

GETRUDE SIHLE SIBANDA
versus
LINDA KATSANDE
and
KIZITO ZVAVAHERA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 24, 25, 26th July 2017 & 31 January 2018

Civil Trial – Application for absolution from the instance

Ms B Mtetwa, for plaintiff
SM Hashiti with K Kachambwa, for first defendant

TAGU J: The plaintiff issued summons against the defendants for an order directing that the first and second defendants sign all the transfer papers to facilitate transfer of Stand No. 4306 Fountainbleau Estate into plaintiff's name upon granting of this order. That in the event of non-compliance with the order, the Deputy Sheriff be and is hereby authorized to sign the necessary transfer papers with the third defendant being directed to accept same and transfer the immovable property from the first and second defendants to the plaintiff. Lastly that the first and second pay costs of suit on an attorney and client scale.

Upon being served with the summons the second defendant filed a consent to judgment and elected to give evidence on behalf of the plaintiff.

Only the first defendant filed an appearance to defend the matter. The first defendant's plea is that she did not enter into any agreement with plaintiff in October 2007. She averred that the agreement with plaintiff was in or about December 2007 and was for a price of Z\$20 000 000 000.00 (Twenty Billion Zimbabwean Dollars only) with a further agreement to declare only Z\$12 000 000 000.00 (Twelve Billion Zimbabwean Dollars) for purposes of Government Stamp Duty as payable by the plaintiff on transfer and for Capital Gains Tax as payable by the first and second defendants. She further denied ever receiving any funds from the plaintiff and averred that as the

contract was tainted with illegality it cannot be enforced by either party. She alleged that she cancelled the agreement on the basis of illegality and on the basis of discovering that the plaintiff was acting in common purpose with certain third parties to defraud the first defendant of all and any benefit due to her under the illegal contract afore-pleaded.

At the pre-trial conference the following were agreed as constituting the issues for trial-

1. Whether the plaintiff and first and second defendant entered into a valid agreement of sale in respect of the property known as NO. 4306 FOUNTAINBLEAU TOWNSHIP OF FOUNTAINBLEAU ESTATE MEASURING 185 SQUARE METRES ALSO KNOWN AS NO. 4306 KUWADZANA 5, HARARE.
2. In the event that the agreement is found to be valid and enforceable, whether the plaintiff fully discharged all her obligations in terms of the agreement of sale.
3. In particular, whether the first defendant was paid the full consideration due to her.
4. Whether the plaintiff is entitled to the relief sought, or any other alternative.
5. ADMISSIONS MADE

That the first defendant admits her signature appearing on the last page of Annexure "A" to the plaintiff's summons and declaration.

5.1 That all payments made by the plaintiff were in United States dollars.

5.2 That the second defendant has consented to judgment in terms of the Consent filed of record on the 2nd August 2016.

The plaintiff and the second defendant gave evidence in support of the plaintiff's case. At the closure of their case the first defendant mounted this application for absolution from the instance.

The test to be applied in an application for absolution from the instance was enunciated in a number of cases and is well settled in our jurisdiction and else- where. In the case of *Gascoyne v Paul & Hunter* 1917 TPD 171 at 173 it was said-

"At the close of the case for the plaintiff, therefore, the question which arises for the consideration of the Court is, is there evidence upon which a reasonable man might find for the plaintiff? And if the defendant does not call any evidence, but close his case immediately, the question for the Court would be, 'Is there such evidence upon which the Court ought to give judgment in favour of the plaintiff?'"

The same principle was stated by the appellate Court in *Oosthuizen v Standard General Versekeringsmaatskappy Bpk* 1981(A) at 1035H -36A as follows:

“If at the end of the plaintiff’s case there is not sufficient evidence upon which a reasonable man could find for him or her, the defendant is entitled to absolution.”

However, in *Gordon Lyod Page & Associates v Rivera & Another* 2001 (1) SA 88 at 92 the court said that:

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

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

See also *Standard Chartered Finance Zimbabwe Ltd v Georgias & Anor* 1998 (2) ZLR 547 at 552-553.

Applying the above principle the question to be asked in the present case is whether or not the plaintiffs established a prima facie case, that is have they proved all the essential elements of the claim? I therefore need not concern myself with the credibility or otherwise of the evidence of the plaintiff, unless of course, it is demonstrably clear that the plaintiff and or her witnesses palpably broke down under cross- examination. See *Ruto Flour Mills (Pvt) Ltd v Adelson* (2) 1958 (40 SA 307 (T) at 309D.

Lastly in *Mazibuko v Santam Insurance Co. Ltd and Anor* 1982 (3) SA 125 CORBETT JA at 132 said-

“In an application for absolution made by the defendant at the close of the plaintiff’s case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff, in other words, whether the plaintiff has made out a prima facie case. This is trite law.”

In the present matter the first defendant applied for absolution from the instance mainly on the basis that the plaintiff and her witness lied before the court. Secondly that the contract they seek to enforce is illegal and unenforceable among other things.

The evidence of the plaintiff which was corroborated by her witness and supported by the facts as captured in the summons and declaration as well as documentary evidence was that sometime in October 2007 the plaintiff, first defendant and second defendant entered into a written agreement of sale of immovable property known as Stand No. 4306 Fountainbleau Estate. The purchase price was agreed as \$12 000 000 000.00 (twelve billion Zimbabwean dollars). In compliance with the provisions of clause 2 of the Agreement Annexure "A" the plaintiff paid the sum of \$12 000 000 000.00 being the full purchase price to the defendants. The defendants were to transfer the property to the purchaser (plaintiff) upon payment of the full purchase price. In breach of clause 3.1 of the agreement the defendants neglected and or refused to transfer the property known as Stand No. 4306 Fountainbleau Estate to the plaintiff despite demand. In actual fact although the agreement of sale reflects that the property was sold for Z\$12 000 000 000.00, the actual amount agreed by the parties for which the plaintiff paid to the first defendant was US\$ 10 000.00. The reason being that by that time it was illegal to transact in foreign currency. The first defendant received the hard currency and she handed part of it to the second defendant. After receiving the money she then turned around and refused to transfer the property to the plaintiff on the allegation that the agreement they had entered was illegal. Besides she did not refund the plaintiff her US\$10 000.00.

Having gone through the documentary exhibits produced by the plaintiff, it is not in dispute that the first defendant signed Annexure "A" the agreement of sale which does not show that the property was sold for Z\$20 billion as she claimed in her pleadings but was purportedly sold for Z\$12 billion dollars. In my view, the issue of illegality aside, the first defendant must be placed on her defense to explain how her signature found its way into Annexure "A". Again the attached agreement of sale shows that the agreement was entered into and payment made on the 5th December 2007. In her pleadings the first defendant alleged that payment was made on the 29th November 2007. She must explain this contradiction. While she alleged that there was a second contract, she must be put on her defense to produce that other contract because she has so far failed to declare it. She is the one who asked to be paid in United States Dollars and she must explain how she arrived at a figure of US\$10 000.00. She must explain what rate was used. She also has to explain why she signed Annexure "A" on 5th December 2007 whose clause 2 specifically states that the full purchase price would have been paid by the 5th October 2007. Further, she signed an

acknowledgment of receipt of the sum of Z\$20 billion from Getrude Sihle Sibanda in full being the purchase price in respect of the sale of Stand 4306 Fountainbleau Estate. She has to explain why she signed it if indeed she did not receive any payments. She talked of an amount of US\$5,4 billion for a property in Chitungwiza, and all these have to be explained before she is absolved. The plaintiff also produced an affidavit by Mr *Machuwaire*, a lawyer who handled the transactions in which he confirmed that the first defendant received a sum of US\$10 000.00. She has to explain all this since this documentary exhibit corroborates the evidence of the plaintiff. While she mentioned that plaintiff connived with certain individuals these have not been disclosed and she needs to explain because the plaintiff vehemently denied the same. The second defendant was her husband at the time and he consented to the claim and pinned her, she also must explain all these discrepancies. I have mentioned but a few examples of the grey areas where the first defendant has to explain before she can be absolved.

While it may appear that the agreement was entered into before dollarization, making it *prima facie* illegal, she is the one who demanded to be paid in foreign currency and having been paid and benefitted she tried to move out of the contract without reimbursing the money she got. For these reasons I feel that the first defendant cannot be absolved from liability at this stage. In the result I will dismiss her application for absolution from the instance with costs.

IT IS ORDERED THAT

- a) Application for absolution from the instance is dismissed.
- b) First respondent to pay costs of suit.

Mtewa & Nyambirai, plaintiff's legal practitioners
Muzangaza, Mandaza & Tomana, 1st defendant's legal practitioners