DISTRIBUTABLE (41)

(1) ENERST GOMBA (2) DESMOINS INVESTMENT (PRIVATE) LIMITED
v
(1) GEORGE PARKING (2) BULAWAYO CITY COUNCIL

SUPREME COURT OF ZIMBABWE
GOWORA JA, HLATSHWAYO JA & BHUNU JA
MARCH 26, 2018 & MAY 31, 2019

S. Siziba, for the appellants

P. Dube, for the respondents

BHUNU JA: This is an appeal against the whole judgment of the High Court sitting at Bulawayo handed down on 22 June 2017. The facts giving rise to the appeal are hotly contested. I proceed to give a brief summary of the facts of the case as gleaned from the pleadings, the record of proceedings and the judgment of the court *a quo*.

The first respondent is the owner of a certain immovable property known as Stand Number 7 and 9 Woodstock, Thorngrove, Bulawayo. The first appellant is an entrepreneur in the business of milling and manufacturing of grinding mills through his company, the second appellant. I shall refer to the first appellant as the 'appellant' and the first respondent as the 'respondent' respectively for convenience's sake. This is because although the second appellant and second respondent are interested parties, they are nominal litigants who played no active part in this litigation leaving the battle to be fought between the first appellant and the first respondent.

Sometime in 2006 the respondent and the appellant entered into a verbal lease agreement whereby the appellant leased the respondent's premises at Number 7 and 9 Woodstock, Thorngrove, Bulawayo. That much is not in dispute. What is in dispute is whether the respondent subsequently sold the property to the appellant thereby entitling him to obtain transfer of the disputed property.

Three issues were presented for determination by the trial court. The issues are:

1. Whether there was an agreement of sale entered into between the appellant and the respondent.
2. If so, when was such (agreement) entered into and what were the terms thereof.
3. What were the circumstances surrounding the writing and signing of annexure "A".

The court *a quo* resolved all the three issues in favour of the respondent and dismissed the appellant's claim for transfer of the property in question. Aggrieved by the court *a quo's* judgment the appellant approached this Court on appeal on three grounds. The grounds of appeal are:

1. The court *a quo* erred in concluding that there was no agreement of sale between the parties because it was not in writing thereby placing an obligation that does not exist at law to have an agreement of sale of immovable property in writing for it to be valid.
2. The court *a quo* further erred in concluding on the basis of affidavits that annexure A was written and signed under duress or undue influence and totally disregarding, without basis, the evidence of eye witness, one Anold Munyikwa on the circumstances in which annexure A was conceived and first respondent's admission at trial that there were no war veterans at the time of signing annexure A thereby

rendering the trial meaningless and nugatory when the proceedings had been converted from motion to action because *viva voce* evidence was crucial.

3. The court *a quo* seriously misdirected itself, such misdirection amounting to an error in law, in failing to come to the conclusion that all objective evidence tendered before it showed the first Respondent's full and committed involvement in the conclusion of the agreement between the parties and that appellant had ultimately proven their case on a balance of probabilities.

On the basis of the above rather long winding and prolix grounds of appeal, the appellant sought the following relief:

"a. That the instant appeal is allowed with costs.
b. That the judgment of the court *a quo* is set aside and in its place is substituted with the following order:

"In the circumstances, I find that the 1st and 2nd Plaintiffs have proved their case on a balance of probabilities. Accordingly the plaintiffs are granted the following relief:

1. The first respondent be and is hereby ordered to, against payment of a sum of US$8 500, sign all necessary papers at second respondent's offices and cede the rights, and title and interests in stands number 7 and 9 Woodstock, Thorngrove Bulawayo from his names into the names of either first or second Plaintiff, within 30 days of this order, failing which the Deputy Sheriff be and is hereby directed, ordered and authorised to sign all necessary documents and complete the aforesaid cession.
2. The first respondent be and is hereby ordered to pay."" (*sic*)

All the issues raised by the appellant snowball into one issue, that is to say, whether the respondent and the appellant concluded a binding contract of sale entitling the appellant to obtain transfer of Stands Number 7 and 9 Woodstock, Thorngrove, Bulawayo.

In the absence of a written contract of sale and the presence of contradictory *viva voce* evidence, the dispute between the parties fell to be determined on the credibility of witnesses and the authenticity of a handwritten document signed by the respondent and his

wife on 20 September 2007. The document is to be found at page 26 of the record of proceedings marked annexure A. It reads:

> "27 September 2007 44 Fife St
> Bulawayo
>
> To Whom It May Concern
>
> As from today Enerst Gomba I.D. 27 – 136264 N 27 is the owner of the premises No. 7 and 9 Woodstock Road, Thorngrove, Bulawayo. Everyone on the premises must vacate immediately. Anyone wanting to operate on the premises must arrange to do so with Mr Gomba.
>
> Signed : GM Parkin
> Signed : G Parkin"

The document is clearly not a contractual document as it was signed by one party and his wife. It contains no contractual terms or purchase price. It gives no insight as to how the appellant came to be the so called owner of the disputed property. Although it is addressed to 'whom it may concern' the contents of the document clearly show that it was addressed to the other occupants of the two premises in general. It is certainly not addressed to the appellant in his personal capacity. The appellant is therefore not privy to the document as the document is not addressed to him.

The circumstances under which the above document was written and signed were hotly contested in the court *a quo*. While the respondent admitted signing the document, he challenged its authenticity on the basis of duress a fact which was the subject of controversy at the trial in the court *a quo*.

Although the court *a quo* found in favour of the respondent to the effect that the document was signed under duress, it was a relatively innocuous document incapable of transmitting any contractual rights and obligations inter parties.

What remains to be determined is whether the court *a quo* was correct in determining that there was no valid contract of sale because of the absence of a written contract of sale of land in instalments.

The appellant's case is that he concluded an oral agreement of sale with the respondent for the disputed immovable piece of land although he sometimes elevated the above document to a written agreement of sale. He averred that the purchase price was 10 trillion Zimbabwean dollars payable in monthly instalments of $500. He claims to have paid the bulk of the purchase price leaving a balance of US$8 500.00 which he tendered to the respondent against transfer.

The purchase of land in instalments is governed by s 7 of the Contractual Penalties Act [*Chapter 8:04*] which provides as follows:

> "Every instalment sale of land shall be reduced to writing: Provided that, where any such contract or any term or condition thereof has not been reduced to writing, the onus of proving the existence of that contract, term or condition, as the case may be, shall rest on the person alleging its existence".

In interpreting the above section the learned author M L Mhishi in his book, *A Guide to the Law and Practice of conveyancing in Zimbabwe 2004*, Legal Resources Foundation, had this to say:

> "An agreement of sale is a document which is drawn up when a person is selling property to another person in this country, unlike in South Africa, a sale of land need not be in writing. An instalment sale of land must be reduced to writing and if not the *onus* of proof is on the person alleging its existence".

That interpretation of the law was affirmed by this Court In *Muswere v Brown & Anor* SC 66- 07 when it remarked that:

> "In terms of the contractual Penalties Act [*Chapter 8:04*] an instalment sale of land is a contract for the sale of land whereby payment is required to be made in three or more instalments. In terms of s 7, every instalment sale of land shall be in writing. Where such a contract or a term thereof has not been reduced to writing, the *onus* of proving the existence of that contract or term shall rest on the person alleging its existence.

On the basis of the foregoing interpretation of the law, the *onus* of proving the existence of the disputed oral contract, its terms and conditions lay squarely with the appellant as these were placed in issue by the respondent. The learned judge *a quo* adjudged that the appellant had failed to discharge the *onus* of proving the existence of the oral contract and its terms and conditions; hence the dismissal of his claim with costs. It is therefore necessary to ventilate the evidence the appellant placed before the court *a quo* to see if it passes the test of proof on a balance of probabilities.

It is needless to say that right from the onset the appellant shot himself in the foot in his founding affidavit found at page 22 of the record of proceedings as will more fully appear at paras 3 and 4.

At para 3 of his founding affidavit he makes it clear that right from the start he knew that he was entering into a bogus contract with the respondent whose object was to use him to evade threats from war veterans. In his own sworn evidence this is what he had to say:

> "The 1st Respondent when we entered into the agreement, I realised that he was using me because he had been threatened by the so called war veterans with takeover of his idle properties and he was using me as a front to protect his properties from invasion". (*sic*)

That statement serves to explain the writing of annexure 'A' which we have already seen does not constitute a contractual document. The appellant's evidence in this respect

dovetails into the respondent's defence to the effect that it was the appellant's idea that he acts as a front for him for protection of his properties from invasion by war veterans.

Thus, whatever purported agreement the parties may have concluded was not meant to be a binding contract but a fake agreement to dupe war veterans into believing that the disputed property belonged to the appellant.

In para 4 of his founding affidavit the appellant makes it clear that the respondent refused to validate or sanitize the bogus or fake agreement when he says:

> "Since dollarization the Respondent has repeatedly refused through flimsy excuses to rewrite an agreement of sale which would indicate the dollarized balance of $40 000. Through poor advice I had agreed to this unlawful setup. As it stands according to my records I have paid $500 for 63 months out of 80 months which will make the total of $40 000. My balance as it stands is $8 500 supposed to be paid within the next 17 months on the said 2 stands… "(my emphasis)

In the 4th para it is apparent that the appellant arbitrarily novated the alleged original oral contract and sought to enforce a contract completely alien to the so called oral contract. That type of conduct is untenable and unlawful with the result that it cannot give birth to a lawful contract. What this means is that the contract which the appellant sought to enforce in the court *a quo* is, on his own evidence, illegal and unenforceable as one cannot set up terms of a contract on his own and seek to bind an innocent party.

Although the appellant was adamant that payments he made to the respondent constituted monthly instalments as part payments for the purchase price and not rentals, concrete evidence placed before the court *a quo* tells a different story. He vacillated between saying he was never the respondent's tenant and saying that he started off as his tenant but

latter bought the property from him. He however finally settled for the fact that he started as a tenant and bought the two stands later.

The appellant's evidence on this aspect of the case reads badly as he inextricably entangled himself under a barrage of cross-examination. The text at page 118 reads as follows:

"Q. Paragraph 4 (of your affidavit), never a tenant but a purchaser – yet evidence in chief you started as a tenant etc. Reconcile?
A. It was an error I wanted to say I am no longer a tenant. I wanted to highlight 1st defendant was no longer honouring agreement.
Q. Page 27 answering affidavit. Replication? Denying you were a tenant – you challenged him to produce a lease agreement.
A. I was answering 1st defendant.
Q. O level language?
A. Problems I eventually passed. A bogus lawyer assisted me
Q. You are telling the court a contrary story because you do not have a genuine story to tell?
A. What I told the court is the correct position. I was a tenant at the premises.
…..
Q. Case falls or stands on your affidavit.
A. evidence in chief is the truth minus the mistakes I made due to misunderstanding paragraphs 3 0n page 4".

Following that pathetic performance under cross-examination counsel for the respondent rubbed salt in the wound by producing receipts clearly marked "Rentals" paid by the appellant. That being the final nail in the coffin the trial judge cannot be faulted for concluding that in the absence of written evidence of the existence of the contract of sale appellant had failed to prove the existence of the oral contract he relied upon as his cause of action. In the result the appeal can only fail.

The respondent has asked for costs on the higher scale. Considering the appellant's devious and dishonest performance under litigation he always knew that his appeal had no iota of success in this Court. By lodging this appeal with the full knowledge that he had absolutely

no prospects of success on appeal, he took a shot in the dark and has put the respondent to unwarranted wasted costs. The respondent is entitled to recoup his wasted costs at the punitive scale.

It is accordingly ordered that the appeal be and is hereby dismissed with costs at the attorney - client scale.

GOWORA JA **:** I agree.

HLATSHWAYO JA **:** I agree.

Ndove & Museta, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondent's legal practitioners