

ROPAFADZOCHIBUSWA

VERSUS

WILLIAM SHUMBA

AND

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 29TH OCTOBER AND 7TH NOVEMBER 2013

Mr G. Sengweni for the Plaintiff
Defendant in person

CIVIL TRIAL

MAKONESE J: On the 25th of August 2008 the Plaintiff commenced proceedings in this court seeking the following relief:

- ”1. An order to compel the 2nd defendant to facilitate transfer into Plaintiff’s name from 1st defendant’s name on stand Number 546 Empumalanga Township, Hwange, which the Plaintiff purchased in December 2002.
2. An order that the Deputy Sheriff attend to the signing of transfer papers in place and stead of 1st defendant should the 1st defendant refuse to do so after five (5) days of granting of this order.
3. An order for payment of suit on attorney and client scale.”

The first defendant defended the plaintiff’s claims and claimed that no agreement of sale had been concluded between the parties. The 1st defendant contended that sometime in December 2002 he received a deposit of Z\$3 million from the plaintiff. He averred that the full purchase price was not discussed at that stage but that he later advised the Plaintiff sometime in 2003 that the full purchase price was Z\$60 million. The 1st Defendant said he cancelled the agreement upon realising that the Plaintiff was unwilling to pay more than the Z\$3 million paid

in 2002.

This matter has been dragging in this court for a considerable period of time. At least five different law firms have been involved in this case at one stage or another. Some of the legal practitioners involved assumed agency, before renouncing agency, only to resume and renounce agency again down the line. On his part the 1st defendant has been represented by not less than five different lawyers. The 1st defendant however appeared in person at the trial.

The Plaintiff's case

The plaintiff was represented by *ADDELAH CHIBUSWA* by virtue of a power of attorney granted to her by the plaintiff. *Addelah Chibuswa* gave evidence in court. Her version of events is rather simple, straight forward and easy to comprehend. She stated that towards the end of the year 2002 the 1st defendant, who was her neighbour for several years, approached her and stated that he was selling his house being stand 546 Empumalanga Township, Hwange. *Mrs Chibuswa* advised the Plaintiff that she could assist the 1st defendant to secure a buyer for the house. The defendant mentioned that the selling price for the house was Z\$3 million. *Mrs Chibuswa* undertook to contact her daughter *ROPAFADZO CHIBUSWA*, who was and is still based in England, with a view to proposing that she buys the house as an investment. After a few days *Mrs Chibuswa* told 1st defendant that her daughter had expressed interest in the property and that she would be sending the money as soon as the 1st defendant supplied her with the relevant account details. It is beyond dispute that following the discussions between 1st defendant and *Mrs Chibuswa* the plaintiff paid 1st defendant a total of Z\$3.5 million. The payments were made in three parts. The sum Z\$3 million was paid into the 1st defendant's CABS account in two separate transactions. The Z\$500 000 was paid into the 1st defendant's Intermarket account. *Mrs Chibuswa* said the 1st defendant thanked her very much for having secured a buyer for the house and indicated that he would be relocating to Bulawayo from Hwange in three months time. There is no dispute that the 1st defendant vacated the house at Hwange and moved to Bulawayo in early 2003.

On the 24th October 2003, the 1st defendant addressed a letter to *Mrs Chibuswa* in the following terms:

31 Devis Road
Queensdale,
Bulawayo,

24th October 2003

"ATT: Mrs A. Chibuswa,

I am now very concerned about the transaction of the house. I phoned you on several times at your house and I even left messages at your work place up to date I have never heard anything from you. Cabs need an agreement of sale between me and Ropafadzo . Again when I left I told you to continue paying \$1 560-00 per month from August 2003 until the Title deeds have been sought out and transferred to Ropafadzo through my account which is 8031 022 645.

I then approached Cabs on 23 October 2003 to find out about some payment. But fine enough I was advised the house is in arrears for three months and was only paid once. Now the issue is if the arrears remain unpaid Cabs will Auction the house. I was told they are sending reminders there and I wonder what action you are taking. See attached Cancellation Calculation final figure from Cabs is \$131 337 14. One hundred thirty one thousand three hundred and thirty seven dollars and fourteen cents if you want to pay it off at once or it be transferred to Ropafadzo. I will continue trying to talk to you on the telephone and explain to you but in the meantime please pay Cabs all arrears and continue to pay on Monthly basis until transfer have been done.

How is everybody in the old town of Hwange? With me and the family we are having better life in Bulawayo. Greetings to all. Lots of love.

W. SHUMBA

Mrs Chibuswa stated that when she received the 1st defendant's letter she complied with its terms. She paid up all the amounts due to CABS which the 1st defendant owed and 1st defendant promised that he would arrange for the title deeds to be made available in the names of *Ropafadzo Chibuswa*. In October 2004, however, *Mrs Chibuswa* testified that she was summoned to Bulawayo by 1st defendant regarding a change of ownership of the house. She met 1st defendant in Bulawayo in January 2005 at the City Hall and she was shocked when the 1st defendant told her that he wanted Z\$60 million for the house. *Mrs Chibuswa* said she looked 1st defendant in the eye and said, "Whats the money for. Do you want to sell the same house to me twice?"

The 1st defendant responded by indicating that people in Bulawayo were making money with houses and then produced a typed document reflecting the total amount he was now demanding from her. A full breakdown of the sum of money demanded by the 1st defendant was

Date: 06 January 2005

Signed:

Mrs Chibuswa says she flatly refused to pay the 1st defendant any more money as she had paid him in full. She went on to say that she had even paid a sum of Z\$66 000 into the 1st defendant's CABS account which he said was in respect of transfer fees. The parties failed to resolve their dispute.

The plaintiff called two witnesses in support of her case. The first to take the witness stand was *REUBEN NHAMO*. He testified that he is well known to both *Mrs Chibuswa* and 1st defendant. He has known the parties since 1985 since they were all neighbours residing in Empumalanga Township Hwange. The crux of this witness's evidence was that sometime in 2002 towards the end of that year the 1st defendant approached him and advised him that he was looking for a buyer for his house since he wished to relocate to Bulawayo. The 1st defendant told the witness that he was selling his property for Z\$3.5 million. *Reuben Nhamo* told the court that he did not have that kind of money at the time so he could not buy the house. He later learnt that *Mrs Chibuswa* had purchased the property for her daughter, but he was not privy to the exact details of that transaction.

The next- witness for the plaintiff was *Vinot Ncube* who also resides at Empumalanga Township, Hwange. The evidence of this witness was largely similar to that of *Reuben Nhamo*. *Vinot Ncube* confirmed that he was also approached by 1st defendant in December of 2002. The 1st defendant indicated to him that he was leaving Hwange and intended to sell his house for Z\$3.5 million. This witness says he tried to make contact with his brother by the name *Joseph Ncube* who is based in England to find out if his brother was interested in the property. The witness says that it came to his knowledge that the house had already been bought by *Mrs Chibuswa* whilst he was still making arrangements with his brother to transfer the funds into Zimbabwe. The witness confirmed that everyone in the 1st defendant's neighbourhood knew that the property was up for sale for the sum of Z\$3.5 million. He went further to say that he was well aware of the controversy surrounding the transaction between *Mrs Chibuswa* and 1st defendant. *Rueben Nhamo* and *Vinot Ncube* are both local business people in Hwange. Both of them have shops next to each other and to *Mrs Chibuswa*.

THE DEFENDANT'S CASE

The defendant gave evidence and did not call any witnesses. He maintained that he received the sum of Z\$3.5 million from the plaintiff as a deposit. There was no final agreement as to the purchase price as the parties were to discuss this at a later date when an agreement of sale would be drawn up and signed by the parties. 1st defendant conceded that when he wrote to *Mrs Chibuswa* on 24th October 2003 requesting her to settle the arrears due to CABS he did not mention that there was a balance still outstanding on the purchase price. The 1st defendant however insisted that he told *Mrs Chibuswa* that the purchase price was Z\$60 million. When they failed to reach agreement and after waiting for the legal proceedings for a long time he decided to re-sell the house to a third party. 1st defendant said he re-sold the property to an innocent purchaser in February 2013. It would appear the matter was reported to the police but the outcome of that case was not revealed during the trial. The 1st defendant asked the court to order that the plaintiff be refunded the Z\$3.5 million since he had already sold the property to a third party and had already received the sum of US\$15 000 from the new buyer which amount he admitted has already been spent.

ANALYSIS OF THE EVIDENCE

It is not difficult to arrive at the conclusion that the evidence of the plaintiff was credible and made common sense. *Mrs Chibuswa* was a truthful witness and the court makes the specific finding that her version of events is more believable than the 1st defendant's story. The plaintiff's case was in my view not tainted with any exaggeration. The evidence of all the witnesses for the plaintiff reads well. The court accepts that the 1st defendant sold his 5 roomed house to the plaintiff for the sum of Z\$3.5 million. He acknowledges receiving the money. In October 2003 the 1st defendant wrote to the plaintiff indicating that she should settle the arrears so that the title deeds for the property could be processed. There was no suggestion in that correspondence that there was any outstanding balance still to be paid by the plaintiff. It is interesting to note that the 1st defendant even concludes his letter by indicating that life was better in the city of Bulawayo. (Presumably because he was still enjoying the money he had received from the sale of the house). It is highly unlikely and utterly logical for the 1st defendant to have failed to place the plaintiff *in mora* at that stage in October 2003, and demanded the balance on the purchase price. The two witnesses for the plaintiff who were credible both confirmed that the 1st defendant was selling his house in Hwange for the sum of Z\$3.5 million. Both witnesses did not claim to have witnessed the agreement of sale between the contesting parties. The court is satisfied that when the 1st defendant sold his property to the plaintiff the purchase price was pegged at Z\$3.5 million. The defendant was not a comfortable witness on the witness stand. He was not forthright in his answers. He failed to explain why the plaintiffs'

witnesses would conspire against him that he had a fixed selling price on his property at Z\$3.5 when he decided to sell the house in December of 2002. The defendant did not impress as an honest person. He took a decision to sell the house to a third party when he well knew that there was a case pending in the High Court. His conduct reflects the behaviour of someone who deliberately decided to defeat the outcome of any court proceedings by ensuring that the subject of the dispute was sold. This conduct smacks of wilful disregard for the law and total contempt of the court proceedings. I am of the considered view that the 1st defendant intended to re-sale the same house twice to the plaintiff. He did not act with *bona fides* in the entire transaction. I therefore did not find the defendant's defence to have any credibility.

ISSUES FOR DETERMINATION

The issues for determination as set out in the Pre-Trial memorandum of Issues are as follows:-

1. Was the house on sale and what was the selling price?
2. Did plaintiff pay the purchase price and how much and how was the payment made?
3. Did the plaintiff pay for the release of the title deeds from Intermarket Bank and how much was paid for that?
4. Whether there was any breach of contract by both parties.
5. Whether or not the plaintiff is entitled to the house.
6. Whether or not there was an agreement of sale between the plaintiff and 1st defendant.

It is self evident that the last issue is the issue critical in the determination of this matter. The rest of the issues become superfluous once the last issue is resolved. From the evidence led by the parties in court there is no doubt that the plaintiff and 1st defendant entered into an agreement of sale. In terms of the verbal agreement the purchase price was set at Z\$3.5 million. The plaintiff proved that this amount was paid into the account of 1st defendant. On the 24th October 2003 the 1st defendant wrote to *Mrs Chibuswa* inviting her to pay up the balance due to CABS to facilitate transfer of the property into the plaintiff's names. The plaintiff complied. The defendant only had a change of mind when he realized that he could actually make more money by re-selling the house to the plaintiff twice. To show that 1st defendant was determined to re-sale the house, he in fact did sale the property to an unsuspecting third party in February 2013 whilst this matter was pending and awaiting trial.

THE LEGAL PRINCIPLES

In deciding whether or not the parties entered into a binding and legal contract the Court must look at the real intention of the parties. This approach was laid down in the case of *COLLEN v REITFONTEIN ENGINEERING WORKS* where Centilivres, JA said:

“The question at issue really resolves itself into (this) what was the intention of the parties at the time they entered the contract?”

It is trite that in the interpretation of a contract the general rule is that the court should determine what the true intention of the parties was. A party to a contract is therefore bound to a contract not because he says he intends to be bound or accepts that he must be bound, but rather, where the offer he has made to another is accepted, the contract is fulfilled and the contract has been made *perfecta*. He must be bound to that contract by virtue of his conduct. I am satisfied that the plaintiff was able to prove on a balance of probabilities that the 1st defendant entered into a verbal agreement for the sale of his property for the sum of Z\$3.5 million. In the case of *MHUTE v CHIFAMBA* 1999 (2) ZLR 115

Sandura JA, held that a contract of sale may be made orally, without it being put into writing. He went further to state that the parties may agree, however, that the oral agreement will not be legally binding until it is drawn up in a written agreement. The onus of proof is on the party who asserts that an oral contract was not intended to be binding until reduced to writing and signed.

In *casu*, it is clear that the parties intended to be bound by the verbal agreement for the following reasons:-

- (a) The plaintiff paid the purchase price directly into the CABS account for the 1st defendant without signing any document.
- (b) The 1st defendant vacated the house and gave the plaintiff vacant possession upon receipt of the full purchase price.
- (c) Almost a year after receiving the purchase price from the plaintiff the defendant requested the plaintiff to pay the balance due to CABS for the purpose of processing the relevant title deed.

I am, therefore, satisfied that the plaintiff entered into a valid agreement of sale with the 1st defendant in December 2002 and duly paid the purchase price in terms of that verbal agreement.

In the circumstances, the plaintiff's claims must succeed, and accordingly the following order is made:

1. 1st defendant be and is hereby ordered and directed to transfer into the plaintiff's names, STAND 546 Empumalanga Township Hwange within 10 days of this order.
2. 2nd defendant be and is hereby directed and ordered to facilitate the transfer of stand 546 Empumalanga Township, Hwange into the names of the plaintiff.
3. The Deputy Sheriff, Bulawayo is hereby authorised to attend to the signing of all relevant transfer documents in place and stand of 1st defendant, should 1st defendant fail to do so within 5 days of granting of this order.
4. 1st defendant to pay the costs of suit on an attorney and client scale.

Dube-Banda, Nzarayapenga & Partners, 1st Defendant's Legal Practitioners
Maronedze, Mukuku, Ndove & Partners, Plaintiff's Legal Practitioners