

DZINGIRAI DINGWIZA
versus
CAMPION MASUNZAMBWA
and
LYNETTE MASUNZAMBWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 7, 8, 19 & 20 February 2013 and 23 July 2014

Civil Trial

M.T. Maja for the plaintiff
P. Jonhera for the defendants

ZHOU J: In November 2006 the plaintiff purchased an immovable property known as Stand No. 4154 Tynwald Township of Lot 5 Tynwald measuring 385 square metres through an estate agent. The agreement of sale was reduced to writing. It reflected the first and second defendants as the sellers of the property. The agreed purchase price of Z\$4 500 000 was paid to the purported sellers. As it turned out, however, the plaintiff had been a victim of a fraud. The true owners of the property had not sold the property, but some other person had used their names to commit the fraud by purporting to sell the property to the plaintiff. That there was no agreement of sale which was concluded between the plaintiff and the defendants was determined by this court in Case No. HC 805/08. That matter was an action by the plaintiff to compel the defendants to effect transfer to him of the property referred to above. The claim was dismissed with costs.

The plaintiff then instituted the instant action claiming a sum of US\$14 000 in respect of compensation for the improvements which he effected on the property. The improvements consisted of a residential house which had been built up to wall plate level at the time that the plaintiff realised that his title to the property was being disputed by the defendants. The plaintiff also averred that he incurred expenses in respect of water and sewer connections. At the commencement of the trial the plaintiff abandoned his claim for alternative relief, viz. that the property should be sold by private treaty and the proceeds from the sale be shared

between him and the defendants. In their defence the defendants stated that the property was sold by them to one Thembekile Dumbu who is now the registered owner of it. They alleged that the structure constructed by the plaintiff on the property was of poor quality, and that they sold the property at a discounted purchase price because the new owner was going to incur the expense of demolishing the structure put up by the plaintiff. The defendants further alleged that they and not the plaintiff had put in place the sewer and water connections.

The plaintiff gave evidence himself and called two other witnesses, Batsirayi Friday Gawaza and Tawanda Dumbu. His evidence was that after he had purchased the property as a vacant piece of land he submitted building plans to the City of Harare, the local authority for the area. He commenced the construction of the house after the plans had been approved by the local authority. In support of his claim the plaintiff produced some receipts showing the materials purchased in connection with the construction of the property. Those receipts show that the expenses were incurred in Zimbabwe dollars. Photographs of the incomplete structure were produced, including the one showing the building at the wall plate level. The plaintiff denied that the defendants had erected a wall on three sides of the premises when he purchased it. His evidence was that the walls which were on some sides of the property had been constructed by owners of adjoining stands.

The second witness, Batsirayi Friday Gawaza, is an estate agent registered with the Real Institute Council. He conducted a valuation of the property with the improvements which had been effected by the plaintiff pursuant to which he compiled a sworn valuation report. According to him the value of the land and the improvements was US\$17 000 while that of the vacant land was US\$5 000. Thus, in his assessment, the value of the improvements was US\$12 000.

Tawanda Dumbu is the husband of Thembekile Dumbu who purchased the property in dispute from the defendants in October 2009. His evidence was that the property was purchased through a loan provided by his wife's employer, National Social Security Authority. He testified that his wife purchased the property together with the improvements, that is to say the incomplete house, which had been constructed by the plaintiff. He was involved in the discussions leading to the purchase of the property. He and his wife completed the construction of the house by putting up the roof and the other aspects of the structure and moved in to stay there. He produced a copy of the agreement of sale between his wife and the defendants which showed that the property was being sold together with the improvements thereon, the incomplete four bedroomed house at roof level. The purchase

price was US\$16 000. He also stated that he and his wife had the property valued in October 2009 by Property Hopes Real Estate (Pvt) Ltd. A copy of the valuation report was produced. The report gives the open market value of the property as US\$20 000 and the forced sale value as US\$13 000. His evidence was that at the time that the property was sold to his wife the defendants did not disclose that they had obtained an order for the demolition of the structure which had been constructed by the plaintiff. That order was subsequently rescinded.

Evidence for the defendants was given by the first defendant, Martin Kasiyandima and Kenneth Munyaradzi Nyamayedenga. The first defendant's evidence was that after he and the second defendant purchased the immovable property in dispute they paid for the installation of a water meter and had water connected. He stated that he paid to his neighbours for the walls which were constructed on three sides of the property. After discovering that the plaintiff had constructed a house on the property he met with him in order to agree on how to resolve the issue of the developments on the property. They failed to agree on the amounts to be paid for the land. He stated that eventually he and the second defendant sold the immovable property to Thembekile Dumbu for \$16 500. According to him what they sold was the land minus the developments effected by the plaintiff. The inclusion of the improvements in the written agreement was, according to him, on the advice of the estate agent that the Zimbabwe Revenue Authority might visit the property and discover them if they were excluded from the written memorandum. He was personally not involved in the discussions for the sale of the property.

Martin Kasiyandima was at all material times employed by an estate agency called Guarantee Properties. Although in his evidence in chief he had stated that he is an estate agent he later stated that he was not registered as an estate agent but was a sales negotiator. He holds a Higher National Diploma in Marketing. He stated that the property was sold to Mrs Dumbu for \$16 500. He prepared the agreement of sale between the defendants and Thembekile Dumbu. The purchase price in that agreement is US\$16 000. Both the first defendant and this witness did not explain how they ended up with the purchase price of US\$16 000 yet the offer that had been made was for US\$16 500. In his evidence the improvements which were included in the sale were those made by the defendants, that is, the wall on three sides of the property and the sewer and water connections.

Kenneth Munyaradzi Nyamayedenga, the third witness for the defendant, is a quantity surveyor. He holds a Diploma in Quantity Surveying from the Bulawayo Polytechnic. He

prepared a bill of quantities in respect of the materials used by the plaintiff in constructing a house at the disputed property. The work entailed assessing the costs of the materials used up to the stage that the plaintiff stopped the construction work. In assessing the cost of materials he used what he referred to as the “standard prices” from suppliers approved by the Ministry of Public Construction. He prepared a report in which he put the cost of the materials used in constructing the house up to the wall plate level at US\$5 482.98. He expressed the view that some of the bricks which were used on the property were not of the proper quality.

From the evidence given on behalf of both parties it is accepted as common cause that the plaintiff was a *bona fide* possessor in relation to the property in dispute. A *bona fide* possessor is a person who *bona fide* but mistakenly believes that he is the owner of the property in his possession. See C. G. van der Merwe & M. J. de Waal, *The Law of Things & Servitudes*, p. 88. In the instant case the plaintiff in good faith purchased the immovable property from persons whom he believed were the owners of the property. As it turned out, those were fraudsters. He effected improvements on the property genuinely believing that he was building a house on his property. A house is a useful improvement. As a *bona fide* possessor, the plaintiff would be entitled to compensation for the useful improvements. Such an action for compensation for improvements is founded upon principles of unjust enrichment, and lies against the person who is the owner of the property at the time that the action is instituted. The measure of compensation is the amount by which the value of the property has been enhanced or the actual expenditure incurred in putting up the improvements whichever of the two is the lesser. See *Fletcher & Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648-9; *Reza v Nyangani NO 2000 (1) ZLR 398(H) at 403A-B*; *Reza v Nyangani 2001 (2) ZLR 203(S) at 206B*.

The defendants argued that they did not sell the improvements on the property but only the land. That contention is contradicted by the written agreement between them and Thembekile Dumbu which clearly states that the property was being sold together with the improvements comprising an incomplete four bedroomed house with a lounge, separate kitchen, dining room, toilet and bathroom at roof level. The suggestion that the improvements were included in the written memorandum in order to avoid problems with the tax authorities must be rejected out of hand. The purchaser’s husband, Tawanda Dumbu, gave evidence that the agreement related to the land together with the incomplete house. His evidence is supported by the written agreement which in clause 13 thereof contains a “whole agreement” clause. As the defendants had obtained an order of this court for the structure to be

demolished they would have explained to the tax authorities that the structure was not acceptable to them. Instead, they included it in the agreement and clearly benefited from the improvements. The first defendant and Martin Kasiyandima stated that the improvements for which the defendants wanted to be paid were the perimeter wall and the sewer and water connection. But those were not included in the written memorandum. The defendants led no evidence of the costs incurred in respect of those expenses. The new owners of the property completed the construction of the house and took occupation of it. In any event, usefulness in the context of compensation for improvements is measured in terms of added value and not in terms of what is appealing to the owner of the property. See *Reza v Nyangani* 2001 (1) ZLR 203(S) at 205E-G. In my view, the defendants were enriched by the improvements.

As regards the amount of the compensation, the plaintiff led evidence on the value of the property together with the improvements put up by him. According to the valuation report prepared by Batsirayi Friday Gawaza the value of the property is US\$17 000. Of that amount US\$5 000 represents the value of the stand without the development. The amount of US\$12 000 therefore represents the value of the improvements or, put differently, the amount by which the value of the property has been enhanced. The evidence led by the plaintiff as to the expenses incurred in respect of the materials showed amounts in Zimbabwe dollars. That evidence is not helpful. This leaves the court with only the evidence led by the defendant. Kenneth Munyaradzi Nyamayedenga assessed the cost of the materials to be in the sum of US\$5 482.98. That is the only evidence of the expenditure actually incurred. And it is less than the amount by which the value of the property was enhanced. A further challenge with the figures given is that the actual purchase price paid for the property with the improvements is less than that assessed. It is common cause that Thembekile Dumbu paid a sum of US\$16 000 as the purchase price. That amount represents the only evidence of the market value of the property, as that was the price at which the property was sold. There is no doubt that the value of the property together with the improvements is more than that of the vacant land. But it is not sufficient to prove that the property has increased in value. To prove that one person has been enriched at the expense of another one of two things must be established – either that the yield of the property has been increased, or that the person claiming the benefit has the intention of selling the property. *Meyer's Trustee v Malan* 1911 TPD 559 at 571. The property *in casu* was sold together with the improvements.

I am mindful of the fact that I am dealing with an equitable remedy in respect of which the court enjoys a wide discretion. The court must endeavour to be fair to both parties.

Reza v Nyangani (supra) at 206C-D. It would be an improper exercise of the discretion to make an award that does not adequately compensate the plaintiff or one that unduly burdens the defendant. The major materials used in constructing the house were bricks and cement. The plaintiff's evidence was that he purchased 30 086 bricks. On the other hand, the bill of quantities produced by the defendants states that 27 784 bricks were used to construct the house in question up to the wall plate level. There is a difference of 2 302 between the two figures. Based on the purchase price of US\$0.06 per unit or brick stated in the bill of quantities, there would be a difference in monetary terms of US\$138.12. The difficulty for the plaintiff is that he did not produce documentary evidence to support his testimony regarding the number of bricks he purchased. The two receipts he produced show quantities of 21 739 and 4 347 which add up to a total of 26 086 bricks. As for cement, the plaintiff's testimony was that he purchased 250 bags of cement. He then gave evidence of further bags of cement which he purchased – 74, 14 and 60 bags. Thus from his evidence he purchased a total of 398 bags. But the documents produced do not add up to that figure. The defendant's bill of quantities puts the total number of bags used at 300. Also, the plaintiff did not lead evidence on the cost of other materials such as concrete stones and pit sand and river sand. In the circumstances, it seems to me that it would be fair for the court to accept the expenditure as stated in the bill of quantities produced by the defendants, as it is more reliable. The figures in that bill of quantities do not materially differ from the quantities given by the plaintiff.

The plaintiff should therefore be given compensation for the useful improvements in the amount of US\$5 483.

In the result, it is ordered that judgment be and is hereby granted in favour of the plaintiff against the first and second defendants jointly and severally the one paying the other to be absolved for:

- (a) Payment of a sum of US\$5 483, together with interest thereon at the prescribed rate from the date of service of the summons to the date of full and final payment.
- (b) Costs of suit.

Madzivanzira Gama & Associates, plaintiff's legal practitioners
Wintertons, defendants' legal practitioners