

ERNEST GOMBA

And

DESMOINS INVESTMENT

Versus

GEORGE PARKINS

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE

TAKUVA J

BULAWAYO 14 – 15 JUNE & 14 JULY 2016 & 22 JUNE 2017

Civil Trial

B. Ndove for the plaintiff

R. Moyo-Majwabu for the 1st defendant

TAKUVA J: The plaintiffs filed a court application under case number HC 1427/14 supported by a founding affidavit in which they alleged that there was an agreement of sale between 1st plaintiff and the 1st defendant wherein the latter sold stand numbers 7 and 9 Woodstock, Thorngrove, Bulawayo. The proceedings were converted to action proceedings on 29th January 2015.

Following a pre-trial conference, the following were agreed as issues for trial:

- “1. whether there was an agreement of sale entered into between the plaintiff and defendant.
2. if so, when was such entered into and what were terms thereof.
3. what were the circumstances surrounding the writing and signing of annexure “A” to the summons.”

In respect of issues 1 and 2 it was agreed that the onus is on the 1st plaintiff, while the 1st defendant has the onus on issue 3.

Plaintiff opened his case by giving *viva voce* evidence. He is a businessman who manufactures grinding mills and is also a miller. Further he owns buses, trucks and a hardware shop where he also sells gum poles. For the past ten years he had been 1st defendant's tenant at number 7 and 9 Woodstock, Thorngrove, Bulawayo. He commenced his business on these premises in 2006 as a tenant who was in the "process of purchasing it". No lease agreement existed between the two although he requested for one from the 1st defendant. It was his testimony that he would pay rent to 1st defendant at his offices at No. 44 Fife Street, Bulawayo but no receipts would be issued by the 1st defendant and he did not bother to pursue the issue of receipts.

Sometime in 2007, Arnold Munyikwa, 1st defendant's employee advised plaintiff that 1st defendant was selling the premises from which he was operating. He eventually met 1st defendant and his wife who confirmed their desire to sell the properties for ten trillion Zimbabwean dollars. After 2 weeks he brought a deposit of Z\$3 trillion which 1st defendant accepted and recorded in a book after which he was given annexure A. He said after reading the document he found it unnecessary to insist on a receipt since the document stated that he had full ownership of the property.

Annexure 'A' dated 20 September 2007 signed by 1st defendant and his late wife provides:

"TO WHOM IT MAY CONCERN

As from today Ernest Gomba I.D. 27-136264 N 27 is the owner of the premises number 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."

There was no agreement on when the balance was to be paid but 1st defendant pointed out the inflationary environment. Plaintiff said he continued to pay rental until November 2007 when he sold a grinding mill which fetched R18 000,00 and upon converting it to Zimbabwean dollars, he raised Z\$4 trillion which 1st defendant happily accepted. However, the following day 1st defendant complained that the \$4 trillion was only equivalent to R50,00. After a bitter

argument over the effects of inflation, they agree that plaintiff stop making payments while assessing the environment. Plaintiff was however to continue paying rent until after the 2008 general election when 1st defendant indicated he wanted to be paid US\$80 000,00 for the premises. They argued over that price with plaintiff pointing out that he had already paid Z\$7 trillion. First defendant was not happy and insisted that plaintiff should pay US\$40 000,00 from January 2009.

An agreement was then struck wherein plaintiff would pay US\$1 000,00 made up of \$500,00 monthly rent and \$500,00 as installment. When water supply was disconnected plaintiff approached 1st defendant who refused to assist plaintiff until the latter paid US\$20 000,00. Plaintiff went behind 1st defendant's back and had water supply restored. In November 2013 plaintiff requested 1st defendant to give him a "document" to use to reconnect water supplies. 1st defendant said that was his wife's responsibility but since she was not enjoying good health plaintiff was to wait. The 1st defendant's wife passed on in 2014 and shortly after that 1st defendant went to South Africa for an operation. Before he left, he had instructed plaintiff to continue paying rent to one Tagarira who receipted the money as "rent". Plaintiff paid for 2 months but complained that the endorsement should not be "rent" as he was buying the property at the same time.

Tagarira refused to budge, indicating that plaintiff should present his grievance to the 1st defendant upon his return. Plaintiff said a 3rd installment of US\$1 000,00 was paid directly to 1st defendant by one of his (plaintiff's) employees. After that he approached the 1st defendant for an agreement but the latter angrily dismissed him saying according to Tagarira the amount paid was insufficient. Plaintiff made a report at Bulawayo Central Police who advised him to secure the services of a lawyer which he subsequently did. All in all plaintiff said he paid US\$31 500,00 to the 1st defendant over 63 months and the balance of US\$8 500,00 is what is outstanding.

Plaintiff stated that he graduated with a Diploma in Motor Mechanics at Bulawayo Polytechnic in 2004. Under cross-examination plaintiff conceded to making numerous errors in his founding affidavit and urged the court to accept his *viva voce* evidence wherever it conflicted

with his founding affidavit and other pleadings. He insisted that annexure A is an agreement of sale but conceded that he never received a receipt for Z\$3 trillion he paid as deposit. When asked to confirm the 1st defendant explanation for the creation of annexure A, the plaintiff initially professed ignorance of any black empowerment campaign during the relevant time.

Later he admitted that 1st defendant was indeed under pressure from War Veterans over his farm near Bulawayo Airport. He was quick to point out that this did not apply to 1st defendant's immovable property in Bulawayo. Plaintiff failed to explain paragraph 3 of his founding affidavit on how he was going to protect 1st defendant's immovable property from compulsory acquisition by war veterans. However, he denied associating with war veterans.

He denied knowledge of the various receipts produced by 1st defendant, but admitted that he paid extra rent for extra space made available to him by 1st defendant. While disputing that he paid rent to Jacob one of 1st defendant's employees, plaintiff readily admitted that he paid "rent" to Tagarira and signed receipts on two occasions despite that these receipts were endorsed "rent". He claimed to have signed them in "error". Also plaintiff was unable to explain why he constructed a structure worth US\$35 000,00 on 1st defendant's property without his authority. Plaintiff admitted that he has not been paying rent since June 2014 because he believed that paying US\$1 000,00 per month would prejudice his case.

The next witness was Arnold Munyikwa an ex-employee of the 1st defendant. He knew the plaintiff as 1st defendant's tenant. Sometime towards the end of 2006 the witness said 1st defendant advised him that he was selling his property where there were 25 tenants. After that he made a public announcement to the tenants resulting in 1st plaintiff approaching him in August 2007 wishing to buy the property. He took him to the 1st defendant who confirmed that he was selling the property for Z\$10 trillion. Plaintiff then brought Z\$3 trillion which was handed over to the 1st defendant and his wife. After that 1st defendant's wife then wrote a document showing that plaintiff had purchased the two stands namely number 7 and 9. He denied that there were any war veterans present when this document was signed. No receipt was issued but 1st defendant endorsed the transaction on a piece of paper.

When asked why 1st defendant would grant ownership before payment had been made in full, he said 1st defendant said “plaintiff was an honest person”. In 2007 he left employment and joined ZESA. Further, the witness said there was never a time that 1st defendant had problems with war veterans over his properties.

Under cross-examination, the witness conceded that there were times when plaintiff failed to pay rent timeously and 1st defendant would send the witness to remind plaintiff. He also conceded that other than 1st plaintiff, the 1st defendant did not have another tenant who had a grinding mill at the premises. Further, when it was put to him that annexure A is not an agreement of sale as it does not show the price and the deposit paid, all he said was “I was present when the document was drafted”. The witness also said although part of his duties was to pay 1st defendant’s farm employees at the farm monthly, he never received a report about harassment by war veterans from these workers. Finally, he denied that plaintiff is one of his best friends.

Levison Ngwenya, a retired member of the Zimbabwe Republic Police was plaintiff’s 3rd witness. His testimony went on like this. He first met 1st defendant in 2003 when the latter had “problems” at his farm. There were farm invaders on the farm who were harassing the 1st defendant. These “beneficiaries” were war veterans according to this witness. He managed to stop these people from harassing the 1st defendant and the two became friends. The witness met 1st plaintiff between 2005-2006 when 1st defendant sent him to remove some property from the premises to Kelvin. He claimed that 1st defendant told him that he had sold the premises to someone.

As regards whether or not he was told by 1st defendant that the property occupied by plaintiff was claimed by war veterans, the witness said he never received such a complaint. However, he said this was not surprising because 1st defendant did not tell him “everything”. Under cross-examination, the witness agreed that as a member of CID Law and Order Section it was not part of his duties to do private work for private citizens. He however defended his conduct by pointing out that 1st defendant was his friend. Finally, the witness told the court that

during that period people of Caucasian extraction in Zimbabwe were having “problems” with war veterans over ownership of immovable property in Bulawayo. The plaintiff closed his case after the evidence of this witness.

The 1st defendant gave his evidence which is basically that he is an 85 year old male suffering from prostate cancer. He is hard of hearing and testified while seated in a wheelchair. He produced a letter from Dr Eric Cohen a specialist physician to the effect that he suffered a stroke (cerebrovascular accident) around the 14th June 2016. He was admitted at Mater Dei Hospital and was subsequently referred to South Africa. The stroke affected his memory. His testimony was that he first met plaintiff when the latter was looking for a hammer-mill and wanted a place to operate a grinding mill business. Plaintiff was allocated space and he started running his business paying rent. The witness could however not recall when this happened. The relationship continued with plaintiff paying \$500,00 per month as rent. Subsequently, plaintiff asked for more space to enable him to sell gum poles.

When it was put to him that he sold stand 7 and 9 to the plaintiff for ten trillion dollars and received three trillion as deposit, the witness said that the property was never for sale and he never entered into a contract of sale with the plaintiff. He challenged the plaintiff to produce a receipt as proof of payment of the 3 trillion dollars. After being shown annexure A, the witness said the signature is different from his own. He however said at the time he had problems with war veterans at the “farm and everywhere”. On the receipt of rentals from the plaintiff the witness said these were paid to Jacob and Tagarira.

Under cross-examination, the witness said he could not remember receiving rent in Zimbabwean dollars between 2006 and 2007. He also could not remember being threatened by war veterans over his property. After examining the signature on annexure A again he said the signature was his. He also identified his wife’s signature but could not remember the circumstances surrounding the signing of annexure A due to his illness and confusion.

Alfonse Tagarira was the 1st defendant’s witness. His evidence was that he came to know plaintiff as a tenant renting 1st defendant’s premises at Renkini industrial area. The witness was

in charge of 1st defendant's insurance issues. He however would be sent to collect money from tenants. In April 2014 when the 1st defendant left the country for South Africa, he instructed the witness to collect rent from the 1st plaintiff. Plaintiff brought US\$1 000,00 on the 11th April 2014 which he receipted and plaintiff signed for it – see exhibit 3. On 7 May 2014 he received US\$500,00 from plaintiff which he receipted as “May 2014 rent for stand” plaintiff signed acknowledging payment. Later on 12 May 2014 the witness again received US\$500,00 towards May rent. He issued a receipt which plaintiff signed - see exhibit 4.

According to the witness, plaintiff struggled to raise the full amount but never queried the inscription “Rent” on the receipts. Also he stated that plaintiff never told him that he had bought the two stands. Under cross-examination, he said he was engaged by 1st defendant after the death of his wife. The witness further explained an incident where other tenants were a nuisance and the Environmental Management Authority Department fined them \$5 000,00. Plaintiff complained and indicated that he wanted to rent the premises on his own since his business had expanded to include selling timber. First defendant agreed to evict the rest of the tenants. After tenants resisted, he elicited the assistance of Ngwenya who was a police officer. A vehicle was made available by 1st defendant and Ngwenya and the witness drove to Renkini.

Upon arrival, they spoke to 1st plaintiff who summoned all the tenants and Ngwenya addressed them on the reasons for their eviction. Although they expressed displeasure, they left and plaintiff started renting the whole premises for US\$1 000,00 per month. He denied that they carried any of 1st defendant's property to Kelvin insisting that in fact it was plaintiff who did that after 1st defendant declined to incur extra costs. Further, the witness said they were using a twin cab which could not transport caterpillars. He also flatly denied that plaintiff bought the two stands from the 1st defendant.

First defendant's 3rd witness was Jacob Hlabangana. He stated that he was employed by 1st defendant as a shop attendant. He recalled that sometime in 2013, 1st defendant who had gone to South Africa instructed him to collect US\$1 000,00 from plaintiff. The witness knew plaintiff as defendant's tenant at Renkini. When he contacted plaintiff, he was told that the money was

not readily available. However, after a couple of days, plaintiff paid US\$1 000,00 and he receipted it. This was on 2 September 2013 the witness handed over the money to Tagarira who signed the receipt. Finally he denied that the receipt was a forgery.

Analysis of the evidence

The onus to prove on a balance of probabilities the existence of an agreement of sale and its terms is on the plaintiffs. In order to discharge the onus, they led evidence from 1st plaintiff himself, one Arnold Munyikwa and Levison Ngwenya. First plaintiff relied on annexure A despite its ambiguity and brief. He accepted the contradiction and inconsistencies between his founding affidavit and *viva voce* evidence. His explanation was that although he holds a diploma, his understanding of the English language is so poor that he had asked a “bush lawyer” to assist him draft the documents. I find this to be a lame excuse in that 1st plaintiff makes the following bold assertion in paragraph 4 of his founding affidavit “I have not been a tenant on stand number 7 and 9 Woodstock Thorngrove, Bulawayo, but a purchaser through an agreement of sale which was verbal”. Despite this positive assertion, the 1st plaintiff has however abandoned this in his oral evidence in court and opted to set out a completely new case in which he admits being 1st defendant’s tenant on stands 7 and 9. This variance cannot be attributed to lack of understanding of the English language in that in paragraph 5, he stated that “the balance of the purchase price was \$8 500,00” and that he was not going to give 1st defendant any extra installment unless he acknowledged the *status quo* that what he received is an installment for the purchase price.

First plaintiff accepted that annexure A has the following shortcomings;

- (a) it does not state that it was a sale agreement between 1st plaintiff and the 1st defendant;
- (b) it is not signed by both parties as is the norm where there is an agreement between two parties;
- (c) it does not state the purchase price agreed between the parties;
- (d) it does not state how the purchase price was to be paid and when.

On the plaintiff's evidence, one is left with a doubt as to the true meaning of this document. However, what it states quite clearly is that from the date it was signed, the 1st plaintiff was the "owner" of stands 7 and 9 Woodstock Road, Thorngrove, Bulawayo. It does not explain how 1st plaintiff acquired ownership rights to the immovable property. Plaintiff's version is that he paid for the property over 63 months without obtaining a single receipt acknowledging payment. In my view it is inconceivable that a businessman in the position of 1st plaintiff would enter into an agreement of sale of immovable property and have no written agreement of sale. It is also highly improbable that he would from 2007 have been paying large sums of money as instalments towards the purchase price but still failed to receive even a single receipt for the amounts paid.

Also, the 1st plaintiff's evidence on the threats by war veterans is less convincing, in that he initially denied that they existed but later conceded that 1st defendant had such problems at his farm and not in respect to stands 7 and 9. More importantly, 1st plaintiff dismally failed to explain why if there was no threat from war veterans, he said;

"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. I did not know that he was cheating me when the phase went past whereby war veterans had been halted by the authorities from taking over of idle premises 1st respondent changed his attitude, but I have given money over time and this has nothing to do with politics but business and business people should be bound by their agreements." (my emphasis) see paragraph 4 of 1st plaintiff's founding affidavit

What comes up from this paragraph is that 1st plaintiff corroborates the 1st defendant's defence of compulsion or undue influence. He confirms that the transaction was not a straight forward agreement of sale. Considered in this light therefore, 1st plaintiff's denial of any knowledge at the time of pressure being exerted on 1st defendant by war veterans is not true. The admission by the 1st plaintiff in paragraph 4 *supra* is consistent with 1st defendant's evidence in his opposing affidavit. In paragraphs 2.1.4 to 2.1.6 he stated;

- “2.1.4 That in or about September 2007 while the 1st applicant was still renting part of the property aforesaid, the war veterans visited the said property and threatened to take it over. The 1st applicant came to me and told me that the war veterans were threatening to break the gate and to occupy the premises. He told me that they were demanding that I give up the place to black people because they could not accept that I as a white man should own property and deny them the right to use those premises as part of the black empowerment project.
- 2.1.5 While all this commotion and threats were going on the 1st applicant had established himself as a mediator between me and the war veterans. I got the suspicion that he was either part of the war veterans if not the instigator of all this attack on my premises but I had no proof of this. I asked the 1st applicant what I should do. He came up with a plan which he thought the war veterans would accept and leave me alone. He suggested that I should tell the war veterans that I in fact gave that property to him as a way of empowering black people and that was why he was running his milling business there. I told him that if that would make the war veterans go away I had no problem with it. The 1st applicant went to the gate talked to the war veterans and when he came back he told me that they wanted to talk to me. I told him to tell them that if they were coming in peace I had no problem allowing them in. They were led in and they asked me to confirm that 1st applicant was the person in charge and that I had given him the property to use for his own business. I told them that, that was the case. They told me they did not believe me and that they would only believe me if I put that in writing.
- 2.1.6 It has to be appreciated that I was with these war veterans in my office and they were demanding that I put what I had said to them in writing. I was on the spot and found myself with no choice but to write and sign annexure ‘A’ and both me and my wife signed it. I gave the document to the war veterans and after a while they left with the document. The 1st applicant remained with me and my wife boasting that he had served the day for us. We thanked him although I still had this feeling that he was part of the war veterans. However, without any proof of that I gave him the benefit of doubt.”

I my view, the contents of annexure A support the 1st defendant’s version that it had nothing to do with an agreement of sale but all to do with some arrangement to defeat certain goals. That is why there is no mention of the word “sale” or the purchase price. In view of the fact that 1st defendant was an established businessman owning various immovable properties in Bulawayo, it is surprising that he would fail to properly draft an agreement of sale in respect of these two stands.

For these reasons, I find that the 1st plaintiff is an incredible witness.

The evidence of Arnold Munyikwa does not bolster 1st plaintiff's case in that he falsely denied a fact accepted by 1st plaintiff, 1st defendant and Levison Ngwenya, namely that war veterans were harassing 1st defendant to the extent of occupying portions of his farm. What is more baffling is that the witness would visit the farm monthly and pay 1st defendant's employees but never heard of the invasion of that farm. It is common cause that at the relevant time some land invaders were physically occupying the farm. I find that this witness was not truthful on this point and the reason is to lend credence to his assertion that 1st defendant freely and voluntarily sold his property to 1st plaintiff in his presence. For this reason I reject his evidence.

As regards Levison Ngwenya, I again find him to be an incredible witness for the simple reason that it would be highly unlikely that having been told of 1st defendant's harassment by war veterans at his farm, 1st defendant would fail to tell him about the same treatment in respect of the property in issue. He admitted that although his interaction with 1st defendant was unorthodox, he engaged him at least twice to assist 1st defendant to get out of sticky situations. However, his evidence on his trip to the premises to "evict" other tenants and remove 1st defendant's property because 1st defendant told him he had sold it to someone is less convincing in my view. The reason is that the witness admitted that he used a vehicle allocated to him by the 1st defendant. It turned out from the evidence of Alphonse Tagarira who accompanied him that they in fact used a twin cab. The question then becomes, how can a twin cab ferry caterpillars? According to Tagarira, the reason why they visited the premises was for Ngwenya to assist 1st plaintiff evict the troublesome tenants and grant 1st plaintiff exclusive use of the property at US\$1 000,00 rental per month. I reject Ngwenya's evidence and embrace that of Tagarira as it is supported by 1st plaintiff's evidence that he was left with "extra space" after other tenants had been evicted.

In respect of the 1st issue, I find therefore that the plaintiffs have failed to discharge the onus cast upon them to prove on a balance of probabilities that there existed an agreement of sale between them and the 1st defendant. As a result of my so finding, the second issue falls away.

As regards the 3rd issue, the 1st defendant's evidence contained in the pleadings before he suffered from the effects of the stroke is clear and detailed. It is also supported by the evidence of other witnesses who confirmed the material aspect, namely that the 1st defendant was under pressure from war veterans to relinquish some of his immovable property. Jacob Hlabangana and Tagarira were truthful witnesses whose testimony was corroborated by documentary exhibits in the form of receipts issued to the 1st plaintiff after payment of "rent". There were also other receipts issued to a tenant operating grinding mills on 1st defendant's premises known as "Marenkini". 1st plaintiff admitted that he was the only one operating grinding mills on that property. If 1st plaintiff had openly purchased the stands many years back why would Tagarira and Jacob categorise his payments as rent in April 2014?

For these reasons, I find that the 1st defendant has proved on a balance of probabilities that he wrote and signed annexure "A" under duress or undue influence and 1st plaintiff was aware of this. On the evidence, it is clear that there was no agreement of sale between the parties in that all the receipts placed before the court clearly show that the 1st plaintiff was a tenant of the 1st defendant paying rent over the years.

In the circumstances, I find that the 1st and 2nd plaintiffs have failed to prove their case on a balance of probabilities. Accordingly plaintiffs' case is hereby dismissed with costs.

Ndove, Museta & Partners, applicants' legal practitioners
Messrs James, Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners