Judgment No. S.C. 130/99
Civil Appeal No. 171/98

GEORGE PARKIN vs

GUARDIAN SECURITY SERVICES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, NOVEMBER 11 & DECEMBER 16, 1999

J B Colegrave, for the appellant

W Ncube, for the respondent

EBRAHIM JA: This is an appeal from the judgment of the High Court sitting in Harare. The learned judge *a quo*, at the conclusion of the trial presided over by her, made the following order:

> "1. The defendant shall take all steps necessary on his part to effect transfer to the plaintiff of certain piece of land situated in the District of Bulawayo measuring 555 square metres called Subdivision A of Stand 1061 Bulawayo Township within ten days of the date of this order, failing which the Sheriff or her lawful Deputy shall, in the place of the defendant, take all such steps as are necessary to transfer the said property to the plaintiff.
>
> 2. The defendant shall pay the costs of this action."

The dispute between the parties arose following the sale of property by the defendant, now the appellant, to the plaintiff, now the respondent. What was sold is in dispute.

The Deed of Sale concluded by the appellant and the respondent reflects that the property sold was:

> "1 The property hereby sold is described as:
>
> 1. Certain piece of land situated in the District of Bulawayo measuring 555 square metres
>
> called Subdivision A of Stand 1091 Bulawayo Township;
>
> 2. Certain piece of land situated in the District of Bulawayo
>
> called The Remaining Extent of Stand 1061 Bulawayo Township."

The trial before the learned judge *a quo* was concerned with whether there had been an agreement between the parties that the appellant transfer the two adjoining properties, the one being a house in 11th Avenue, Bulawayo, being the "Remaining Extent of Stand 1061, Bulawayo Township"; the other being a three story block of flats at the corner of 11th Avenue and Jameson Street, being "Subdivision A of Stand 1061, Bulawayo Township".

It was the appellant's case that he sold only the house. The respondent averred that it had been sold the house and the flats. At present the house is registered in the respondent's name. In June 1995 the respondent commenced proceedings in an attempt to effect the transfer of the flats to its name. The respondent relied on the Deed of Sale which had been drawn up by Mr Baron of Ben Baron & Partners. Oral evidence was also led in support of the respondent. The appellant, for his part, relied upon the fact that the respondent's claim to one of the properties (the block of flats) was abandoned in terms of a notice of withdrawal dated 7 February 1992. He also led oral evidence in support of his case.

The notice of withdrawal was in the following terms:

> "TAKE NOTICE that the Defendant hereby withdraws his (sic) defence to the above claim and its claim in reconvention on the following agreed terms:
>
> 1. That Defendant will pay to Plaintiff the original agreed price in respect of the immovable property known as 32 11th Avenue, Bulawayo, more properly described as Certain piece of land situated in the District of Bulawayo measuring 555 square metres called the remaining extent of Stand 1061 Bulawayo Township, together with costs of transfer within ten days."

The appellant himself gave evidence and also called Mr Oberholzer, who had been the respondent's legal practitioner during 1991/1992. He also relied on an affidavit of the late Mr Baron. In this affidavit Mr Baron deposed to the fact that on 29 May 1987 he had met with the appellant and two persons representing the respondent, the one being Mr Rambanepasi and the other being a Mr Ndlovu. Mr Baron stated that at this meeting it had been made clear by the appellant that "the block of flats situate next to the house and also owned by him was not part of the sale". He also stated that the respondent's representatives confirmed the purchase of the house and Mr Baron was instructed by "both parties to prepare a Deed of Sale". Mr Baron attached to his affidavit the original notes he made at the meeting and included a list of the improvements of the house. The notes made by him were the following:

> "George Parkin
> 32 - 11 Avenue
> Guardian Security Services (P) Ltd.
> $50 000 free of exchange in Bulawayo
> 1/7/87
> House 1 story
> Brick under iron
> 6 living rooms
> 1 separate garage

Servants' quarters attached to garage brick under iron
Hove attorney

2035
370
2
——

2407
——

Bank guarantee".

I turn now to consider the evidence of Mr Rambanepasi, the respondent's director. It was on his evidence that reliance was placed in the main by the respondent. He deposed that both properties, the house and the block of flats, were the subject of the purchase made by the respondent. He did not dispute that he had travelled to Bulawayo and accompanied the appellant to Mr Baron's office to give instructions. According to Mr Baron, this meeting took place on 29 May 1987, which was a Friday.

It was Mr Rambanepasi's evidence that it was the respondent's intention to purchase both properties. This is not only inconsistent with what Mr Baron deposed to in his affidavit, but is not borne out by a letter written by the respondent on 13 May 1987, sixteen days earlier, to the appellant. This letter reads as follows:

> "Please be advised that this Company is willing to purchase your property/house at number 32 - 11th Avenue, Bulawayo, for the sum of $50 000.00 as agreed.
>
> One of the Company Directors shall be coming to Bulawayo about the 18th May 1987, to settle the sale agreement.
>
> Trust you are keeping well and with best regards."

In terms of the contents of this letter, it is clear that all the respondent was interested in purchasing from the appellant was the house. It is not in dispute that the respondent had the use of the house, utilising it as an office, prior to its sale to the respondent. There is no mention in the letter of the respondent's intention to purchase the block of flats on the adjoining property.

This is even more apparent from the letter written by the respondent to the appellant on 20 March 1987. This reads:

> "We are renting your property number 32 - 11th Avenue, Bulawayo. We started to rent on the 1st December 1986.
>
> During discussions to rent the above property, we mentioned that we may wish to buy this property in the near future. To this you said it was up to us and you gave the purchase price as $45 000.00.
>
> We now confirm that we wish to buy this property at the above mentioned price. Please confirm the sale of this property, and then we can arrange for the sale agreement." (Emphasis added).

On receipt of this letter the appellant endorsed thereon, words to the following effect: "have agreed to sell to Guardian for $50 000". It seems improbable that the appellant would have made such an entry if he also contemplated the sale of the flats as part of the agreement.

It is also not in dispute that the respondent sought and obtained a bond from CABS in the amount of $28 038.00. The mortgage bond was registered as a "first mortgage bond over the remaining extent of Stand 1061 Bulawayo Township (the house) by Guardian Security Services (Private) Limited in favour of this Society (CABS) for the amount of $28 038.00". I find it strange that had the respondent been

purchasing both the house and the block of flats that the mortgage bond issued only makes mention of the house.

I have averted earlier in this judgment to the fact that the respondent had withdrawn from pending litigation its claim for the block of flats. It was Mr Rambanepasi's evidence that he only became aware of this withdrawal when informed of this by his new legal practitioner in 1995. This cannot be so when regard is had to the contrary averments made in the appellant's declaration in a case involving the appellant and the respondent. The declaration, in para 3, reads:

> "From 1st August 1987 to 28 February 1992 (the) defendant was unlawfully in occupation and/or in possession and control of the property. (The) plaintiff only regained possession of the property on 7 February 1992 upon the withdrawal by (the) defendant of its defence and claim in reconvention in Case No. HC 584/87."

In its plea to that case the respondent pleaded:

> "Save for admitting that it withdrew its defence and claim in reconvention in Case Number HC 584/87 on the 7th of February 1992 (the) defendant denies that its occupation and for (or?) possession and control of the property before that date was unlawful and puts (the) plaintiff to the full proof thereof. In its defence (the) defendant repeats para 2 above and states that its occupation, possession and control of the property was consequent to an agreement of sale it had entered (into) with (the) plaintiff."

Mr Rambanepasi's claim therefore that he was not aware of the "withdrawal" does not inspire confidence.

It was also Mr Rambanepasi's evidence that he proceeded to Bulawayo and met with Mr Baron on a Saturday. In his affidavit Mr Baron says he met with Mr Rambanepasi on 29 May 1987 which, from looking at the calendar for that year,

was a Friday. I consider it unlikely that the late Mr Baron, an elderly legal practitioner, would have met with Mr Rambanepasi on a Saturday outside his normal business days at his office.

In support of his case the appellant gave evidence himself. The learned judge *a quo* was not impressed with him as a witness. She took the view that he was far from credible, evasive and he made a poor impression on the court. Mr *Colegrave*, representing the appellant in this Court, submitted that the learned judge appears to have taken no account of the fact that when the appellant gave evidence before her, almost ten years had elapsed since his dealings with the respondent. It is apparent that the learned trial judge has made no observations in her judgment on whether she made any allowances on this aspect.

The appellant, in any event, relied on the evidence of Mr Oberholzer in support of his evidence. Mr Oberholzer at the time when the sale took place was the respondent's legal practitioner. It was his evidence that the respondent had withdrawn its claim relating to the block of flats as early as 1992. It was Mr *Colegrave's* submission that insofar as his evidence in this regard was concerned, he either made a mistake as to the instructions he received from Mr Rambanepasi or he was *mala fides* in withdrawing his client's claim. He relied on documents produced during the trial to support his submission that Mr Oberholzer was neither mistaken nor *mala fides*.

An examination of the notice of withdrawal establishes quite clearly that there were terms attached to the withdrawal, in that full payment was to be made

within ten days. This is apparent from the precise terms of the notice of withdrawal which I have cited earlier in this judgment. There is therefore merit in Mr *Colegrave's* submission that the only sensible conclusion to be drawn is that Mr Oberholzer must have received specific instructions from the respondent. This must be so, particularly when regard is had to two letters written by Mr Oberholzer on behalf of the respondent, indicating strong opposition to any attempt to rectify the Deed of Sale.

The first letter, written to the appellant's legal practitioner by Mr Oberholzer on 29 October 1987, contains the following passage:

> "In the interim it appears that our clients now understand that there is some unsolved question about the properties they have purchased from your client. Apparently your client is alleging that, contrary to the contents of the agreement of same (sale?) and your summons in the High Court action you instituted herein on behalf of your client, it is now being suggested that they did not buy both stands from your client.
>
> We do not accept that this is true."

On 26 November 1987 Mr Oberholzer again wrote to the appellant's legal practitioner in the following terms:

> "Unfortunately it would appear, as our instructions stand at present, that you will have to apply for rectification of the Deed of Sale.
>
> You must, however, realise that any error, which are (sic) not admitted, are to your own making.
>
> Apparently Mr Kantor of Kantor & Immerman in Harare asked you to provide him with a photocopy of the diagram of the properties in order that he may consider our client's position in the light thereof. The sooner you comply with this not unreasonable request, the sooner we will be in a position to revert to you with a firm indication of our client's attitude."

These letters in effect show that there was strong opposition to the rectification of the Deed of Sale. It must therefore follow that Mr Oberholzer could hardly have been mistaken as to Mr Rambanepasi's change of attitude when he filed the notice of withdrawal on his behalf.

Can it be said that Mr Oberholzer was *mala fides* in his approach in his dealings with his client? In my view, there is no possible basis for making such a finding. The letters I have referred to earlier suggest otherwise. He could only have changed his stance reflected in these letters following instructions received from Mr Rambanepasi.

The learned trial judge's criticism of the quality of the evidence deposed to by Mr Oberholzer does not bear scrutiny. She appears to have taken no account of the fact that when Mr Oberholzer gave evidence before her he was doing so many years after the dealings had taken place between the parties. This would explain the uncertainty in the manner he gave his evidence.

The evidence of Mr Oberholzer and the appellant does not, in any event, stand alone but is corroborated in the affidavit by Mr Baron. He unequivocally deposed "that the block of flats situate next to the (house) and also owned by him (the appellant) was <u>not</u> part of the sale". He also said that he had been "instructed by both parties to prepare a Deed of Sale". He said:

> "I attach the original notes I made at the meeting and I made a list of the improvements of the <u>house</u>, which I itemised for the purpose of preparation of the Declaration of Seller and Purchaser …".

Of particular significance is Mr Baron's handwritten note, referred to earlier in this judgment, which makes no reference at all to the block of flats.

Mr Baron also sets out in his affidavit the embarrassing mistake he made in identifying the property which was the subject of the sale. I find myself in entire agreement with Mr *Colegrave's* submission that it is inconceivable that Mr Baron would have admitted to such a blunder if, in truth, the appellant had instructed that both the house and the block of flats had to be transferred to the respondent.

It seems to me, therefore, that there is considerable merit in Mr *Colegrave's* submission that there is an overwhelming probability that Mr Baron was telling the truth in his affidavit. His affidavit is supportive of Mr Oberholzer's evidence, which in turn lends credence to the appellant's version of events.

It is true that an appellate court is reluctant to interfere with the findings of credibility of a trial court unless the reasons given for accepting certain evidence may be unsatisfactory - Hoffmann & Zeffertt *The South African Law of Evidence* 4 ed at p 484. The probabilities are important in assessing credibility. See *Arter v Burt* 1922 AD 303; *Germani v Herf & Anor* 1925 (4) SA 887 at 903B. Compare *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (S) and *Caps Holdings Ltd v Zivo Chikuavira* S-73-99.

I am satisfied, for the reasons I have outlined earlier in this judgment, that there was no sound basis for rejecting the corroborated evidence of the appellant,

which not only received direct support from the oral evidence of the respondent's own former legal practitioner but the support of a senior legal practitioner, Mr Baron; the evidence of both of whom was given credence by documentary evidence placed before the trial court. The probabilities in any event strongly support the appellant's version of events.

I conclude therefore that the learned judge *a quo* erred in rejecting the appellant's case and in her finding for the respondent.

Accordingly, the appeal is allowed with costs and the order of the court *a quo* is altered to read that the plaintiff's claim is dismissed with costs.

GUBBAY CJ: I agree.

MUCHECHETERE JA: I agree.

Ben Baron & Partners, appellant's legal practitioners

Mabuye & Company, respondent's legal practitioners