SONNY FUNDISI
and
BETTINA FUNDISI
versus
NICHOLAS MHENE

HIGH COURT OF ZIMBABWE
CHITAKUNYE & NDEWERE JJ
HARARE, 2 July 2015& 28 January 2016

Civil Appeal

Ms *G. Mahlangu,* for the appellants
A.F Majachani, for the respondent

NDEWERE J: The background of this appeal is that on 10 October, 2012 the respondent who was the plaintiff in the court *a quo* issued summons for the eviction of the appellants who were the defendants in the court *a quo* from a property known as stand 22 Tana B, Zvamatenga Resettlement, Shurungwi. The appellants entered an appearance to defend and filed the following plea on 29 April, 2013.

> "1. Defendant avers that the plaintiff's claim has prescribed.
>
> 2. The defendant avers the cause of action is based on an agreement of sale purportedly entered in 2005.
>
> 3. The plaintiff only issued summons for eviction in 2012. This was well out of the 3 years required by the Prescription Act, [*Chapter 8:11*] s 15 thereof.
>
> Wherefore the defendant prays that the plaintiff's claim be dismissed with costs.
>
> Alternative Plea on the Merits
>
> 1. The defendant denies ever selling the homestead and plot to the plaintiff
>
> 2. The defendant aver that all the documents filed by the plaintiff are either forged or fraudulent documents as the defendants never entered into a sale agreement with the plaintiff.
>
> 3. The defendant will aver that the plaintiff entered into a lease agreement with the defendant to enable the plaintiff to occupy the land in question.

4. The defendant will aver that through his machinations the plaintiff then altered the position so as to make him a purchaser yet he was merely a tenant at the plot.

5. The defendant avers that because the documents are forged, the plaintiff does not have a cause of action against the defendant at all.

Wherefore the defendant prays that the plaintiff's claim against the defendant be dismissed with costs".

The respondent as the plaintiff in the court *a quo* persisted with his claim against the appellants who were the defendants. The following issues were referred to trial.

1. Whether or not the claim had prescribed
2. Whether or not the plaintiff was entitled to evict the defendants.

The matter went to trial on 20 August, 2013 and at the end of the trial on 28 August 2013 the magistrate ruled in favour of the plaintiff, who is now the respondent. Pursuant to the magistrates' decision, the respondent evicted the appellants from the property in dispute.

The appellants noted an appeal against the whole judgment by the learned magistrate. The following were the grounds of appeal:

"1. The court *a quo* erred and misdirected itself in finding that the appellants sold their immovable property to the respondent.

2. The court *a quo* further erred and misdirected itself in finding that the respondent's witnesses gave a correct testimony on the case. The Councillor and Chairman did not give evidence regarding the sale of the property but only said they went to the council offices wherein it is said first defendant surrendered his property to the respondent. That is not proof of sale.

3. The court a quo further erred in finding that the respondent is the one who issued summons for eviction therefore it showed that the appellants sold their immovable property.

4. The court *a quo* further erred and misdirected itself by finding that effecting improvements on the land meant that the respondent bought the property. The learned magistrate did not appreciate that a tenant can also make improvements on rented land.

5. The court *a quo* further erred and misdirected itself by totally disregarding the contents of the alleged agreement of sale. The said agreement of sale was not signed by the appellants and it does not meet the requirements of an agreement of sale. There is no mention of the subject matter which is being sold and when and how the purchase price would be paid".

The appellants prayer was that the judgment of the court a quo be set aside and substituted with a dismissal of the respondent's claim for eviction in MC 1595/12, with costs. The respondent contested the appeal.

The appellants and the respondent filed heads of argument in support of their positions. On the day of the appeal hearing, both parties addressed the court orally. The court considered both the written and oral submissions.

It is common cause that the appellants agreed that the respondent would occupy Plot No. 22, Zvamatenga Resettlement Tana B, Shurugwi and use the land, buildings and fields from 2005. In exchange, it is common cause that the respondent immediately paid the appellants partly in cash up to $20 million and by exchanging with twenty or more bags of fertilizers. It is common cause that the respondent immediately took over the plot on 3 July, 2005. He successfully did some farming on the plot which led to a field day being held on the plot the following year, 2006. The respondent also improved the building structures on the plot, extended the house, fenced the homestead, fenced the fields, drilled a borehole and constructed a water tank. It is common cause that the respondent was in peaceful possession of the plot from 2005 to 2012, when the first appellant came back and started demanding the plot back. The only issue in dispute is whether the respondent occupied the plot from 2005 to 2012 as a purchaser and new owner of the plot or as a mere tenant.

The respondent adduced evidence to show that he had bought the plot while the appellants argued that he was just a tenant on the plot.

The plaintiff's evidence was that he bought the plot and shop. He said the price was Z$50 million, He said he paid the full purchase price in cash and fertilizers. He said after discussions with the appellants, he reduced the agreement into writing and he signed the agreement as purchaser while the second appellant signed as the seller. He tendered the agreement as an exhibit (exh 1). The agreement which is on p 75 of the record has the heading. "Stand and Shop Developments". It is dated 3 July, 2005, the date which is accepted by the appellants as the date they discussed and agreed on the takeover of the plot by the respondent. The total purchase price is given as $50 000 000.00. The initial deposit is given as 20 bags of fertiliser. The cash required is given as $ 30 000 000.00. A cash amount of $20 000 000.00 is indicated to have ben paid on 3 July, 2005 and the balance of $10 000 000.00 was to be paid at the end of July. The remaining amount was to be paid as and when resources permitted. Thereafter, the agreement was signed by N. Mhene as purchaser and by Zvitambo as seller. Khumalo signed as a witness.

On p 48 of the record, the second appellant confirms that after discussions on 3 July 2005, the respondent wrote an agreement, he signed and he too signed. The only contradiction is that he said the purpose was to rent. On the same page he also confirms being paid some money.

Page 48 para 3:

> "He then produced bearer cheques. He then counted the money and gave it to my wife. My wife gave me the money. I counted the money and I gave it to my wife"

His wife the recipient of the money, correctly told the court that the cash they were given on that day was ZW$20 million dollars. On the same p 48 second appellant confirms that the respondent took occupation of the plot in July 2003 and he started ploughing the fields in October 2005 and he had a field day in 2006. On the first paragraph of p 48 of the record, second appellant confirmed being given 30 bags of compound D fertiliser which was delivered to Guinea Fowl before 3 July, 2005.

> "He stated he was first to give us fertilizer. He first ferried the fertilizers to Guinea Fowl. There were 30 bags of compound D fertiliser. He then gave a date to go again to Kwekwe and collect the balance"

So on p 48 of the record, there is evidence from the second appellant which corroborates the agreement which was written about the cash payment and the payment through fertilisers.

As regards the seller's signature on the agreement, on p 49 of the record about the middle of the page, the second appellant's evidence was that the signature belonged to his late father who passed away in 1998.

> "Q: The signature on the seller is said to be yours?
> A: The signature belongs to my late father who passed away in 1998.
> Q: where did plaintiff get that signature?
> A: He can explain where he got it from."

Still on the signature on the agreement, from p 54 to 55 of the record, the second appellant confirms using the name Zvitambo, which is the name written underneath the signature. He says his children use that name when signing. He confirms that the signature itself reveals the name SZ Fundisi, which is his name. On the second from last question on p 55, he was asked,

> "Q: The Signature bears your two initials, SZ Fundisi?
> A: I do not know where this came from.
> Q: You can't allege that it's your father's signature when it's written SZ Fundisi.
> A: What are you saying?"

The improbable explanation that the signature on the agreement of 3 July, 2005 belonged to his father who died in 1998, coupled with the second appellant's admission that the signature has his name SZ Fundisi, clearly shows that the second appellant is the one who signed the agreement of sale, exh 1, as a seller, while respondent signed as a purchaser. His

father could not have risen from the dead to come and sign exh 1. The court therefore agrees with the court *a quo*'s finding that there was an agreement of sale between the appellants and the respondent.

On the other hand the appellants did not produce any evidence of the lease agreement which they alleged. On p 43 of the record second from last question the second appellant was questioned as follows:

"Q: When was the last time he paid rentals. You allege he was your tenant?
A: He never paid after he gave me the fertiliser."

Page 44, 3rd question,

"Q: If he refused to move from the premises, why did you not take any action?
A: He is the one who took action. We also want to take action."

On p 59 of the record 8th question the first appellant was also questioned about the lease.

"Q: In your plea you said you were renting the property to plaintiff?
A: Yes
Q: How much were the rentals?
A: One tonne of maize or equivalent sum in money.
Q: When was the last time you received rentals from plaintiff?
A: He only paid me once.
Q: What did you do about it to assert your rights?
A: I did not do anything. My wife went to Kwekwe to confront plaintiff.

Page 60 third question,

"Q: Is it logical that you did not receive rentals for a period of 7 years and then you fail to take legal; action?
A: I thought plaintiff was to vacate the premises."

The above responses by both the first and second appellants reveal that the appellants never leased the plot to respondent. They sold it. The one tonne of maize referred to was the lease arrangement with the previous occupier; and not the respondent, that is why there is no evidence of any tonne of maize being paid to the appellants by the respondent at all in this case. The fact that appellants did not take any action throughout the 7 years despite the alleged fundamental breach of the lease agreement is confirmation that there was never a lease agreement which was breached by the respondent. This means the only agreement, in all probability, was the sale agreement.

The evidence by other witnesses corroborated respondents' evidence that he bought the homestead and took it over as owner. The second witness for the respondent was Tedious

Marenje, a Councillor. His evidence was that on 29 December, 2005 he was waiting for a bus to go home at the bus stop when he was approached by the chairperson for Village B and the second appellant who invited him to accompany her to the council office where levies are paid. They proceeded to the office of the responsible clerk, one Mrs Chipere. The witness learnt that the appellants had sold their stand and was actually disturbed by the appellant's decision and asked second appellant why they had done that when they had children. He said when they approached the clerk, she said the second appellant should write a letter as evidence of the handover of the stand. The letter was written in the presence of the witness who stamped it. The letter was identified by the witnesses and tendered as exh 2. He said the levy arrears on the stand were cleared by respondent who was represented by his son on that day.

The third witness was the Chairman of Village B, Mr Leonard Machisa. His evidence was similar to that of the second witness.

The important evidence of the handover of the stand at the council offices was never really disputed by the appellants during cross examination, so it remained unchallenged.

The handover note itself, exh 3, was very clear. It informed council that they would be dealing with the respondent "forever and ever" (translated from "muchave naye narini narini."). The note did not say council would deal with the respondent during the duration of a lease agreement, but forever and ever.

As regards the signatures on exh 3, the second appellant admitted that the signatures were the same as his on p 61 of the record, second from last question;

> "Q: Comment on the signatures on exh 1 and 3 whose signatures are those?
> A: These signatures are the same as mine. The other one there is Zvitambo underneath."

The above is a final admission by the second appellant that he signed exh 1, the agreement of sale and exh 3, the handover note.

In view of the above, our conclusion is that there is no merit in the appeal. The appeal is therefore dismissed, with costs.

Bherebende Law Chambers, appellant's legal practitioners
Danziger and Partners, respondent's legal practitioners