Christie's *Business Law in Zimbabwe*, at p67;

> "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."

So it is *in casu*, the respondent is bound by her signature. That said, the court a quo therefore grossly erred in finding that the respondent had honoured the agreement of sale upon which her claim for eviction was hinged when such agreement had not been honoured. Her claim for eviction was therefore not supported by what she sought to rely on in support of the claim.

It could be said the 1st appellant was unfair in expecting more payment in light of what the respondent had already paid but this is what the respondent agreed to by signing the agreement of sale.

As PATEL JA stated in *Magodora and Others* v *Care International Zimbabwe* SC-24-14.

> "In principle, it is not open to the courts to re-write 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."

The court *a quo* sought to "re- write" the parties' contract when it failed to acknowledge that the agreement of sale the respondent was relying on was not consummated as the payments therein were not honoured.

The first ground of appeal subsumes the second ground of appeal. This is so because the second ground of appeal speaks to the amount paid as reflected on the receipts tendered in evidence, which receipts were of payments made before the signing of the agreement of 11th December 2006.

It was therefore erroneous of the court *a quo* to make mention of the $516 million which did not relate to the agreement of sale upon which the respondent's claim was based.

Counsel for the respondent contended that the court *a quo* made factual findings from the evidence led and as the trial court it was better placed to make findings of credibility. Granted, findings of credibility of a witness is the

province of a trial court (*S* v *Gilbert Zulu* HB-52-03) but *in casu*, it was the factual findings made in light of the evidence which is in issue.

> "The position is now settled that an appellate court has no power to interfere with the findings of fact made by a lower court unless it is persuaded that the findings complained of are so outrageous in their defiance of logic that no sensible person properly applying his mind to the question to be decided would arrive at such a conclusion."
> (*Samson* v *Windmill (Pvt) Ltd* SC-7-15; *Barros and Anor* v *Chimphonda* 1999 (1) ZLR 58 (SC))

In casu the factual findings were at variance with the evidence, warranting an appellate court's interference.

In the circumstances, the first and second grounds of appeal have merit. Before I turn to the 3rd and 4th grounds of appeal, I propose to consider the issue relating to the respondent's right to bring eviction proceedings.

I am persuaded by counsel for the appellant's argument that this is not a point of law being raised for the first time on appeal. This is so because in her claim, the respondent stated that she is the legal owner of the property and therefore entitled to evict the 2nd appellant.

In *Lafarge Cement (Zimbabwe) Limited* v *Mugove Chatizembwa* HH-413-2018, a case wherein an ex-employee was resisting eviction from a house he occupied by virtue of his now terminated employment MATHONSI J (as he then was) had this to say:

> "The principles of the *actio rei vindicatio* are settled in our law. The owner of property has a vindicating right against the whole world. It is a remedy available to the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner of property to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser, where the property would have been sold."

And in *Stanbic Finance Zimbabwe* v *Chivhungwa* 1999 (1) ZLR 262 MALABA J (as he then was) articulated the two essential elements of the *actio rei vindicatio*, namely that one is the owner of the property and possession or occupation is with the person against whom the action is being taken. (See also *January* v *Maferefu* SC14/20)

In casu as already alluded to, the respondent did not prove ownership of the property. The issue was not whether the 2nd appellant proved that he bought this property but whether the respondent made a case for his eviction. Is it not an irreconcilable contradiction to claim ownership of a property on the basis of an agreement of sale and payment of the full purchase price and yet accept signing such agreement which shows that such purchase price was not paid? I think it is.

The documents relied on by the respondent did not prove ownership. It is worthwhile to point out that the respondent's use of "legal owner" is telling. Ownership can only be legal where the one claiming such has title to the property. There was no evidence that the respondent obtained title to this property. The agreement of lease with option to purchase and the confirmation of ownership from the Municipality of Gwanda do not amount to transfer of the property which only occurs upon registration of such transfer. Ownership can also be through a cession agreement wherein the owner transfers the right, title and interest in the immovable property to the purchaser. *In casu* the 1st appellant's evidence was to the effect that such transfer would have been at their instance as they were the owners of the property until such time that the purchaser fulfilled the terms of the purchase agreement. This did not happen as the respondent did not pay the purchase price as per the parties' agreement of sale entered into on 6th December 2006.

The respondent therefore had no legal standing to seek the eviction of the 2nd appellant. I am persuaded by counsel for the appellant's argument that the issue of ownership presented itself from the outset and it was incumbent upon the court a quo to decide whether the respondent had the legal standing to evict the 2nd appellant as the nature of the claim and the basis for it called for such determination.

I turn now to the 3rd ground of appeal.

3. Did the court *a quo* err in reading the terms of the registration form into the agreement of sale

The registration form mentioned a 4 roomed house and this tallies with what the respondent testified to. She told the 1st appellant's officials that she wanted a 4 roomed house. The stand she was purchasing was to eventually have this 4 roomed house constructed thereon.

The registration form was not the agreement of sale and the contents therein could not be read into the agreement of sale. The agreement of sale

related to a stand upon which a dwelling house was to be built. On page 3 of the judgment, the court *a quo* made reference to documents produced by the respondent in proving her case and such documents included the registration form and the agreement of sale.

The court *a quo* did not however specifically mention the relevance of the registration form and whether it was to be read together with the agreement of sale.

I therefore fail to appreciate the import of this ground of appeal.

The last ground of appeal relates to the court *a quo's* findings that the 2nd appellant had not produced evidence to show that he also purchased the property in question.

I have already expressed the view that this matter was one for eviction and the respondent had to make a case for the relief she was seeking. Whether the 2nd appellant also bought the property and what he proved or failed to prove is neither here nor there. The 2nd appellant would have had to show what right he had to resist eviction but only after a case for eviction had been made.

I therefore do not intend to unduly exercise my mind on this ground of appeal. Suffice to say the onus to prove the entitlement to the relief of eviction was on the respondent. She did not discharge that onus.

The appeal therefore has merit. In the result I make the following order:

1. The appeal succeeds with costs.
2. The judgment of the court *a quo* is set aside and substituted with the following:-

   "The plaintiff's claim be and is hereby dismissed with costs."

Makonese J …… I agree

Masiye-Moyo & Associates (inc. Hwalima, Moyo & Associates) appellants' legal practitioners

Legal Aid Directorate, respondent's legal practitioners