

STANLEY SIBANDA

Versus

MAXWELL SININI SIBANDA

And

CITY OF BULAWAYO

And

DEPUTY SHERIFF

And

PEDIA MKWANANZI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 7 FEBRUARY 2009

G Nyoni for applicant
Ms N Dube for 1st and 4th respondents

Opposed Application

NDOU J: The applicant seeks the confirmation of the provisional order granted by this court [on 29 May 2006] in the following terms:

- “1. 1st respondent be and is hereby ordered to transfer house [stand] number 24628 Pumula South, Bulawayo within 10 days of this order to the name of the applicant.
2. Should 1st respondent fail to act as ordered in (1) above, the 3rd respondent be and is hereby mandated to sign all such papers that may need be signed at 2nd respondent’s office to facilitate the transfer of ownership of house number 24628 Pumula South, Bulawayo from 1st respondent’s name to that of applicant ...”

The salient facts of the matter are the following. On 8 February 2005 applicant approached 1st respondent in need of a residential stand, though he did not have a housing form i.e. he was not on Housing Waiting List. The 1st respondent is a building constructor. The applicant was sold stand number 24628 Pumula South, Bulawayo for \$13 000 000,00. The stand was acquired using the 1st respondent’s form. The applicant paid the 1st respondent to construct a dwelling house thereat for

which he charged \$18 000 000,00 which he duly paid. The applicant paid for the registration of the plan. Further, the applicant covered the costs of labour and purchased the necessary building materials. At a later stage, the 1st respondent disappeared from the construction site with no trace. One, Mr K Sibanda took over where the 1st respondent had left and did the roofing. The flooring and plastering remained unattended at the time of the hearing of this application. On 18 April 2006, the 1st respondent sold the stand, subject matter of this application, to the 4th respondent. This state of affairs came to the applicant's attention when a person tried to plaster the house and tube it for electrification purposes at the behest of the 4th respondent. At the offices of the 2nd respondent, the 1st respondent, had applied for local authority's consent to sale to the 4th respondent. The applicant reported the matter to the police and also instituted these proceedings.

It is clear that what we have here is a double sale situation. In *B P Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd* 1964 RLR 7 it was stated:

“In my view, the policy of the law will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be an invariable rule, but I agree with the view expressed by Professor McKerron that save ‘special circumstances’ the first purchaser is to be preferred.”

The position was restated in *Guga v Moyo* 2000(2) ZLR 458 (S). The Supreme Court held that where a seller fraudulently sells immovable property to two purchasers, the court has to decide between two innocent purchasers. When transfer has not been passed to either party, the basic rule of double sales is that the first purchaser should succeed in the absence of special circumstances. The first purchaser is treated as having the stronger claim and the second purchaser is left with a claim for damages against the seller. *In casu*, the applicant was the first purchaser and the *maxim qui prior est tempore potius est jure* applies. This is so because the applicant paid the full purchase price for the stand. He paid the 1st respondent in full the costs for building the dwelling on the stand. This was done up to roof level. The applicant in fact bought the building materials. The 4th respondent only emerged at plastering, plumbing and electrification stage. *Barros & Anor v Chimphonda* 1999(1) ZLR 58 (S). The balance of convenience favours the applicant. The 4th respondent bore the

burden of establishing a preponderance of equities in her favour. She failed to do so. Even then, she did not do much before she was stopped by these proceedings. The applicant acted in good faith. The City of Bulawayo, which is the 2nd respondent in these proceedings does not oppose the transfer of the stand from the 1st respondent to the applicant, notwithstanding the fact that the latter was not on the Waiting List at the time of agreement – *Dube v Khumalo* 1986(2) ZLR 103 (SC); *Gawu v Gwangwa & Ors* HH-137-95 and *Mapendauswa v Munyika & Anor* HB-110-03.

It follows that the ruling should favour the applicant because of the foregoing.

Accordingly, the provisional order granted by this court on 29 May 2006 be and is hereby confirmed in terms of the above draft with costs on the ordinary scale.

Majoko & Majoko, applicant's legal practitioners
Marondedze & Partners, 1st and 4th respondent's legal practitioners