

EVIIOUS JAMELA
versus
IVIS JIMU [In his capacity as Executor of Estate Late Patrick Jimu]
and
DAVID MASHUMBA
and
DIRECTOR OF HOUSING, HARARE CITY COUNCIL
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20, 21 & 22 January 2016

Civil trial – absolution from the instance

N.D. Munharira, for the plaintiff
F.M. Katsande, for the first and second defendants
No appearance for the third and fourth defendants

MAFUSIRE J: At the close of the plaintiff’s case, the first and second defendants, the only ones who had contested the plaintiff’s claim, applied for absolution from the instance. This was on the basis that the plaintiff had not adduced such cogent evidence as might reasonably persuade the court to grant judgment in his favour.

The dispute between the parties concerned a certain “*township*” house in the Harare suburb of Kuwadzana. The plaintiff claimed the house was his, he having “*bought*” it from the original “*owner*”, some twelve years or so before the second defendant’s purported purchase. The original “*owner*” was said to be one Patrick Jimu. He had since died.

On their part, the defendants claimed that the house belonged to the second defendant, he having “*bought*” it from the first defendant, the latter, in his capacity as the heir and executor to the Late Patrick Jimu’s estate. The defendants said, in their pleadings, and through cross-examination by their counsel, that at the time of the second defendant’s purchase, there had been no encumbrance on the property, or anything to suggest, or place anyone on their guard, that the house could have been “*bought*” by the plaintiff. Both sides

were agreed that the house was, at the time of the trial, “*registered*” in the name of the second defendant.

The substantive relief sought by the plaintiff, apart from an order of costs against the first and second defendants, was a reversal of the “*transfer*” from the second defendant’s name, and an order compelling the first defendant to sign all the “*transfer*” papers into plaintiff’s name, failing which the third defendant should be compelled to “... *facilitate the cession of the property* ...” to the plaintiff. The third defendant was cited as the representative of the local authority, the real owner of the property.

The first and second defendants’ plea, in substance, and in my own words, was that the plaintiff had not complied with his alleged agreement of sale with the Late Patrick Jimu, in that there had been no proof of payment of the purchase price, either in terms of that agreement, or at all; that for close to twelve years, the plaintiff had slept on his rights and had only woken up much later, to take advantage of the demise of Patrick Jimu when the second defendant had, through the first defendant, legitimately purchased and taken cession of the rights, title and interest in the property. The defendants prayed for the dismissal of the plaintiff’s claim with costs.

Right at the outset, I remonstrated with the plaintiff’s counsel for the apparent misconception and use of the wrong terminology in the description of the purported rights or interest of the parties in the property. I drew attention to my judgment in *Brighton Mberi v Savious Mbewe & Anor*¹ and to the cases referred to therein.

In the legal sense, none of the parties had “*bought*” any real rights in that house. Neither the Late Patrick Jimu nor his heir and executor, the first defendant, had “*owned*” it. The house had not been “*registered*” in the second defendant’s name. It belonged to the City of Harare. All that the rival claimants, and the respective “*sellers*”, had endeavoured to do, had been to purchase/sell the rights and interest in the property. The second defendant had merely obtained a cession of the rights and interest of the estate Late Patrick Jimu.

It seems to me that the 1992 complaint by McNALLY JA in *Gomba v Makwarimba*², a case that I cited in *Mberi*³, has not quite reached home yet. I repeat it:

“As so often happens, the parties have used the word ‘sale’ to describe what was in reality a cession of rights, since the house actually belongs to the Chitungwiza Town Council.

¹ HH 420/15

² 1992 [2] ZLR 26 [SC], at pp 27 - 28

³ At p 2 of my cyclostyled judgment

.... It is unfortunate that legal practitioners persist in ignoring the distinctions between sale and cession of rights in these cases, both because there are many such cases and because there are many such distinctions.

In this case the respondent was not the owner of the disputed immovable property but merely a ‘lessee-to-buy’. The contract in terms of which the respondent acquired and held her rights in the property, and which defined her rights in the property, was not before the Court. Nor was the owner cited as a party.”

In the present case, although the owner of the property was cited, the rent-to-buy agreement was not produced. But it was common cause that the property had been on a home-ownership- scheme with the City of Harare.

The plaintiff’s case, told by himself, was this. On 19 May 1998 he and the Late Patrick Jimu had executed an agreement of sale. The document was produced as exhibit 1. In the preamble, it said Patrick Jimu was the “*registered owner*” of certain title, rights and interest in the property, with no title deeds, but with a certificate of occupation. In terms of it, Patrick Jimu had sold, and the plaintiff had bought, the property for \$80 000. It was common cause the currency of the transaction was the now defunct Zimbabwean dollar.

The plaintiff would pay a deposit of \$75 000 on the day of the agreement. The balance of \$5 000 would be paid on or before 30 July 1998. The plaintiff would take vacant possession of the property either on 30 July 1998, or on “*transfer*”, whichever would be sooner.

In his evidence, the plaintiff said he did pay the \$75 000 deposit on the day of signing. There was much fire-works and heat generated on how the plaintiff had paid that amount. In his summary of evidence, which, incidentally, he had supplemented twice, the plaintiff had written that he had paid this amount with a “bearer cheque” drawn in the name of Patrick Jimu. He had further written that the cheque had been drawn from a micro-finance company called UDC Limited. In his evidence, he said the cheque had been an open cheque drawn in favour of the Late Patrick Jimu. He said the cheque was unavailable or untraceable because UDC Limited had become defunct.

Mr *Katsande*, for the first and second defendants, objected to the plaintiff’s evidence on the cheque as being inadmissible, allegedly not being the kind of **first-hand hearsay evidence** contemplated by s 27 of the Civil Evidence Act, [*Cap 8:01*], particularly subsection [3][b] thereof. Either the plaintiff produced the cheque itself, or his evidence on it should not be led, Mr *Katsande* charged.

Section 27 of the Civil Evidence Act reads:

“27 First-hand hearsay evidence

- (1) Subject to this section evidence of a statement made by any person, whether orally or in writing or otherwise, shall be admissible in civil proceedings as evidence of any fact mentioned or disclosed in the statement, if direct oral evidence by that person of that fact would be admissible in those proceedings.
- (2) Evidence of a statement referred to in subsection (1) shall be admissible even where the person who made the statement is called as a witness in the proceedings concerned.
- (3) If a statement referred to in subsection (1)-
 - (a) is not contained in a document, no evidence of the document shall be admissible unless it is given by a person who saw, heard or otherwise perceived the statement being made;
 - (b) **is contained in a document, no evidence of the statement shall be admissible except the document itself, or a copy of the document if such copy is admissible in terms of this Act or any other law.** [emphasis by Mr *Katsande*]
- (4)
- (5)

I overruled Mr *Katsande's* objection. I considered that he had been made it prematurely. The plaintiff was still leading evidence on the circumstances of the cheque.

Surprisingly, despite my overruling the objection, Ms *Munharira* seemed to be in some inexplicable difficulty concerning the plaintiff's evidence on this cheque. The reason for this only became apparent right at the end of the plaintiff's case, when I was putting questions to him to clarify certain grey areas in his evidence which had not been clarified by cross-examination or re-examination. I shall revert to this shortly.

On this \$75 000 cheque issue, the plaintiff gave the impression that either he himself had handed it to the Late Patrick Jimu, or that he had witnessed it being handed over. He said the cheque had been given in the presence of, or by, his then legal practitioners. His proof that the Late Patrick Jimu had indeed received it, was that his life style had dramatically changed. Among other things, he had acquired motor vehicles. The plaintiff attributed it to the proceeds of the cheque. Mr *Katsande* was unimpressed.

The plaintiff's other proof that the Late Patrick Jimu had received that cheque was that he [the plaintiff] had eventually obtained vacant possession of the house. He had gone on to enjoy peaceful and undisturbed occupation for an unbroken period of fourteen years. However, it subsequently transpired that neither he himself nor members of his immediate family had ever lived at the house. He claimed he had occupied the house through a younger

brother, one Never Siwera, and some two other tenants. This was seriously challenged in cross-examination, it being alleged that Never Siwera had, in fact, been the Late Patrick Jimu's tenant whom the first defendant had "inherited" and who the second defendant had also subsequently "inherited". The second defendant had eventually evicted Never Siwera on account of his failure to pay rent, in breach of an order from the Rent Board, which had been registered with the court. The plaintiff confirmed Never Siwera's eviction at the instance of the second defendant.

As Ms *Munharira*, leading the plaintiff's evidence-in-chief, seemed about to leave the point about the \$75 000 cheque, I drew her back to it since Mr *Katsande*'s objection was still alive. She readily conceded that the plaintiff's evidence on that aspect was inadmissible and that the objection could be sustained. That was even before what the plaintiff had gone further to disclose much later in his evidence, when I was putting questions to him. He conceded that he had omitted to disclose that he had never been present when the \$75 000 cheque had allegedly been passed onto the Late Patrick Jimu, but that it had been his wife who had delivered it, albeit in the presence of his former legal practitioners. Surprisingly, the plaintiff was not calling his wife to testify. He said the particular lawyer who had witnessed the handing over of the cheque had since died. That, to me, explained Ms *Munharira*'s apparent discomfort. The whole of plaintiff's evidence on that point was inadmissible hearsay. Ms *Munharira* must have sensed it.

The next bit of the plaintiff's evidence was that after the Late Patrick Jimu had received the deposit of \$75 000 and had himself taken vacant occupation of the house through Never Siwera and the tenants, Patrick Jimu had vanished. Only in July 1999 had he then bumped into him by chance. To persuade him to agree to effect "*transfer*" he had paid him the balance of \$5 000 by a bank cheque drawn on his account with the Central Africa Building Society [*CABS*]. However, that cheque was also unavailable. It was also no longer traceable. But CABS, on application by himself, had provided a bank statement showing, among other things, a withdrawal of \$5 000 on 27 July 1999. Amid vehement objection by Mr *Katsande*, I allowed the production of the alleged bank statement. There were further fireworks on it.

In cross-examination, it turned out that the plaintiff had made no such withdrawal in July 1999. In fact, there had been several withdrawals of lots of \$5 000. The closest withdrawal of \$5 000 to July 1999 had been made in January 1999, i.e. some five months before. The plaintiff claimed that that withdrawal in January 1999 had been the one the

proceeds of which he had used to pay off the balance of the purchase price. Asked about the discrepancy on the dates, he said he had merely been admitting to such dates as were being read out by his counsel.

The plaintiff conceded that if he paid the Late Patrick Jimu only in July 1991, he would have been in breach of the agreement of sale which had required that this balance be paid on or before 30 July 1998.

The plaintiff also conceded that his alleged payment, way after the deadline had expired, would have been contrary to the other clauses of the agreement that provided *inter alia* that the written agreement was the entire agreement between the parties and that no variation of it would be of any force or effect unless reduced to writing and signed.

The rest of the plaintiff's evidence was that upon his giving the Late Patrick Jimu the balance of \$5 000, they had gone together to the City of Harare's council offices for the change of ownership. However, they had hit a snag. The council officials would not agree to effect transfer unless Patrick Jimu produced certain documents, particularly his late wife's death certificate. This had not been done. Patrick Jimu had then disappeared again. The plaintiff later learnt that he had died in 2001.

The plaintiff conceded that he had done nothing to enforce his rights over the property. But his explanation was that he had been awaiting advice from his lawyers.

The plaintiff said that in or about 2010 he learnt that the Late Patrick Jimu's estate had been wound up and that the first defendant had been appointed the heir and executor. He later heard that the first defendant had purported to sell the house to the second defendant. He applied to re-open the Late Patrick Jimu's estate to enable him to present his claim herein. This application had been granted. The plaintiff also said that he had at one time or other filed an urgent chamber application to restrain the second defendant from proceeding with the renovations to the house. No further details of this application were given.

After his evidence, the plaintiff's closed his case. Mr *Katsande* applied for absolution from the instance. He relied mainly on the serious contradictions in the plaintiff's testimony and the paucity of his evidence on the alleged payment by him of the purchase price, especially given that the onus lay on him and that this, to his knowledge, was the bulwark of the first and second defendants' defence.

In her written submissions in response to the application for absolution from the instance, Ms *Munharira* argued that the inconsistencies in the plaintiff's testimony should not be held against him and, certainly, should not blind the court to the need to look at that

evidence holistically, especially given that the events in question had occurred a long time ago. She said there was no doubt that the plaintiff had paid the purchase price in return for which he had been given vacant possession of the property by the Late Patrick Jimu.

However, Ms *Munharira* went on to submit that in view of the fact that the City of Harare had apparently not consented to the sale, and in view of the weight of authorities on the point, as cited in *Mberi*, she felt constrained to concede, as an officer of the court, the manifest illegality of the agreement of sale between the plaintiff and the Late Patrick Jimu.

Ms *Munharira's* concession was well made. The usual rent-to-buy agreements contain clauses expressly prohibiting the cession or assignment of rights under them, or the parting with the rights of occupation of the property, or the alienation of the property without the prior written consent of the local authority, the real owners of the property. The law on these so-called township houses is settled. It is this:

“It is trite that where a contract of lease contains prohibitions against sub-letting, cession or assignment, either absolutely or without the lessor’s consent, a sub-lease, cession or assignment, entered into without title to do so, is valueless and confers no rights on the third party; for he can acquire no greater rights in the property than the lessee has. A further obvious consequence of the prohibition is that the court will refuse to enforce the sub-lease, cession or assignment, at the instance of the lessee. To do otherwise would be to confer a right upon the lessee not given by the lessor.”

“Plainly enough in the present case the content of the lease-to-buy agreement was ... invalid because of a failure of the parties to it to request and obtain the written consent of the Council – a failure that related to a contractual formality.”

per GUBBAY CJ in *Pedzisa v Chikonyora*⁴. See also *Hundah v Murauro*⁵; *Magwenzi v Chamunorwa & Anor*⁶; *Guta v Chimbunde & Anor*⁷; *Nkomo v Mujuru*⁸ and *Jangara v Nyakuyamba & Ors*⁹.

The plaintiff sued on an agreement that was unenforceable. The City of Harare had withheld its consent to the cession. Therefore, he was non-suited. On that basis there was no evidence upon which a court might reasonably find for the plaintiff. There was no need to put the defendants on their defence.

⁴ 1992 (2) ZLR 445 (SC), at pp 453 - 454

⁵ 1993 [2] ZLR 401 [SC], at pp 403 - 404

⁶ 1995 [2] ZLR 332 [S], at pp 335 - 336

⁷ HH 194-94

⁸ 1997 [1] ZLR 155 [H]

⁹ 1998 [2] ZLR 475

I would come to the same conclusion even on the generic evidence by the plaintiff. It was replete with irreconcilable differences. His claim was some kind of a claim for specific performance against the estate of the Late Patrick Jimu. Even assuming that the estate had the capacity to cede its rights and interest in the property to the plaintiff in the face of the City of Harare withholding its consent, the plaintiff had to show that he had performed his side of the contract. He failed to do so. The defendants said he had not paid the purchase price wanted by Patrick Jimu and that this explained his inexplicable lack of interest in the property. This lack of interest was shown by not only his indifference to assuming personal occupation, but also by his doing nothing for close to twelve years to take cession. The claim that he took occupation through a younger brother was heavily disputed. He failed to rebut the defendants' assertion that Never Siwera had presented himself as the defendants' tenant. He had subsequently been evicted following a certificate from the Rent Board, which, incidentally, the plaintiff consistently referred to as the "Lodgers' Court".

Therefore, if there was no evidence of performance of his side of the contract, the plaintiff could not claim specific performance.

The test for absolution from the instance at the close of the plaintiff's case is well known. It has been expressed in a number of ways in a number of cases on the point: see *Corbridge v Welch*¹⁰; *Gascoyne v Paul and Hunter*¹¹; *Theron v Behr*¹²; *Supreme Service Station [1969] [Pvt] Ltd and Goodridge [Pvt] Ltd*¹³; *Erasmus v Boss*¹⁴; *Gordon Lloyd Page & Associates v Rivera*¹⁵; *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor*¹⁶ and *Bailey NO v Trinity Engineering [Pvt] Ltd & Ors*¹⁷. But I prefer the formulation of the test by HARMS JA in *Gordon Lloyd Page & Associates, supra*. He put it this way¹⁸:

"The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G – H in these terms:

'... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would

¹⁰ (1892) 9 SC 277;

¹¹ 1917 TPD 170

¹² 1918 CPD 443

¹³ 1971 [1] RLR 1

¹⁴ 1939 CPD 204

¹⁵ 2001 [1] SA 88 [SCA]

¹⁶ 1998 [2] ZLR 547 [H]

¹⁷ 2002 [2] ZLR 484 [H]

¹⁸ 2001 (1) SA 88 (SCA), at p 92

finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2) 1958 (4) SA 307 (T)'

This implies that a plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no Court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37 G – 38A; ...)"

In the present case there can be no question that the defendants are entitled to be absolved from the instance.

Mr *Katsande* submitted that the costs should follow the result. Ms *Munharira* prayed that each party should bear their own costs. Her reason for this was that the plaintiff was an aided person who, as such, is absolved from paying costs in terms of s 18 of the Legal Aid Act, [*Cap 7: 16*]. Section 18 of this Act provides that notwithstanding any other law, a court shall not award costs against an aided person.

Unfortunately for the defendants, they cannot recover their costs. But for the provisions of the Legal Aid Act, I would have ordered the plaintiff to pay the first and second defendants' costs. In my view, the plaintiff was reckless. He had slept on his rights for a very long time. When he had eventually woken up he was rather careless in the manner he presented his evidence in court. He remained head strong despite the warning shots the defendants had fired in their plea.

In fact, there was one aspect of the matter which the defendants inexplicably abandoned, but which, in my view, tended to further demonstrate the plaintiff's lackadaisical approach to this whole matter. It was that of prescription. What happened was that after this court had re-opened the estate of the Late Patrick Jimu to enable the plaintiff to launch his claim herein, he had been given ten days of that order to make his claim. It was Ms *Munharira* who had moved for the order in motion court. But it was not until some three or so days after the deadline, that the plaintiff had eventually issued his summons. Among other things, the defendants pleaded prescription. In his replication, the plaintiff argued that although the order had been granted on the day of the motion court, it was not until some days later that it had been issued as evidenced by the registrar's date-stamp. That seemed lame. The defendants persisted with the point right up to the pre-trial conference stage where it was listed as the first issue for trial. However, when the trial commenced, Mr *Katsande*

expressly abandoned it even though Ms *Munharira* had resigned herself to dealing with it. Whatever the merits of that dispute, the plaintiff had undoubtedly been dilatory.

Be that as it may, the plaintiff is immune from any order of costs. In the circumstances, the application by the first and second defendants for absolution from the instance at the close of the plaintiff's case is hereby granted.

22 January 2016



F.M. Katsande & Partners, plaintiff's legal practitioners
Legal Aid Directorate, first and second defendants' legal practitioners