

GETRUDE SIHLE SIBANDA  
versus  
LINDA KATSANDE  
and  
KIZITO ZVAVAHERA  
and  
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 24, 25, 26<sup>th</sup> July 2017, 31 January and 19 September 2018

**CIVIL TRIAL**

*Ms B Mtetwa*, for the plaintiff  
*S M Hashiti with K Kachambwa*, for the first defendant

TAGU J: The facts are that sometime in the month of October 2007 the plaintiff and the first and second defendants entered into a written agreement of sale of immovable property known as Stand No. 4306 Fountainbleau Estate measuring 185 square metres held under deed of grant number 00117/05. In terms of clause 2 of the Agreement (Annexure A) filed of record the purchase price of the Stand was \$12 billion dollars only. The purchase price was to be paid directly to the sellers namely first and second defendants. The defendants were in terms of clause 3.1 to transfer the property to the purchaser (plaintiff) upon payment of the full purchase price. In compliance with the provision of clause 2 of the Agreement the plaintiff paid the sum of Z\$ 12 000 000 000.00 (Z\$12 Billion) being the full purchase price to the defendants. In breach of clause 3.1 of the Agreement the defendants neglected and or refused to transfer the property known as Stand No. 4306 Fountainbleau Estate to the plaintiff despite demand.

The plaintiff issued summons against the defendants for an order directing that the first and second defendants sign all the transfer papers to facilitate transfer of Stand no. 4306 Fountainbleau Estate into plaintiff's name upon granting of the order; that in the event of non-compliance the

Deputy Sheriff be and is hereby authorized to sign the necessary transfer papers with the third defendant being directed to accept same and transfer the immovable property from the first and second defendants to the plaintiff and the defendants to pay costs of suit on an attorney and client scale.

Upon being served with the summons the second defendant filed a consent to judgment and elected to give evidence on behalf of the plaintiff.

The first defendant filed an appearance to defendant the matter. In her plea she denied entering into any agreement with the plaintiff in October 2007. She agreed to have entered in the agreement with plaintiff in or about December 2007 for a price of \$20 Billion dollars, with a further agreement to declare only \$12 billion dollars for purposes of Government Stamp Duty and Capital Gains Tax. She however, denied receiving any money from the plaintiff hence she terminated the agreement since it was tainted with illegality and the fact that she later discovered that the plaintiff intended to defraud herself acting in common purpose with third parties out of her benefits in the agreement.

Seven issues were referred for trial in this case as follows-

1. Whether the plaintiff and first and second defendant entered into a valid agreement of sale in respect of the property known as No. 4306 Fountainbleau Township of Fountainbleau Estate Measuring 185 Square Metres also known as No. 4306 Kuwadzana 5, Harare.
2. In the event that the agreement is found to be valid and enforceable, whether the Plaintiff fully discharged all her obligations in terms of the agreement of sale.
3. In particular, whether the first defendant was paid the full consideration due to her.
4. Whether the plaintiff is entitled to the relief sought, or any other alternative relief.

#### ADMISSIONS MADE

5. That the first defendant admits her signature appearing on the last page of Annexure "A" to the plaintiff's summons and declaration.
- 5.1 That all payments made by the plaintiff were in United States dollars.

#### ANY OTHER ISSUES TO WHICH THE REGISTRAR'S ATTENTION IS DRAWN

6. That the second defendant has consented to judgment in terms of the Consent filed of record on the 2<sup>nd</sup> August 2016."

During the trial the plaintiff gave evidence as to how she entered into an agreement of sale with the first and second defendants. She produced documentary exhibits pertaining to Stand No. 4306 Fountainbleau Estate. Her evidence was corroborated by the second defendant who elected to give evidence in support of the plaintiff. The second defendant Kizito Zvavahera happened to be an ex-husband to the first defendant Linda Katsande. Their evidence was to the effect that the three of them entered into a written agreement of sale in respect of the property known as No. 4306 Fountainbleau Township of Fountainbleau Estate Measuring 185 square metres also known as No. 4306 Kuwadzana 5, Harare. The written agreement was produced in court and the first defendant indeed signed the said agreement. Mr Kizito Zvavahera confirmed that although the agreement referred to the purchase price quoted in Zimbabwean Dollars, the purchase price was actually paid in United States of America Dollars and that he shared the proceeds with the first defendant who acknowledged receiving her share in writing. The acknowledgement of receipt of the money was produced in court.

At the close of the plaintiff's case the first defendant applied for absolution from the instance. This court having carefully analyzed the application dismissed it for lack of merit and ordered that the first defendant be put on her defence in case HH34/18.

The first defendant then opened and closed her case without giving any evidence. She was not even put on the witness stand by her defence council who opted to make written closing addresses to the court despite the fact that she was present in court.

In my view, having denied that the agreement attached to the plaintiff's summons is the correct agreement, and having pleaded the existence of two further agreements, the first defendant fully bore the onus to place before the court such agreements and to explain how the second agreement of \$12 billion differed from that relied upon by the plaintiff, particularly as Annexure "A" had \$12 billion as the purchase price and was signed on 5<sup>th</sup> December 2007, which date accords with the first defendant's plea that an agreement in the sum of \$20 billion was executed in or about December 2007. The first defendant opted not to testify.

Annexure "A" bears both Sellers' signatures which includes the first defendant as the second Seller. The first defendant has not denied that she signed Annexure "A" and if she did not sign this agreement, it is unclear how her signature found its way onto this agreement. On the contrary, the joint pre-trial conference minute records as an admission that she in fact signed

Annexure “A”. There can therefore, be no doubt that Annexure “A” is the agreement of sale signed between the parties and the first defendant’s failure to testify means that the court has an agreement of sale which appears valid ex-facie and which the first defendant has not sought to discredit through credible evidence. Her co- defendant confirmed that Annexure “A” is the agreement she signed at their legal practitioner Machuwaire’s offices and there was no suggestion to him that he in fact signed two separate agreements with different amounts.

The first defendant at para 6 of her plea stated that she cancelled the agreement, firstly on the basis of illegality and secondly on the basis that plaintiff was acting in common purpose with third parties to defraud her. She further denied receiving any funds from the plaintiff, whether pursuant to the illegal contract or under any other scenario. By failing to testify many issues have been left unexplained. For example, if there were two or more agreements and she cancelled only one, the question is what has happened to the other agreements? Which of the agreements did she cancel? If one agreement was cancelled when did such cancellation take place? Was such cancellation before or after receipt of the purchase price by all concerned? If she did not receive any funds from the purchase why would she have signed an acknowledgment of receipt on 17<sup>th</sup> December 2017 specifically confirming receipt of her respective share if in fact the agreement had been cancelled and she had received no funds from plaintiff as pleaded in para 6 of her plea? What is the illegality and who is the third party who was involved in defrauding her? In the absence of evidence from her these pertinent questions remained unanswered.

In my view the first defendant who was present and available in court chose not to testify in order to avoid answering the many questions that arose from her contradictory pleadings and the stances she took in the different proceedings including the criminal trial in CRB 88/08 produced as exh 5 in these proceedings. This is particularly so taking into account her admission that she signed Annexure “A”. See *Tshishonga v Minister of Justice and Constitutional Development & Another* 2007 (4) SA 135 (LC) 2007 (4) SA p157 where PILLAY J stated as follows:

“The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to testify or produce evidence of a witness who is available and able to elucidate the facts, as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him, or even damage his case. That inference is strengthened if the witness have a public duty to testify”.

Similar sentiments were expressed in *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (C) where the following was stated-

“It is generally true that if a party fails to place the evidence of a witness who is available and able to elucidate the facts before a trial court, such failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him”.

In *casu*, the plaintiff has an agreement of sale which was admittedly signed by the parties, including the first defendant. She has acknowledgments of receipt of the full purchase price by both Sellers. Plaintiff has an affidavit from the deceased legal practitioner who helped the parties with the agreement. She has the co-seller confirming the performance of the full terms of the agreement by the purchaser to an extent where he has consented to judgment. Now can it be seriously contended that the plaintiff has not made out a case on a balance of probabilities? The answer is a definite no.

In conclusion what the court has following the plaintiff's evidence and the first defendant's choice of closing her case without discharging the onus on the claims she has made in her plea is a valid agreement of sale, drafted and its implementation supervised by a legal practitioner who has confirmed full compliance with the terms of the agreement by the plaintiff, an acknowledgment by both defendants that they received the full purchase price, that the first defendant sought to resile from the agreement only when she was called upon to sign the transfer papers, a clear indication that she had not cancelled the agreement as the papers would not have been sent to conveyancers if she had already cancelled the agreement. There can be no question that all the essential elements of a valid agreement of sale were met. That the sellers received the full purchase price and that all that remains is transfer of the property to the plaintiff and on the evidence before the court no legal hurdle exists why first defendant should not effect transfer of the property in question to the plaintiff.

IT IS ORDERED THAT

- a) 1<sup>st</sup> and 2<sup>nd</sup> Defendants sign all the transfer papers to facilitate transfer of Stand No. 4306 Fountainbleau Estate into Plaintiff's name upon granting of this order.
- b) In the event of non-compliance with (a) above, the Deputy Sheriff be and is hereby authorized to sign the necessary transfer papers with the 3<sup>rd</sup> Defendant being directed to

accept same and transfer the immovable property from 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Plaintiff.

c) 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay costs of suit on an attorney and client scale.

*Mtewa & Nyambirayi*, plaintiff's legal practitioners

*Messrs Muzangaza, Mandaza & Tomana*, 1<sup>st</sup> defendant's legal practitioners