

SAMSON NDHLELA MAKHANDA

Versus

MARGARET NCUBE

And

TIMOTHY COSMAS MAPHOSA

And

TSHOLOTSHO RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE

NDLOVU J

BULAWAYO 23, 30 JUNE 2023 & 3, 7 JULY 2023 & 15 FEBRUARY 2024

Civil Trial

B. Ndove, for the Plaintiff

N. Ndlovu, for the 1st Defendant.

M.R. Petkar, for the 2nd Defendant.

No Appearance for the 3rd Defendant

NDLOVU J:

INTRODUCTION

The plaintiff sued for an order in respect of **Stand No. 104 MAIN STREET, TSHOLOTSHO**, to the following effect;

- a. *That the cession of rights, title and interest from the names of 1st Defendant to the names of 2nd Defendant be declared null and void.*
- b. *Reversing the transfer of the cession of the rights, title and interest from the names of the 2nd Defendant to the names of the 1st Defendant.*

- c. Ordering subsequent transfer of the rights, title and interests from the names of the 1st Defendant into Plaintiff's name.*
- d. Evicting the 2nd Defendant and all those claiming through him from the property in question.*
- e. Ordering payment of occupational damages by the 2nd Defendant at US\$250.00 per month or US\$830 per day calculated from 18 September 2013 to the date of eviction.*
- f. Alternatively ordering the payment of the outstanding purchase price tendered with occupational damages of US\$250.00 per month or US\$8.30 per day calculated from the 18th of September 2013 to the date of full and final payment.*

The 1st Defendant is not opposed to the claim. If anything she testified more or less in the Plaintiff's corner. The 2nd Defendant is opposed to the relief sought. The 3rd Defendant did not file any opposition or appear in court.

COMMON CAUSE FACTS.

It is common cause that, The 1st Defendant sold her rights, title and interests in ***STAND No. 104 MAIN STREET, TSHOLOTSHO*** to Plaintiff sometime in 2003. In 2009 Plaintiff sold to the 2nd Defendant the said property for ZAR60 000.00 [Sixty Thousand Rand] and signed an Agreement of Sale with 2nd Defendant dated 23rd April 2009. The 2nd Defendant took vacant occupation of the said property on the strength of that Agreement of sale and is still in occupation of the premises. The 2nd Defendant only paid a deposit of ZAR30 000.00 (Thirty Thousand South Rand) leaving a balance of ZAR30 000.00 (Thirty Thousand Rand) to date. In September 2013 Plaintiff purported to cancel the sale between him and the 2nd Defendant on account of the 2nd Defendant having failed to pay the ZAR30000.00 balance. The cancellation was resisted leading to this litigation.

PLAINTIFF'S CASE.

The onus of proof was on the Plaintiff on the following issues per the PTC Memorandum.

- a. *Whether 1st Defendant sold her rights, title and interest in Stand Number 104 Main Street, Tsholotsho to Plaintiff.*
- b. *Whether 1st Defendant signed cession papers to transfer the rights, title and interest in Stand Number 104 Main Street, Tsholotsho from her name to Plaintiff.*
- c. *Whether the 2nd Defendant should pay occupational damages in the sum of US\$250.00 per month or US\$8.30 per day from the 10th of September 2018 up to the date of eviction.*
- d. *Whether the 2nd Defendant should pay the cost of suit.*

Plaintiff testified that the contract of sale between him and the 1st Defendant was perfecta. Together with the 1st Defendant, he visited the Tsholotsho RDC Offices [*the 3rd Defendant*] and signed cession documents. This piece of evidence is confirmed by the 1st defendant in her testimony. These documents were however later burnt in a fire that gutted his house with his other belongings. Owing to the 2nd Defendant's failure to settle the balance of the sale price for the property from 2009 to 2013 he duly cancelled the agreement sale. That despite the error in the property description in the letter of cancellation, the 2nd Defendant later realized and indeed has always been aware that the subject matter of the cancellation was **STAND No. 104, MAIN STREET, TSHOLOTSHO**, and not any other property hence the specific contents of his lawyers' letter dated 23rd September 2023. 2nd Defendant had no reason to remain in occupation of the property when he failed to pay the balance of the purchase price and any rentals for his occupation of the property. 2nd Defendant ought to be evicted from the premises and ought to pay occupational damages claimed in the Summons and Declaration.

1ST DEFENDANT'S CASE.

1st Defendant has no substantial interest in this matter. She can be best termed "a bridesmaid" in this action as she merely has to give evidence on how she acquired the stand and subsequently sold it to the Plaintiff. Her evidence was that on the 17th of January 1995, she bought **STAND No. 104, MAIN STREET, TSHOLOTSHO**. [*the stand in question*] from one Daniel Mahlaba Tshuma and they reduced their agreement into writing. They then proceeded to the 3rd Defendant's Offices and signed Cession Forms to transfer the rights, interest and title in the stand from Mr. Daniel Mahlaba Tshuma to her.

It was her evidence that she eventually sold the stand to the plaintiff and they signed an agreement of sale to that effect on the 6th of March 2003. In her plea, she indicated that, together with the Plaintiff, they proceeded to the 3rd Defendant's Offices to sign Cession Forms to formalise the transfer. Thereafter, she left the country and only came back in 2012. She only knows 2nd Defendant in connection with this case and has no relationship with him.

She is not privy to the Sale Agreement between Plaintiff and 2nd Defendant. She is not aware of any repossession of the stand from her. She was never consulted when the same stand was then allocated to the 2nd Defendant.

The documents tendered as evidence by the 1st Defendant are clear concerning the background of the property, and her previous rights on it. The 2nd Defendant did not meaningfully challenge her evidence. 1st Defendant corroborated Plaintiff's case in discharging his onus on the issue highlighted in paragraphs 2 (a) above.

2nd DEFENDANT'S CASE.

2nd Defendant in his evidence concentrated on that Plaintiff never cancelled the Agreement of Sale chiefly because his letter of cancellation referenced a wrong property. The issue of Plaintiff cancelling the agreement of sale was not referred to trial at the Pre-Trial Conference. Plaintiff is not entitled to occupational damages or for the eviction of the 2nd Defendant because the 2nd Defendant was not a tenant of Plaintiff.

2nd Defendant has always been willing to pay the balance of the purchase price to Plaintiff despite knowing that Plaintiff has serious legal issues about the ownership of the stand since Plaintiff had no valid title to the property although he claimed that he had title deeds to the property. Since 2009 to date, Plaintiff and his legal practitioner refused to accept the balance of the purchase price and would demand exorbitant amounts from him.

That the property was allocated to him by the 3rd Defendant after it had been repossessed from the 1st Defendant. The 3rd Defendant did confer a valid leasehold with an option to purchase rights to him over ***STAND No. 104 MAIN STREET, TSHOLOTSO***. He does not dispute the

fact that Plaintiff purchased the property in dispute from 1st Defendant but Plaintiff had no valid title to ***STAND No. 104 MAIN STREET, TSHOLOTSHO***, because Plaintiff and 1st Defendant did not comply with the standard leases that the Tsholotsho Rural District Council gave out to occupiers of land. 1st Defendant could not sell or cede her right, title and interest to Plaintiff without the written consent of the Tsholotsho Rural District Council. 2nd Defendant's case is therefore not affected as the 1st Defendant sold the land to Plaintiff who in turn did not acquire rights, title and interest in that land, because 1st Defendant sold land to Plaintiff without the authority and permission of the Tsholotsho Rural District Council which in itself is a nullity as far as passing rights, title and interest in the said land is concerned.

2nd Defendant holds rights, title and interests in ***STAND No. 104 MAIN STREET, TSHOLOTSHO***. The plaintiff failed to show any concrete proof or documentary proof that he ever held any title to the property conferred upon him by the 3rd Defendant. The plaintiff's claim must be dismissed with costs on an attorney and client scale.

ANALYSIS.

All that a party has to do in a civil trial is to adduce evidence that on a preponderance of probabilities is reasonably true.

“.....in a civil case, the standard of proof is never anything other than proof on the balance of probabilities.....the dispute is between individuals, where both sides are equally interested parties. The primary concern is to do justice to each party, and the test for that justice is to balance their competing claims.....” Zimbabwe Electricity Supply Authority vs Dera 1998 (1) ZLR 500 SC.

What flows in this dispute as proven through the evidence adduced is in my view the following.

The Plaintiff bought from the 1st Defendant the property in question. I note that in his Declaration, Plaintiff was clear that there was no change of the ownership details from the 1st Defendant to himself in the records kept at and by the 3rd Defendant. Paragraphs 7 and 14 of the Plaintiff's Declaration is a record of this position. Surprisingly, this key information in respect of

the Plaintiff's claim was forgotten by Plaintiff but is remembered by the 1st Defendant. Paragraph 3 of her Plea bears testimony to this. Notwithstanding the 1st Defendant's plea, she could not discover the said Cession documents but discovered the Cession documents in her favour from the original owner. In turn, Plaintiff turned wiser under cross-examination and told the Court that soon after he bought the property he went with the 1st Defendant to 3rd Defendant's Offices to sign the Cession Forms which were later burnt in his house. Surprisingly, the 1st Defendant testified away from her Plea by discreetly avoiding the question of whether or not there were cession forms signed in favour of Plaintiff, in her evidence.

I find that there was no proof that the 1st Defendant and Plaintiff signed any Cession Forms at the Offices of the 3rd Defendant. Plaintiff lied in his evidence in that regard while the 1st Defendant lied in her Plea in the same regard. The 2nd Defendant is therefore telling the truth that the property was never registered in Plaintiff's name.

There is no evidence contradicting that Plaintiff took over the payment of rates payments to the 3rd Defendant from the 1st Defendant upon his purchasing the property. The 3rd Defendant is conspicuous by its absence from this litigation yet it was cited and served. There is no evidence before me, direct or indirect, proving that the property in question was repossessed by the 3rd Defendant from the 1st Defendant. Only the 3rd Defendant could testify to that. Without the 3rd Defendant's active participation in this litigation, the 2nd Defendant's defence was wounded.

2nd Defendant's defence is based on the fact that Plaintiff did not have the rights, title and interest ceded to him by the 1st Defendant, claiming that Plaintiff could not cede a right, title and interest he never held. 2nd did not cite any authority nor tender any evidence showing that in the jurisdiction of the 3rd Defendant what 1st Defendant and Plaintiff did was an illegality nullifying what they were purporting to be doing. Even if it was a nullity, it is of no moment, because there is no evidence adduced or admitted showing that shortly before he bought the property from Plaintiff the property was no longer legally belonging to the 1st Defendant. The 2nd Defendant cannot speak for the 3rd Defendant.

In terms of the agreement of sale between the Plaintiff and the 2nd Defendant, the 2nd Defendant ought to finish paying off the ZAR30000.00 balance to the Plaintiff by January 2010. We now know that he did not. More than three years down the line, the Plaintiff wrote to him cancelling

the agreement. He says that the notice referred to a different property. This argument has no wind to assist in its sail. No evidence has been adduced showing that the parties had an agreement of sale in respect of the said different or wrong property and he had failed to fully pay the purchase price for that property as well, leading to his confusion. Secondly, the cancellation letter was written on 18 September 2013 and on 23 September 2013 [5 Days later] his lawyers wrote back indicating that he wished to pay the balance of ZAR30000in of this stand in issue.

In terms of the Agreement of Sale signed between the Plaintiff and the 2nd Defendant. Clause 7,

*“Breach – If the Purchaser fails to pay the full purchase price in terms of [the] agreement within the agreed period the seller be entitled to **cancel** the agreement immediately” [my emphasis].*

“A party who fails to fulfil the obligations of a contract commits a breach. The injured party becomes entitled to resile from the contract and may seek damages arising out of the breach.”

Pramadvara Appalraju & Anor vs Miriam Patsanza HH 145/18.

DISPOSITION.

The Plaintiff has on a balance of probabilities proven his case and is therefore entitled to the relief sought.

As a result, I make the following order.

1. The purported Lease with Option to Purchase agreement between 2nd Defendant and 3rd Defendant in respect of Stand No. 104, Main Street, Tsholotsho be and is hereby declared a nullity, hence void ab initio and has no force at law.
2. The Agreement of Sale between Plaintiff and 2nd Defendant in respect of Stand No. 104, Main Street, Tsholotsho was duly and properly cancelled.
3. The 3rd Defendant be and is hereby directed and ordered to allocate and register the rights, title and interests in Stand No. 104, Main Street, Tsholotsho, in Plaintiff’s name within 10[ten] days of service of this order upon it.

4. Failure to comply with para-3 above by the 3rd Defendant, the Sheriff of this Court be and is hereby authorised and directed to sign all the necessary papers to effect the cession of the rights, title and interests therein in favour of the Plaintiff.
5. The 2nd Defendant and all those claiming through him be and are hereby ordered to vacate Stand No. 104, Main Street, Tsholotsho, within thirty [30] days of service of this order upon him.
6. The 2nd Defendant shall pay Plaintiff occupational damages in the sum of US\$250.00 per month reckoned from 18 September 2013 to date of vacation from the premises.
7. The 2nd Defendant shall pay costs of this suit.

NDLOVU J.

15/02/2024

Ndove And Associates, Plaintiff's Legal Practitioners.
Ndlovu, Dube And Associates, 1st Defendant's Legal Practitioners
M.R Petkar Law Firm, 2nd Defendant's Legal Practitioners