

DEBRA MUKASA

Versus

PHIDELIS BEN DHLODHLO

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 21 & 24 FEBRUARY 2005 & 5 APRIL 2007

C P Moyo for the applicant

S S Mazibisa for the respondent

Opposed Application

NDOU J: This matter has been characterised by too many applications emanating from both sides. Most of these applications are of a technical nature and do not deal with the merits of the matter between the parties. The chronology of these cases is as follows. The parties will be referred to as applicant and respondent throughout for convenience sake. Under case number HC 3093/01 is application by the respondent against the applicant seeking to confirm a mutual cancellation of the agreement of sale (“the agreement”) between the parties in respect of stand number 4053/2 Magwegwe North Flats, Bulawayo (“the disputed property”). This application was dismissed for want of prosecution on 14 April 2003 through a chamber application in case number HC 708/03. Under case number HC 3163/01 is an application by the applicant against the respondent seeking an order confirming the agreement between the parties as being valid and binding as well as compelling the respondent to effect transfer accordingly. Under case number HC 1731/03 is an application by the respondent against the applicant seeking to set aside a judgment obtained by applicant on 4 July 2003 under case number HC 3163/01, which

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applicant did not cross reference case number HC 708/03 even though she was already aware that her application had already been dismissed. Put plainly, she obtained her order because she misled the court.

Under case number HC 79/04 is a chamber application by the applicant against the respondent seeking the dismissal of the respondent's application under case number HC 1731/03 for want of prosecution. This court granted this application on 13 January 2004. Under case number HC 1445/04 is a court application by the applicant against the respondent seeking the rescission of the judgment in HC 79/04. This application is still pending.

Under case number HC 3683/04 the respondent made an application to interdict his eviction by the applicant and under HC 3875/04 the respondent made an application to amend the provisional order as he had already been forcibly evicted. The amendment was granted on notice to the applicant who did not file opposing papers. When the respondent enforced the order obtained under case number HC 3683/04 as amended under case number HC 3875/04, the applicant then filed the current application under case number HC 271/05. This application is opposed. Realising that the parties have argued and re-argued, at great expense the aforesaid peripheral applications, I brought to the attention of the parties the need to bring this litigation to finality. Both parties share my concern and agreed that the way forward is to go straight to the merits of the case and do away with the peripatetic litigation.

At the centre of this dispute is the agreement of sale in which the respondent sold the disputed property to the applicant. The purchase price was agreed at \$270 000,00.

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The applicant paid a deposit of \$215 000,00 on signing. The balance of \$55 000,00 was to be paid by monthly instalments commencing 2 November 2001. The applicant was to take occupation of the disputed property by not later than 1 October 2001. The respondent made an application to the City of Bulawayo to consent to the cession.

Apparently the City of Bulawayo consented to the cession. All that was left was for the parties to go to City of Bulawayo Housing Department to finalise the cession.

According to the applicant, thereafter the respondent started evincing intentions of reneging from the agreement. This is disputed by the respondent. To start with, the respondent contrary to the provisions of the agreement, stated that he could only formalise the cession only if the applicant paid the outstanding balance immediately and not on agreed monthly terms. This is disputed by the respondent. The crux of the dispute is what transpired at the meeting of the parties on 27 September 2001.

Besides the parties, the respondent attended this meeting with his wife and Stanely Madakwa. The applicant was accompanied by two men. [She says they are her cousins] According to the respondent, the applicant showered him with insults, including the allegation that he was a crook who had sold the disputed property to three other buyers. Applicant also suggested that someone indicated to her that the price of the disputed property should be in the region of \$180 000 and not \$270 000 that the parties had agreed upon. The respondent averred that the applicant then

ordered him to pay her back the full deposit of \$215 000,00 as she had decided to buy a house and was no longer interested in the flat. Respondent averred that he then

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accepted the cancellation of the agreement at the behest of the applicant and undertook to pay back \$215 000,00, the next day. The respondent's case is that the applicant then agreed to come and collect the \$215 000,00 the following day. The parties then agreed to meet at the respondent's bankers, Zimbabwe Building Society for this purpose. The applicant did not come to the bank as agreed. He eventually collected the cheque from the bank and endorsed it in applicant's favour and handed it over to her but she refused to accept it. This was at the High Court. In short, his case is that the agreement was cancelled by mutual agreement at the said meeting. On the other hand, the applicant disputed that she and her two male cousins were in any way obstreperous at the above-mentioned meeting. She averred that no insults were hurled at the respondent. She averred that she and her cousins, were in fact pleading with the respondent to abide by the agreement after he had evinced an intention not to be bound by terms of the agreement by demanding the immediate payment of \$55 000,00 although the same was not due. At that date, the first instalment of \$5 000,00 was only due on 1 November 2001. The applicant averred that she did not accuse the respondent of having sold the disputed property to other persons. Neither did she level any accusations that the respondent had overpriced the disputed property. She disputed that she demanded the refund of the deposit that she had paid. Instead, she

averred that it was the respondent who insisted that he had cancelled the agreement and offered to refund her the money that she had paid. More importantly, she never sought the cancellation of agreement. She had always sought and still seeks to enforce the agreement. She averred that it was the respondent who had made up his

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mind that he no longer wished to abide by the agreement although he had no valid reason to resile from the agreement. She said it was the respondent who thereafter became bellicose, banging at her door, shouting insults and making threats to such an extent that she had to seek police intervention. From what I have just highlighted, it is clear that there is a material dispute of fact on the issue of the cancellation. Mr *Moyo*, for the applicant on the one hand submitted that I order parties to submit heads of argument on the substantive issue as a way of bringing the dispute to finality. Mr *Mazibisa*, for the respondent, on the other hand submits that the matter be referred to trial. I am in agreement with the latter view. The dispute between the parties can only be resolved by oral evidence of those who attended the meeting of the parties on 27 September 2001. This is the type of dispute of fact that cannot be resolved on the papers even if the court was to adopt a robust approach.

Accordingly, I refer the matter for trial with the founding papers and opposing papers standing in as the summons and plea respectively with costs being costs in the cause.

Majoko & Majoko, applicant's legal practitioners
Cheda & Partners, respondent's legal practitioners