

M MUCHATIVUKA

Versus

J K KUMSINDA

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 27 JULY & 10 AUGUST 2005 & 1 JUNE 2006

N T Mashayamombe for plaintiff

1st defendant in person

No appearance for second defendant

Trial Cause

NDOU J: The plaintiff seeks an order against the defendants in the following terms:-

- “(i) That 1st defendant be compelled to transfer his rights and title in stand number 3 Harris Road, North End, Bulawayo to the plaintiff.
- ii) That the Deputy Sheriff sign all necessary papers on behalf of 1st defendant should he fail to comply with (i) above.
- iii) Costs of suit.”

The claim is based on the following facts. Sometime in October 2003 plaintiff and 1st defendant entered into an agreement of sale of stand number 3 Harris Road, North End, Bulawayo in which the 1st defendant agreed to sell to plaintiff the said property for a purchase price of \$52 million. It was a material term of the contract that plaintiff was to pay the full purchase price of the property by 1 November 2003, failing which an agreed penalty

would start accruing for any late payments thereafter. The

HB

55/06

plaintiff paid the full purchase price on 10 November 2003 as well as a penalty fee of \$500 000,00 agreed by the parties. The said amount was accepted by the 1st defendant as final payment in terms of the agreement of sale. Thereafter, the plaintiff has on numerous occasions asked 1st defendant to transfer the property all in vain. Not only has 1st defendant failed or neglected to transfer the property, he has instead, sought to unilaterally increase the purchase price to \$57 million.

1st defendant's case is best captured by the following extract from his own plea:-

- “1. That I never sold any house to the plaintiff and that the plaintiff represented to me that he did not have any intention to buy my house.
2. ...
3. ...
4. I then advertised my house in the paper for a good three months without having any takers.
5. In October 2003, the plaintiff approached me and asked why I was selling my house, and when I told him, he laughed and said that he can get me the money I want to buy another house without selling one if I can help him and a prominent Nigerian to bring in their huge funds into this country.
6. The plaintiff then told me that the only way these funds can be brought into the country is if it appears that the Nigerian is buying a house here in Zimbabwe and that this is where I was to co-operate with them by pretending that I had sold my house to them although the name to be used as that of the buyer would be that of the plaintiff himself.
7. The plaintiff told me that I would be paid handsomely, that is at least \$75 million.
8. Sometime in October 2003, the plaintiff brought some

papers to me for signing and these were an agreement of sale of my house which I was assured, was to be a front for the bringing in of the Nigerian's money which would be well over \$500 million.

9. I signed the papers, all in the hope of getting easy money, and the plaintiff was in the company of a lady, and he asked me to write a receipt.

10. ...

HB
55/06

11. ...

12. On 10 December 2003, the plaintiff came back against with another agreement, this time for \$10 million, and got me to sign it. By this one, I was given \$25 million as bonus and this agreement is hereby attached marked Annexure "A".

Plaintiff's Case

Munyaradzi Shava Muchativuka

He is the plaintiff. He said that sometime in September 2003 he saw the house, subject matter of these proceedings, advertised as being for sale in the Chronicle newspaper. He telephoned 1st defendant in order to go and view the property. He went to view the property. He went again to show his wife and she was interested. He subsequently expressed willingness to purchase the property. He offered to pay the purchase price in a space of one month. He started paying the instalments. The purchase price had been agreed at \$52 million payable over a period of a month. The agreement was signed on 1 October 2003 and the final payment was due on 31 October 2003. He said that he did not make the final payment timeously. He said he and 1st defendant were parties to the agreement with their respective wives acting as witnesses. He conceded that the date 1 October 2003 does not appear on the

agreement but he attributed this to oversight but he is adamant they signed on 1 October 2003. He further said that he made the final payment on 10 November 2003, but he also paid the penalty for late payment by cheque in the sum of \$500 000. He says that 1st defendant issued a receipt against each payment. The first receipt was dated 14 October 2003 for \$2 000 000,00. The next receipt was for \$15

HB

55/06

000 000,00 issued on 17 October 2003. The next receipt was for \$20 000 000 and issued on 23 October 2003. The next was issued on 3 November 2003 for the sum of \$20 000 000,00. He said he fulfilled all his obligations in terms of the agreement. After the payment of the full purchase price they agreed that 1st defendant and his family would remain in occupation of the property until the end of December 2003. At the end of December he wanted to move into the property, 1st defendant changed goal posts and demanded more money saying the price of properties had gone up. A dispute arose and his wife went to the local Zimbabwe Republic Police and reported. He was in the United Kingdom at the time. 1st defendant's wife promised that they were preparing to move out. Thereafter 1st defendant became uncooperative resulting in the institution of these proceedings. He had however, taken occupation of the property. He confirmed that he also signed the "agreement"

produced by 1st defendant dated 10 December 2003. He, however, explained that this document was authored by 1st defendant as a means of tax evasion. This document reflected the purchase price of \$10 million. This was so because 1st defendant said he could afford capital gains tax required by Zimbabwe Revenue Authority (ZIMRA). So the document was for ZIMRA's "ears" only so to speak. He said that they signed this document a month after he paid the full purchase price in terms of the agreement. This is an agreement with a simulated intention. He said that 1st defendant did not refund him any part of the purchase price. The plaintiff does not seek to enforce the disguised

HB

55/06

transaction. He denied 1st defendant's allegations as reflected in the above extract of his plea. Under cross-examination he conceded that he in fact paid \$57 million as reflected by the receipts. He said he used to see 1st defendant's wife when he went to pay. I am satisfied that this witness gave his evidence well. He was not shaken under cross-examination. He explained the context under which the document purported to be an agreement sale for \$10 million signed. He readily conceded that it was intended to cheat ZIMRA. His testimony is straight forward and logical.

Annastatia Muchativuka

She is the wife of plaintiff. At the time of sale she was not yet married to plaintiff but part of the bride price had been paid for her. She said that in October 2003 she and her husband were looking for a house to buy. They would scan the classified section of newspapers and also made enquiries from people. That is how they came to know about the property subject matter of these proceedings. She by and large corroborated the testimony of the previous witness. She was present when the agreement of sale was signed. Most of the cash payments were made in her presence. After the payment of the full purchase price she said that 1st defendant and his family promised to vacate but kept on breaking the promises. I am also satisfied that she gave her testimony well. She confirmed what plaintiff said in a material way.

HB

55/06

Defendant's CaseJohn Staford Kamusinda

He is a fully qualified diesel fitter. He said that plaintiff approached him in response to an advertisement he placed in the newspaper in connection with the sale of the disputed property. He said plaintiff

approached him at his workplace and informed him that he did not want to buy the house as such, but told him the scheme as outlined in his plea above. He said the scheme was to create fictitious agreements of sale which the parties would sign and generate fake receipts. He said he enquired from plaintiff whether they would carry out these transactions without the services of a lawyer. Plaintiff told him not to worry as he was a lawyer. He said plaintiff paid him amounts of \$2 million, \$15 million and \$20 million in the presence of his wife. He would, however, approach him the absence of his wife to collect these amounts. He said although plaintiff had promised him \$75 million he never kept his promise. He, however, said that plaintiff later paid him \$500 000 by cheque. He said that on 10 December 2003 plaintiff came with a second agreement for \$10 million which he said would encourage these Nigerians to pay him an additional \$25 million (bringing a total owed to \$100 000,00). This money was not forthcoming. The plaintiff requested for the title deeds so that he could make copies thereof but he refused to hand them over. Thereafter plaintiff kept on requesting for them and plaintiff threatened legal action, a threat he eventually carried out. He could not convincingly explain why he was prepared to pawn his lifetime investment (i.e. the property) for a shoddy

HB

55/06

and sketchy deal he did not understand. This is so because plaintiff was a stranger to him. He did not even bother to find out the

source of the \$500 million. He could not explain why the agreement did not reflect \$500 million instead of the \$52 million. He said his wife signed as his witness in the transaction. I am satisfied that 1st defendant is an untruthful witness.

His story does not make sense at all and in some instances borders on undermining the court's intelligence. He was extremely shaken under cross-examination and I am satisfied that the only reason that he received the cash, issued receipts and signed the agreement is consistent with the existence of an agreement of sale between plaintiff and him. All this fanciful story about money coming from some Nigerians (in his pleadings it was one Nigerian but in court 1st defendant kept on using the plural) is a figment of 1st defendant's own imagination. The agreement of sale is legal and binding. The agreement is not tainted with illegality. Plaintiff met all his obligations in his agreement (i.e. he paid the full purchase price plus the penalty for the late payment of the final instalment). This agreement is enforceable as against the parties. The second disguised "agreement" of sale dated 10 December 2003 does not impact on the agreement of sale of 1 October 2003. The disguised transaction of 10 December 2003 was devised for the purpose of evading tax. In essence it is a dishonest transaction as the parties to it do not really intend it to have, *inter partes*, the legal effect which its terms convey to the outside world. The purpose of the disguise is to deceive by concealing what is the real agreement or transaction between the parties. This transaction is said to be in

fraudem

HB

55/06

legis, and is interpreted in accordance with what the real agreement or transaction between the parties- *Skjelbreds Rederi Als and Ors v Hartless Pty(Ltd)* 1982(2) SA 710 (A) at 732G; *Du Plessis v Joubert* 1968(1) SA 598 (A) and *Bird v Lawclaims (Pty) Ltd* 1976(4) SA 726(D) and 729. I am satisfied that from the credible evidence at my disposal, the real intention of the parties is contained in the agreement of sale signed on 1 October 2003.

In that agreement the parties have expressed themselves in language calculated without subterfuge or concealment to embody the agreement at which they arrived. They intended the agreement to be exactly what it purports.

Accordingly, it is ordered that:-

1. the 1st defendant be and is hereby compelled to transfer his rights and title in stand number 2613 Bulawayo North of Bulawayo Township also known as number 3 Harris Road, North End, Bulawayo to the plaintiff.
2. the Deputy Sheriff sign all necessary papers on behalf of 1st defendant should he fail to comply with 1 above within fourteen(14) days of the service of this order on him.
3. the 1st defendant to bear costs of this suit.

Ben Baron & Partners, plaintiff's legal practitioners

