

MR MBOZVI
versus
CHENGETAI SIDHUNA

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 27 March 2019

Date of written judgment: 5 June 2019

Civil appeal

Mr *L. Mhungu*, for the appellant
Mr *D. Chirima*, for the respondent

MAFUSIRE J

- [1] The dispute between the parties centred on a property described as Stand 238 Phase 1 Checheche (“*the property*”). It is one of those council-owned township properties that local authorities sell on a rent-to-buy basis. It is under the Chipinge Rural District Council. In the court *a quo* the respondent (“*Chengetai*”) sued the appellant (“*Mbozvi*”) for eviction and holding over damages. The court granted the orders. Mbozvi appealed. We heard argument on 27 March 2019 and reserved judgment. This now is the appeal judgment.
- [2] In her claim, Chengetai alleged that Mbozvi “... *unilaterally entered* ...” her property in January 2017 without her authority. She alleged she had acquired the property in November 2007; that she had partially developed it to window level but that the defendant was staying there illegally and without paying rentals.
- [3] The claim was poorly presented. The drafting was sloppy. For example, there was no reason why Mbozvi’s name was not cited in full when all his particulars were available. But that is besides the point.
- [4] In his defence, Mbozvi took an objection *in limine*. He said Chengetai had no *locus standi in judicio* to evict him or to seek holding over damages because the property was

his. But it seems this objection went nowhere. It seemed abandoned or forgotten somewhere along the way. It was not even on the list of issues at the pre-trial conference. The objection was ill-conceived anyway, especially if regard is had to the nature of the claim and the nature of the defence.

[5] On the merits, Mbozvi denied that he had “... *unilaterally entered* ...” the property. He alleged he had lawfully acquired it from one Tafirenyika Maturo (“*Tafirenyika*”), to whom Chengetai had transferred her right, title and interest.

[6] In its judgment the court *a quo* ruled that there had never been a transfer from Chengetai to Tafirenyika but that what had happened had all been a fraudulent scheme to strip Chengetai of her ownership. As such, since no thief or fraudster can in law transfer rights in a thing, Mbozvi’s claim to the property was held to be defective. The court also ruled that Chengetai was entitled to holding over damages.

[7] The case went like this. Chengetai opened and shut her case with only the evidence from herself. She said the property was allocated to her by the Chipinge Rural District Council in 2007. She produced the offer letter from Council dated 29 November 2007. All this was common cause. But there was a subtle detail on the letter that was at war with her case. The letter had two parallel lines drawn in long hand running diagonally across it and between which the words “*Stand No 238 PHASE 1*” were inscribed, also in long hand. Mbozvi said that was the evidence of the cession of the property from Chengetai, or of the original allocation to her having been cancelled. She denied it. But she proffered no other explanation for that endorsement. In a boxing match that would be a point for Mbozvi.

[8] Chengetai said she had submitted some developmental plans to the Council for the construction of a 3-roomed cottage on the property. As proof, she produced some drawings endorsed with a date stamp from the Chipinge Rural District Council in 2012. But again a subtle detail on the drawings contradicted the flow of her evidence. Mbozvi said the plans were for a different property, not Stand 238. Indeed the drawings cited a different property. They were titled “*PROPOSED COTTAGE ON STAND No 120*”

INFILL CHECHECHE GROWTH POINT". Chengetai said the reference to Stand 120 was a mistake which the Council had promised to rectify but had never done. But again in a boxing match, this would be another point for Mbozvi.

- [9] Beyond this evidence and these two documents, Chengetai's evidence proved nothing further. Everything else she said was a bare denial of the cogent and overwhelming evidence by Mbozvi through himself and his very relevant witnesses, namely, Tafirenyika, his wife Leona or Loren Chiona ("*Leona*") and Mbozvi's friend, Collen Gapara ("*Collen*") who had facilitated the sale deal between Tafirenyika and Mbozvi.
- [10] Mbozvi's case was this. He heard the property was on sale. He went to inspect it. He liked it. Together with a sister and his wife they went to inspect Council records. These reflected Tafirenyika as the "owner". Tafirenyika worked and stayed in South Africa. Mbozvi called him. They agreed on a purchase price of fifty thousand Rand (R50 000). Tafirenyika referred them to his wife, Leona, whom he said had all the authority to represent him. The sale deal was concluded. The purchase price was paid. They went to Council offices for the usual session. This was done. He took occupation in 2015 and started building the partially constructed house. He completed the structure; tiled the floors; installed water and electricity; planted some trees and flowers around the yard; put up a security wall along the perimeter and started staying there from January 2016. Until he received her summons in March 2018, he had never heard of Chengetai and her claim to the property.
- [11] To all that Chengetai denied ever selling the property to anyone. She denied ever dealing with Tafirenyika or his wife, Leona. She was adamant none of them was known to her. Mbozvi set to demolish her case. He called Collen. Collen's evidence corroborated Mbozvi's in relation to the sale by Tafirenyika. One important aspect of that corroboration was that it was his advice to Mbozvi to clear the property first with the Council before committing himself to Tafirenyika. He was present at the Council offices when the records were pulled out and inspected. They all reflected Tafirenyika as the "owner". Another important aspect of the corroboration was that when Mbozvi took occupation there was a partially built structure which Mbozvi completed in 2016.

Even the court *a quo* accepted Collen gave his evidence very well and that he remained unshaken under cross-examination.

- [12] But the sale and transfer from Tafirenyika to Mbozvi was less contentious. Fireworks were in respect of the sale and transfer from Chengetai to Tafirenyika. Chengetai swore she knew nothing about it or that Tafirenyika and his wife, Leona, were ever known to her. So Mbozvi called Leona. She stayed at Checheche Growth Point. She said it was Chengetai herself that had come to her house personally on 4 February 2015 to inform her that she had sold the property to her husband Tafirenyika. Tafirenyika had already telephoned her (Leona) about the deal. Before coming to Leona's house, Chengetai had first telephoned her for directions. The purpose of Chengetai's visit was to arrange transfer of cession at the Council offices. They agreed on a date, 6 February, i.e. two days later.
- [13] Leona's evidence on the cession transfer at the Council's office was quite elaborate. In brief it was this. She had her husband's national registration particulars. Chengetai had hers. Together they were moving from office to office signing documents. Chengetai would sign first. She would sign in place of Tafirenyika. After completion of the sale and transfer she and Chengetai actually became friends.
- [14] Next, Mbozvi called Tafirenyika. His formal evidence was that he worked and lived in South Africa. He was married to Leona under customary law. They had three children together. He was the one who sold the property to Mbozvi. Everything was done through Leona, his wife whom he had granted all the authority.
- [15] Critical aspects of Tafirenyika's evidence were these. He met Chengetai for the first time in South Africa. He did not know her before. She had been in the company of two people, one of them Zviedzo Chipfunde ("**Zviedzo**"), an old school mate of his. Zviedzo was then married to Chengetai. He told him Chengetai was selling a stand for thirty thousand Rand (R30 000). He reached an agreement with her. He paid her a deposit of twenty thousand Rand (R20 000). The balance of ten thousand Rand (R10 000) would be paid on the transfer of cession.

- [16] Tafirenyika's critical evidence continued. Towards December, Chengetai was demanding the balance of the purchase price. He told her they needed to change ownership first. They agreed that since he was busy he would give her his wife's contact details through whom the transactions would be carried out. Back in Zimbabwe, Chengetai did contact Leona and went to see her at home. Together they arranged and facilitated the change of ownership. Chengetai subsequently returned to South Africa and collected the balance of R10 000 after both she and Leona had confirmed the cession at Council offices.
- [17] To all that testimony Chengetai's position was just a bare denial. She denied she knew Tafirenyika or his wife, Leona. She denied she had sold her property to them. She denied she had been to South Africa during the period mentioned by Tafirenyika. She denied she had received that kind of money from Tafirenyika or anyone else in connection with the property. She denied the cession at the Council offices and alleged that all the documents suggesting a cession of rights by her were forgeries or fraudulent.
- [18] Mbozvi's witnesses were forthright, straightforward and unshaken. Cross-examination was lame. For example, *Mr Chirima*, for Chengetai, put it to Tafirenyika that Leona was a mere concubine of his since there was no registered marriage between them. He pestered Tafirenyika why he did not apply to be joined to the proceedings if ever he wanted to defend his sale of the property to Mbozvi and protect him! This was absolutely ironic. It was the process issued by *Mr Chirima* himself, on behalf of Chengetai, and his presentation of the case that were patently incompetent. For example, the summons excluded very relevant parties like Tafirenyika and the Chipinge Rural District Council, the true owner of the property, and the records for which reflected Tafirenyika as the owner. Not only that, but Chengetai's case was closed with no evidence from any of the Council officials testifying on what had really transpired regarding the property and whether there had really been a fraud.
- [19] There was an aspect of Mbozvi's evidence and that of his witnesses that left Chengetai rather exposed. They asked how on earth they could have ever guessed Chengetai's national registration particulars which were inserted on the cession documents. At first

she denied they were hers. But she subsequently admitted them. She gave no explanation how Mbozvi and his witnesses could have got them.

[20] Mbozvi's documentary evidence should have won him the case. In a boxing match it would be the technical knock-out punch. It was completely in consonant with his testimony and that of his witnesses. Firstly, he relied on Chengetai's own original offer letter from Council and highlighted the cancellation endorsed on it. Next he discredited the drawings or building plans as belonging to a different property altogether. The critical cession document from Chengetai to Tafirenyika was produced through Leona. It was one of those standard cession forms used by rural district councils which are printed on council stationery. Blank spaces were completed in long hand. It had four sections: the first for completion and signing by the cedent; the second for completion and signing by the cessionary; the third for official use, and the fourth and last for approval by the Minister of Local Government.

[21] Completed, the relevant portions of the cession document read as follows:

"The undersigned ... CHENGETAI SIDHUNA, National Reg. No: 13 – 174976 A 13 do hereby cede, assign and transfer to ... MATORO (sic) TAFIRENYIKA Nat Reg No: 13 – 200661 T 13 All my rights and title to and interest in lease number 238 at CHECHECHE Business centre in Chipinge Rural District from 6 day of FEBRUARY 2015"

Above the word "CEDENT" was a signature, in very clear print: "*C h e n g e t a i*", with the letter "e" quite distinct and somewhat stylish. There were also signatures by two witnesses.

[22] The section for the cessionary read as follows:

"I ... MATORO (sic) TAFIRENYIKA Nat Reg No 13 – 200661 T 13 Address 1107 Phase 2 CHECHECHE Do hereby accept transfer of the Agreement of number (blank) Business Centre in Chipinge Rural District, as from the 6 day of February 2015"

As with the cedent, the cessionary's signature was a distinct name in print "*LOREEN CHIONA*". There were also signatures by two witnesses.

- [23] The last two sections of the cession document, which were for official use and approval, were left blank. Mr *Chirima* latched onto this. He said the alleged cession was incomplete and unapproved. He said it was defective and fraudulent because Leona purported to be Tafirenyika and to sign as him. He said she had no power of attorney. The court *a quo* accepted the argument. It fell into error.
- [24] There is nothing magical about a cession of rights. In *Chauke & Anor v Mangena* HMA 9-19 in which a similar argument arose, I said there is wise Shona saying: “*kupedzera miseve pamakunguwo idzo hanga dziripo!*” meaning, wasting all the arrows on worthless crows when more treasured guinea fowls abound: in other words, to major in minors. Simply put, a cession is the transfer or giving up of rights and interest by one party which the other party accepts or receives. The cession is pivoted on an agreement that is legitimate. The transferor or giver of the right is the cedent. The receiver is the cessionary. No formalities are required for a valid cession: see **R.H. Christie**: *Business Law in Zimbabwe*, Juta & Co Ltd, 1998, at p 110.
- [25] In *Mberi v Mbewe & Anor* HH 420-15, after reviewing a number of cases on the point such as *Gomba v Makwarimba* 1992 (2) ZLR 26 (SC); *Hundah v Murauro* 1993 (2) ZLR 401 (SC); *Pedzisa v Chikonyora* 1992 (2) ZLR 445 (SC) and *Magwenzi v Chamunorwa & Anor* 1995 (2) ZLR 332 (S), I said in a great number of cases of this nature the local authority, which is the true owner of the property, is little concerned with what the tenant-to-buy does with his rights and interest in the property.
- [26] The local authority normally consents in advance of the alienation or disposal of such rights, or it subsequently ratifies. The consent can be tacit or express. In the present case it was both. That when Mbozvi and his team went to inspect the Council records before he committed himself to Tafirenyika they found the property reflecting Tafirenyika as the owner was not challenged. Thus, unless the Council had given tacit approval to the sale from Chengetai to Tafirenyika, there could be no explanation why the records were in Tafirenyika’s name. But there was more. Produced in evidence was a very detailed rent-to-buy agreement between the Chipinge Rural District Council and

Tafirenyika in respect of the property. It was signed by Leona as lessee and by Chengetai as a witness. Nothing could be better evidence of the express consent by the local authority and of the transfer of rights from Chengetai to Tafirenyika.

- [27] The court *a quo* said all these documents were a fraud to strip Chengetai of her ownership of the property. It said Leona had no power of attorney to sign the documents as Tafirenyika. It went on to quote from some authority defining a power of attorney as generally being a physical document under seal, and concluding that the purported power of attorney relied upon by Leona not having been a document under a seal, all that she had done in the name of Tafirenyika had been a “*farce*”.
- [28] With all due respect, the court seriously misdirected itself on this aspect. Mbozvi and his witnesses never said Leona had a power of attorney. The term ‘power of attorney’ was introduced into the matrix by Mr *Chirima* in cross-examination. All Mbozvi and his witnesses said was that Leona had authority from her husband to transact on his behalf, and that that authority had been given over the telephone. Whilst a power of attorney gives authority, not all authority is given by a power of attorney.
- [29] All that the court *a quo* had to be satisfied with was whether Leona had her husband’s authority to transact on his behalf. These were unsophisticated people. The court had to be satisfied by the substance of the arrangements, and not be concerned with fancy legal niceties, or with form over substance. But whatever might have been lacking in form was given substance by the Chipinge Rural District Council itself. It gave its badge of authority to the two cessions: the first and crucial one from Chengetai to Tafirenyika, and the second and uncontentious one from Tafirenyika to Mbozvi. The triangle was complete. That Council itself and the Ministry of Local Government might not have signed their sections on the cession document seemed to be mere carelessness or plain inadvertence that did not in the least detract from the fact that the parties had agreed and that the Council had granted both tacit and express approval. Everything else was subterfuge.

- [30] Mr *Chirima* successfully persuaded the court *a quo* to find meaning and substance in a letter from the Chipinge Rural District Council written to himself by the Growth Point Manager on 10 April 2018 and which he had solicited for. Relevant portions of that letter read as follows:

“Your letter dated 25 March, 2018 refers. Ms Chengetai’s Sidhuna’s letter on same subject dated 18 September, 2017 also refers.

Please note that the stand cession process is a long and arduous process which takes place at five different levels, namely, the sub-office at Checheche, then Heads of Departments have to consent to it before submitting to ZIMRA. After ZIMRA’s concurrence, the matter will finally come back to the Lands and Assets Office at the Main Office before being finally presented to the Chief Executive Officer to complete the signing of a lease agreement thereto.

As you observed, there is no complete cession yet and there is no lease agreement yet between Council and the incumbent Tawanda Mbozvi. The forms are still at the Checheche sub-office, held back because of an incomplete process. Implicitly, the first level has therefore not yet been satisfied by the parties to warrant it to move up to the second stage where the Heads of Departments will peruse the documents before they can be passed on to ZIMRA. The stand is therefore not yet **formally** (*emphasis added*) in the buyer’s or cessionary’s ownership, albeit the nominated cessionary already having been clearly cited for practical functional purposes – **and this we always do as instructed and agreed between the seller and the buyer. In the case of any objection by the parties, we always delay or defer process until we are granted a green light by the parties** (*emphasis added*).

In the matter at hand, there is agreement between the incumbent Tawanda Mbozvi and Tafirenyika Matoro who claims to have bought the property from Chengetai Sidhuna (*emphasis added*). The dispute, therefore, lies between Chengetai Sidhuna and Tafirenyika Matoro who passed ownership of Sidhuna’s property to Mbozvi.

Essentially, therefore, Council fully recognises Sidhuna’s objection to processes that were transacted in our offices. She is the holder of the more critical Council stand documents and her consent to the process is therefore paramount. **To that effect, Council has deferred the cession process of stand 238**, given the apparent validity of Chengetai Sidhuna’s formal complaint since September, 2017.

By copy of this letter, we advise the three parties on our records (being Mbozvi, Matoro and Sidhuna) to convene or otherwise resolve matters and instruct us accordingly. ...”

- [31] The letter is an example of double-speak. But the highlighted portions are a fabulous give-away. There is an acknowledgement of the double cession. The cession from Chengetai to Tafirenyika was complete as signified by the lease-to-buy agreement between the Council and Tafirenyika. The cession between Tafirenyika and Mbozvi was complete as signified by firstly, a handwritten agreement between Tafirenyika and Mbozvi, and secondly the cession addendum from Tafirenyika to Mbozvi, both in December 2015. All these documents were part of the Council records. And yet neither Mr *Chirima* nor the court saw it fit to have Council officials called to give evidence.

- [32] Chengetai proved no fraud or any form of unlawful misrepresentation. On the contrary, the evidence established that she had sold her rights and interest in the property to Tafirenyika who in turn had sold his rights and interest to Mbozvi. The court *a quo* failed to appreciate that the conclusion in Council's letter above to the effect that the rights, title and interest in the property still lay with Chengetai was the very aspect it was being asked to adjudicate upon.
- [33] Apart from the foregoing, the court *a quo* failed to appreciate that there was also evidence that was not only common cause, but also *aliunde* to that given *viva voce*. That evidence supported Mbozvi's case and contradicted Chengetai's claim. It was this. Not only had Mbozvi been in occupation of the property for more than two years before Chengetai's summons, but also he had openly completed the partially built house on it from window level right up to completion and to a habitable state with not a whimper of protest from Chengetai. Chengetai conceded she saw the building going up but failed to confront Mbozvi or his builders. She claimed she feared violence. She said she went to complain to Council. That is implausible. It is unbelievable. Mbozvi took effective occupation in December 2015. Council's letter above suggests she only complained in September 2017, thus almost two years later. Her summons was in March 2018, more than two years later. At the very least, she should have sought an interdict to bar Mbozvi from carrying out any construction.
- [34] Justice is often depicted as a lady blindfolded, holding a sword in one hand and a set of balancing scales in another. The scales are said to be for measuring the strength of a case. They represent the weighing of evidence. Before the case starts, the scales are evenly balanced. They are in a state of equilibrium. The weight of the evidence as the case progresses upsets the balance. As the case concludes the court checks the way the scales are tilted. Judgment is granted for the party in whose favour the scales are tilted.

[35] Thus, a trial in a civil case involves the making of findings or inferences of facts by balancing probabilities and selecting a conclusion which seems to be the more natural or plausible one from several other conceivable ones, even though that conclusion may not be the only reasonable one: see *Joel Melamed and Hurwitz v Cleverland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vorner Investments (Pty) Ltd* 1984 (3) SA 155.

[36] In this case, the scales of justice were undoubtedly tilted in favour of Mbozvi. Chengetai proved nothing. Mbozvi proved everything, even though the onus had not been on him. The judgment in the court *a quo* was a travesty of justice. Regarding holding over damages, if Chengetai had no case for eviction, concomitantly she had no case for holding over damages. Yet the court granted it. And demonstrably, even the amounts were plucked from the air. There was no basis for the rate of damages or for the quantum.

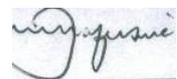
[37] In the result, the appeal is allowed with costs. The following order is issued:

i/ The judgment of the court *a quo* is hereby set aside in its entirety and substituted with the following:

“The plaintiff’s claim be and is hereby dismissed with costs.”

ii/ The costs of this appeal shall be borne by the respondent.

5 June 2019



Mawadze J. agrees: _____

Mhungu & Associates, appellant’s legal practitioners
Chirima & Associates, respondent’s legal practitioners