

TAWINEI NHACHI

Versus

A B MINING & EQUIPMENT (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 15 & 16 MARCH 2005 AND 1 JUNE 2006

G Nyoni, for the plaintiff
M Ndlovu, for the respondent

Civil Trial

NDOU J: Sometime around 1997/1998 plaintiff bought a property from one Monica Verkevisser for \$320 629. The said house was registered in his name as per title deeds number 1495/98. The said property is also known as number 104 Churchill Road, Bellevue, Bulawayo.

The defendant, then under the managing directorship of Mr Muguti Senior, lent and advanced to plaintiff the total sum of the purchase together with transfer fees all amounting to \$368 729. A mortgage bond was registered against plaintiff's property under 5333/98 to secure the debt. The plaintiff has since paid up the total debt but the defendant has refused in writing to cancel the said bond. The plaintiff seeks an order compelling defendant to cancel the mortgage bond with the defendant also bearing costs of suit. From its plea, the defendant's case is that the plaintiff failed to pay the outstanding debt and only purported to tender the balance out of time. The defendant further requires the plaintiff to pay current

market value of the property before it cancels the bond.

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The plaintiff testified that he used to work for the defendant between 1998 and 2000 as the Telecommunications Manager. He said he obtained the loan from the defendant through its now deceased Managing Director, Mr Muguti. The money was paid by cheque in the name of Ben Baron & Partners for the purchase (and transfer) of the aforesaid property. When the house was transferred into his name his colleagues came to know about the loan resulting in disgruntlement as the defendant has not previously advanced loans to any of the employees. They accused the Managing Director of favouritism. Mr Muguti then suggested that in order to cover his back, he (i.e. plaintiff) had to register the said mortgage bond. At some stage he fell into arrears but he eventually paid in full. This was by arrangement with Mr Muguti. He made his final payment in 2002. Before he tendered the last payment there was no demand. Further the mortgage bond was not called up prior such last payment. He eventually resigned from the defendant's employ in July 2002 giving the requisite notice. He went to the United Kingdom. On the resignation they worked his benefits and paid him. He declines to pay the current market value of the property arguing that what he got from the defendant was cash and not the property.

He says he was never sued by the defendant in connection with the loan. He says he is willing to pay an additional amount as long as it is in the context of the bond. He said his instalment was \$3 800 per month. He said his relationship with the late Mr Muguti was good and hence no action was taken when he defaulted in payments. I am satisfied that the plaintiff is a

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truthful witness. He was open about his defaulting in paying instalments. He was the sole witness for the plaintiff.

Daisy Muguti was the first witness for the defendant. She is a director of the defendant and also a widow of the late Mr Muguti. She said the late informed her about the loan to the plaintiff. The loan was advanced to the plaintiff specifically for the purchase of the house. She said she was not aware of the nature of the relationship between the plaintiff and her late husband. After the death of her husband the plaintiff went straight to the lawyers without first approaching her. Plaintiff offered her the balance and she declined and told him the money had lost value on account of his failure to make timeous payment. Her testimony does not take the case any further. I am satisfied that she gave her testimony well.

Yvonne Muguti also testified. She is also defendant's director. The late Mr Muguti was also her husband (she was the second wife).

She first came to know about the loan in 1998 where her late husband told her about it. Her late husband told her that they had taken the title deeds of the disputed property when the plaintiff failed to make payments. She is the one who told the senior wife (previous witness) about title deeds. From her concessions it was apparent that during the lifetime of Mr Muguti she was not involved in any discernable way in the running of the business. Her testimony does not take the case any further. Mr *Ndlovu*, for the respondent blew hot and cold on the legal basis on which the claim is opposed. A party cannot simply refuse to accept final payment in terms of

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the agreement because the value of the dollar has dropped significantly. The plaintiff has established his claim on a balance of probability.

Accordingly, the following order is hereby made:

1. It is ordered that mortgage bond number 5333/98 registered against plaintiff's property under title 1495/98 be and is hereby cancelled.
2. The plaintiff shall pay the tendered balance of \$10 million with interest thereon at the prescribed rate from 17 November 2003 to date of payment in full.
3. The defendant is to bear the cost of this suit.

Majoko & Majoko, plaintiff's legal practitioners
Lazarus & Sarif, defendant's legal practitioners