

Judgment No. HB 5/05
 Case No. HC 2821/04
 X-Ref HC 1672/02 & HC 2782/04

1. ROSELYN WAVY TSHUMA

Versus

TENNYSON DHLAMINI

And

ZIMALL RELIANCE (PVT) LTD

And

JAMES, MOYO-MAJWABU & NYONI

And

THE REGISTRAR OF DEEDS

2. TENNYSON DHLAMINI

HC 2782/04

Versus

ROSELYN WAVY TSHUMA

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 16 SEPTEMBER 2005 & 11 JANUARY 2007

K I Phulu, for applicant

J Sibanda, for 1st respondent

R Moyo-Majwabu, for 3rd respondent

Judgment

NDOU J: This court, in HC 3506/04, ordered that the matters in HC 2821/04 and HC 2782/04 be argued at the same time. The two matters are inter-related. In case number HC 2821/04 the applicant, Roselyn Wavy Tshuma, seeks a rescission of an order of this court granted against her in case number 1672/02. Although she had filed papers including heads of argument, in that matter, she did not attend court when the application was heard, leading to a default judgment being entered against her. Her application was dismissed with costs on the higher scale. She is therefore, applying for rescission of the said default order through case

number

HC 2821/04. In the second matter HC 2782/04, the applicant is Tennyson Dhlamini. He applies against Roselyn Wavy Tshuma for an order evicting Roselyn Wavy Tshuma (and all those who occupy through her) from the dispute premises (in both matters) being number 2570 Cowdray Park, Bulawayo).

Background facts

The salient facts of this matter are that around May 1998 Tennyson Dhlamini acquired, through Zimall Reliance (Pvt) Ltd, stand 2570 Cowdray Park, Bulawayo. There was at that time a scheme in terms of which the Bulawayo City Council allocated residential stands in Cowdray Park to Zimall Reliance (Pvt) Ltd, which company was then supposed to develop the said stands into houses, find prospective buyers for the houses, which buyers were supposed to be on the City Council Housing Waiting List and provided such buyers were able to meet their financial obligations. Zimall Reliance (Pvt) Ltd would then introduce such buyers to a building society which would then fund the purchase of the houses on the security of a bond registered over the houses. Facts that are common cause or at least beyond dispute from the papers, show that after the said stand was allocated to Tennyson Dhlamini, he proceeded to apply for and obtained mortgage finance from Founders Building Society. In due course a bond was registered by Founders Building Society over the property. The papers also show that Tennyson Dhlamini was invited by the conveyancing legal practitioners Messrs James, Moyo-Majwabu & Nyoni to attend at their offices to sign all the transfer papers, which he did. The said legal practitioners were agents of the Bulawayo City Council and were acting on behalf of their said principal. The papers also show that on 11 June 1999 stand 2570 Cowdray Park was registered in Tennyson Dhlamini's name. After the property was registered in the

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name of Tennyson Dhlamini, it appears that Zimall Reliance (Pvt) Ltd sold the same property to one Ambrose Tshuma. The papers clearly show that the agreement of sale between Zimall Reliance (Pvt) Ltd and Ambrose Tshuma is dated 25 June 1999, i.e. about two weeks after the said property was registered in the names of Tennyson Dhlamini. The papers show that Ambrose Tshuma, nevertheless, took occupation of the property with his family but shortly thereafter he passed on. But, before he passed away, Ambrose Tshuma had commenced proceedings in this court under case number HC 2172/01 wherein he sought an order declaring him to have purchased the disputed stand. The papers also show that after his demise, his widow, Roselyn Wavy Tshuma re-commenced the same proceedings in her own name after she had been appointed executrix dative in Ambrose Tshuma's estate. It is in those same proceedings that Roselyn Wavy Tshuma failed to prosecute by not attending court on 2 July 2004.

In her application, Roselyn Wavy Tshuma, did not cite the Bulawayo City Council, but chose to cite their chosen agents as 3rd respondent. 3rd respondent's case is that they were acting on behalf of the Bulawayo City Council, their principal. Their principal, Bulawayo City Council were the owners of the disputed property. The Bulawayo City Council sold the said property to Tennyson Dhlamini for \$900. Thereafter, their principal instructed them to transfer the property into the names of Tennyson Dhlamini, which they did. There was no contractual relationship between them and Ambrose Tshuma. At the time of the transfer, 3rd respondent's case is that it was never instructed by its principal that the sale agreement between the principal and Tennyson Dhlamini had been cancelled. Further, 3rd respondent's case is that it was never advised by Zimall Reliance (Pvt) Ltd or Ambrose Tshuma of the agreement

they signed on 25 June 1999. It is, therefore, 3rd respondent's case that there was no error in the

transfer.

Application for rescission: HC 2821/04

It is trite law that in an application for rescission, there are two essential elements, namely, (a) that the party seeking rescission must present a reasonable and acceptable explanation for his/her default, and, (b) that on the merits that party has *bona fide* defence which, *prima facie*, carries some prospect of success – *G D Haulage (Pvt) Ltd v Munurugwi Bus Services (Pvt) Ltd* 1980(1) SA 729 (ZR, AD); *Chetty v Law Society Transvaal* 1985 (2) SA 756 (A); *Songare v Olivine Industries (Pvt) Ltd* 1988(2) ZLR 210 (S); *Bishi v Secretary for Education* 1989 (2) ZLR 240 (HC); *Ndebele v Ncube* 1992(1) ZLR 288(S); *HPP Studios (Pvt) Ltd v ANZ (Pvt) Ltd* 2000(1) ZLR 318 (HC); *Saitis and C v Fenlake* [2000] 4 ALL SA 50 (ZH) and *Khumalo v Mafurirano* HB-11-04.

The 1st and 3rd respondents have given the applicant the benefit of the doubt on this issue of failure to attend court on 2 July 2004. They have accepted that her failure to attend is attributable to the somewhat lax conduct of her legal practitioner.

Both, however, vehemently argue that the application for rescission should fail on the basis that on the merits, she has no *bona fide* defence which *prima facie* carries some prospect of success. I wish to consider these submissions in detail.

Defence on merits

I have already outlined the 1st and 3rd respondents' respective cases on the merits above. But in brief, they are saying that the agreement she is seeking to rely on was entered into after the property was registered in Tennyson Dhlamini's name. As such, at the time of the purported agreement between her late husband and Zimall

Reliance (Pvt) Ltd, the property belonged not to Zimall Reliance (Pvt) Ltd but to Tennyson Dhlamini. Zimall Reliance (Pvt) Ltd could not, therefore, either in law or in fact sell a property

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that did not belong to them. The sale agreement between Zimall Reliance (Pvt) Ltd and Ambrose Tshuma was in their view, *void ab initio*. The only remedy available to her was to sue Zimall Reliance (Pvt) Ltd. In her heads of argument in paragraph 14.3 and 14.4 there is an attempt to suggest that the agreement between Ambrose Tshuma and Zimall Reliance (Pvt) Ltd was entered/concluded prior 25 June 1999 but only put in writing on that date. It is still, however, not suggested that oral agreement was concluded prior 11 June 1999. This argument is not based on the applicant's case in her papers. This was never part of her case in the papers. In fact, in her founding papers in the application for rescission she attached her heads of argument in HC 1672/03 in support of her case on the merits as annexure "A". The merits of her defence are captured as follows:

"2.3 1st respondent (Tennyson Dhlamini), by his own admission and from papers ... failed to pay or produce proof that he would be able to pay the full price for the 5 roomed house. He had a shortfall of just under \$19 000,00 which he failed to pay, even by his own admission.

2.4 Following upon that, and on the 25th June 1999, 2nd respondent (Zimall Reliance (Pvt) Ltd) resold the property 2750 Cowdray Park, Bulawayo to applicant's late husband Ambrose Tshuma.

3. ...
4. It has quite clearly been established that 1st respondent having been unable to meet his full obligations regarding the purchase of 2570 Cowdray Park, that property was withdrawn from him and resold to applicant's husband ...
5. It is submitted, further, that this is a case where the first sale contract was revoked, and a second valid sale entered into ..."

As alluded to above, the property was registered in Tennyson Dhlamini's name in the deeds Registry. It is trite law that such registration in the deed registry is a matter of substance and not mere form – *Takapfuma v Takapfuma* 1994 (2) ZLR 103 (S) at

105 H-106A and *Charamba v Charamba & Anor* HB 31-05. Before Zimall Reliance (Pvt) Ltd could sell the property to Ambrose Tshuma, it had to properly resile from the agreement with Tennyson Dhlamini and have the property transferred from Dhlamini's name to its own. In this regard it has to be borne in mind that the right to resile from an agreement does not arise merely

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by virtue of the fact that a contracting party has failed to carry out an obligation under an agreement timeously and has received a valid notice of rescission. In addition, an essential requirement is that the *mora* must relate to a vital or important term of the agreement. In other words, a notice of rescission is of no legal consequence unless it relates to the failure to perform a vital or important term of the contract timeously. – *Sweet v Ragerguhara* 1978 (1) SA 131 (D); *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A); *The Mud-Man Empire (Pvt) Ltd t/ a Blue Chip Agencies v H Nechironga & Anor* HH-128-03; *Bhoprops Ltd v Levy & Anor* G-B 7-75 at p 12; *Aucamp v Morton* 1949 (3) SA 611 (AD) at 619; *Asharia v Palet & Ors* 1991 (2) ZLR 276 (SC) and *Zigwati v Munowapei & Anor* HB-80-06. In other words there is an earlier agreement whose rescission has not been established. The said earlier agreement has resulted in a transfer to the name of Tennyson Dhlamini. The said registration in the deeds registry has not been set aside. The subsequent agreement the applicant is relying upon cannot stand. Zimall Reliance (Pvt) Ltd cannot transfer the immovable property not registered in their name. Registration in the name of Tennyson Dhlamini is proof of ownership of the immovable property. That this is the legal position admits of no doubt. Given the above facts, even the alternative argument of the double sale scenario will come to the aid of the applicant. It is trite that as a general rule or a starting point, unless special circumstances, dictate otherwise, the first purchaser's

rights supercede those of subsequent purchasers – *B P Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd* 1964 RLR 7 (G); *Guga v Moyo* 2000(1) ZLR 458 (S) and *Sawyer v Chioza* 1999 (1) ZLR 2003 (HC).

I have some doubt on the applicability of the alternative argument in light of the property having been registered in the name of Tennyson Dhlamini. Be that as it may, even in such a scenario agreement of sale between Tennyson Dhlamini and Zimall Reliance (Pvt) Ltd is the first

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one and should supercede the one between Ambrose Tshuma and Zimall Rleiane (Pvt) Ltd.

Accordingly, the application for rescission has no merit.

Application for eviction: HC 2782/04

From the above findings Roselyn Wavy Tshuma has no legal basis to remain in occupation. She has already been given notice to vacate. In view of the above findings she has no legal basis to resist.

Accordingly, it is ordered as follows:

- 1) The application for rescission in HC 2821/04 be and is hereby dismissed with costs.
- 2) In HC 2782/04, it is ordered that the respondent, Roselyn Wavy Tshuma, vacate the premises situate at number 2570 Cowdray Park, Bulawayo within fourteen (14) days of this order, failing which, the Deputy Sheriff be and is hereby authorised to carry out the eviction of the respondent and all those who claim through her from such premises, with the respondent paying cost of the application.

Coghlan & Welsh, (in HC 2821/04 and respondent in HC 2782/04) applicant's legal practitioners
Job Sibanda & Associates, 1st respondent's (in HC 2782/04 and applicant in HC 2782/04) legal practitioners
James, Moyo-Majwabu & Nyoni, 3rd respondent's (in HC 2821/04) legal practitioners