

BRIAN GAVA
versus
CHAMISA MAWERE
and
CHAMPION CHAKANETSA (*In his capacity as Executor of Estate Late Claudio Chakanetsa*)
and
MISHECK MIZEKE
and
MESSENGER OF COURT – GWERU
and
CITY OF GWERU
and
REGISTRAR OF DEEDS – BULAWAYO N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 31 January 2019

Date of written judgment: 8 May 2019

Opposed application

Mr *T. Zishiri*, for the applicant
Mr *L. Nkomo*, for the first and third respondents
Second, fourth, fifth & sixth respondents in default

MAFUSIRE J

- [1] The property situate Stand 2468 Mkoba 7 Township in Gweru (“*the property*”) was at all relevant times owned by the fifth respondent, Gweru City Council. However, one Honest Pepolo was apparently buying it from Gweru City Council in terms of one of those standard term lease-to-buy agreements. Apparently in June 2004 Pepolo sold his rights and interest to one Claudio Chakanetsa, now deceased (“*the deceased*”). In these proceedings his estate was cited as the first respondent, duly represented by the executor.
- [2] I say “apparently” because although none of these specific issues were in contention by themselves, a great deal of the factual background was seriously disputed. And the

applicant's case, with all due respect, was badly pleaded. I shall elaborate on this later on. First, the facts that were common cause or uncontentious.

- [3] At all relevant times the deceased, or his estate, owed a sum of money to the first respondent ("*Chamisa*"). Chamisa sued, got judgment and executed through the fourth respondent ("*the messenger of court*"). The property was duly advertised for a public auction. On 23 September 2016 it was sold. The buyer was the third respondent ("*Misheck*"). On 21 October 2016 the magistrate's court confirmed the sale.
- [4] On 5 July 2017 Gweru City Council and Misheck executed what was on the face of it an agreement of sale of the property. But in reality it was a cession. Transfer was conditional upon, among other things, Misheck erecting on the property a building, or buildings, of a certain value within a stipulated time-frame. However, it was common cause that at the time of the agreement there was already a fully developed dwelling house which had a number of occupants.
- [5] In January 2018 Misheck sued for vacant possession and holding over damages. He succeeded. In the application before me it was hotly contested who occupied the property at the time. Misheck's summons for eviction cited one Monica Maboke ("*Monica*") and all those claiming occupation through her. Monica was one of the deceased's surviving spouses. But she did not stay at the property. In these proceedings the applicant claimed it was his tenants occupying the property at the time. Both Chamisa and Misheck disputed that.
- [6] In November 2018 the applicant instituted these proceedings. Apart from costs he sought an order declaring him the rightful owner of the property. He also sought an order setting aside the auction sale and a cancellation of the cession of the property from Gweru City Council to Misheck. At the end of argument I dismissed the application for lack of merit.
- [7] The applicant's cause of action, in paraphrase, was that prior to the attachment of the property by the messenger of court at the instance of the judgment creditor, Chamisa,

he had since bought it from the deceased during his lifetime in terms of a written agreement of sale dated 6 January 2013. He attached the document. The applicant said he had duly taken occupation of the property through his tenants. He said efforts to get transfer had been frustrated by the second respondent, the executor, who continued to duck and dive each time he made a follow-up.

- [8] The one misconception about the applicant's case was in relation to the true nature of the rights and obligations that are created by these so-called lease-to-buy- agreements in respect of these types of township houses. Terms such as "*sale/purchase of rights, title and interest in*", "*transfer*", etc. are manifestly misguided. Yet as long ago as 1992 the Supreme Court voiced concern over such use of wrong terminology in such situations. In *Gomba v Makwarimba* 1992 (2) ZLR 26 (SC) McNALLY JA said, at pp 27 – 28:

"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. 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."

- [9] Consistent with such misconception, the agreement of sale between the deceased and the applicant referred to the deceased as the owner of the property. But he was not. It was Gweru City Council that was. The agreement went on to allege that the Seller (the deceased) was selling and the purchaser (the applicant) was buying the property. But there could have been no such sale of such property. All that the deceased was purporting to do was to cede his rights and interest in the property. And conversely, all that the applicant wished to do was to accept the cession. Of course, it is perfectly normal for the cession price to equate to the market value of the property.

[10] Significantly, the agreement said nothing about transfer. Obviously there could be no transfer of real rights in such circumstances. Only personal rights were involved. The agreement simply said:

“The parties have been advised at the Ministry of Housing and Local Government that the house will be registered upon inspection and being given a certificate of occupation (*sic*).”

[11] If the above misconception was more technical, the next one was not. It was more profound and fatal. It was the bedrock of the applicant’s purported cause of action. His suit was a *rei vindicatio*. He boldly stated he was already the owner of the property by the time the messenger of court attached and sold it in execution. So all he now wanted was for the court to confirm by way of a declaratory order that he was the owner and that Misheck’s agreement with Gweru City Council was void.

[12] But unfortunately for the applicant, he could not vindicate. He was not, and had never been the owner of the property. The *rei vindicatio* is only available to an owner of a thing whose possession of it was taken away against his or her will. He or she is entitled to claim the thing wherever he or she finds it, and from whomsoever has got it: *Chetty v Naidoo* 1974 (3) 13 (A), 20B. All that the owner has to prove is that he or she is the owner; that his or her thing is in the defendant’s possession; and that it is still in existence and clearly identifiable: see SILBERBERG AND SCHOEMAN’S *The Law of Property*, 5th ed., pp 243 – 244, and the cases cited thereon. *Rei vindicatio* is a common law remedy.

[13] The applicant pleaded in the alternative a double sale situation. That was another misconception. He said even if the circumstances portrayed a double sale situation in respect of the property (i.e. his and the deceased as the first one, and Misheck’s at the auction as the second one), he was entitled to regain the property on the basis that his purchase was the first in time.

[14] The applicant further alleged that Misheck was not an innocent purchaser. He alleged that when Misheck had come to view the house in preparation of the auction, he had been advised by one of his (applicant’s) sisters, allegedly one of his tenants at the

property, that the house was not on sale and that it belonged to the applicant. Misheck had allegedly been advised to go to the City Council for verification. At the City Council Misheck had been informed that he could not buy the property as the deceased had sold it off to multiple buyers. But Misheck had allegedly ignored all that.

- [15] The law on double sales, as per McNally JA in *Guga v Moyo & Ors* 2000 (2) ZLR 458 (SC), at p 459 is as follows:

“The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But that rule applies only ‘in the absence of special circumstances affecting the balance of equities’. See McKerron (1935) 4 *SA Law Times* 178, *Burchell* (1974) 91 *SALJ* 40. And in *BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd* 1964 RLR 7 (G), Macdonald J (as he then was) said:

‘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 the invariable rule, but I agree with the view expressed by Professor McKerron that save in “exceptional circumstances” the first purchaser is to be preferred.’

“.....The broad principle as set out above was acknowledged to be our law in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58 (S) Similarly in *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (S).”

- [16] In the present case, my major reason for dismissing the applicant’s case was that apart from the above misconceptions no attempt was made at all to show any special circumstances as would warrant favouring him ahead of Misheck. Not only had Misheck openly purchased the property at a public auction, but also he had gone on to obtain transfer of rights through a cession from the real owner, Gweru City Council. If the applicant’s purchase was first in time the onus was on him to explain why so many years after the alleged purchase, his right to title had remained hidden from the world leaving the property exposed to attachment at the instance of the creditors of the deceased or his estate.

- [17] There is a long line of cases that have dealt with the situation where a party buys a property but makes no effort to obtain title or to protect their rights and interest, invariably losing it to the second time buyer: see for example *De Villiers v Cohn* 1906

TH 12; *Van Niekerk v Fortuin* 1913 CPD 457; *Maphosa & Anor v Cook & Ors* 1997 (2) ZLR 314 (H) and *Sheriff for Zimbabwe v Hersel (Pvt) Ltd & Ors* HH 856-15

- [18] The legal position is that a judgment creditor is entitled to attach and sell in execution the property of his debtor notwithstanding that a third party has a personal right against such debtor to the ownership or possession of such property which right may have arisen prior to the attachment or even to the judgment creditor's cause of action and of which the judgment creditor had notice when the attachment was made: see HERBSTEIN & VAN WINSEN: *Civil Practice of the High Courts of South Africa*, 5th ed. Vol. 2 at p 1020.
- [19] If the third party had bought that property but was still to take transfer, his rights were merely personal as against the judgment debtor. They were subservient to those of the judgment creditor after the attachment.
- [20] In *Maphosa's* case above, the applicants had bought the half share in the property prior to its attachment by the deputy sheriff in pursuance of a judgment and a writ in favour of a third party, a bank, which was owed a sum of money by one of the respondents, the owner and seller of the half share. The applicants sought the upliftment of the caveat that had been registered on the property on attachment so that they could take transfer. The application was dismissed. MALABA J, as he then was, held that even though the applicants had paid the purchase price, they did not become the owners until transfer had been registered. All they had obtained had been personal rights claimable against the landowner. The judgment creditor was held entitled to have the property sold even in the face of the third party's personal rights against the judgment debtor.
- [21] The right of a judgment creditor to insist on the property being attached and sold in execution is of course, not an absolute one. The existence of special circumstances in any given situation may persuade the court to set aside the attachment to enable transfer to be registered in favour of the third party claimant. At pp 458 – 459 of his judgment in *Van Niekerk's* case above, KOTZE J said:

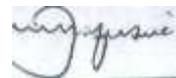
“It seems to me that the plaintiff being a judgment creditor, and the property being still registered in the name of the defendant, *prima facie* the plaintiff has the right to ask that the property shall be seized in execution, **unless the party interested can show that there are special circumstances why such an order should not be granted**” (underlining by myself).

[22] *In casu* the applicant said he “bought” the property way back in January 2013. But it was not until September 2016, almost three years later, that Misheck bought it at the auction. The applicant said his efforts to get transfer from the deceased’s estate were frustrated by the executor who was non-committal. That was hardly a special circumstance. The courts were always there. There was nothing stopping the applicant from enforcing his rights.

[23] Furthermore, and at any rate, the auction had been duly advertised in the press. That was notice to the whole world. The applicant took no action. The law says property sold at a properly conducted and valid judicial sale cannot, after delivery in the case of movables, or registration in the case of immovables, be vindicated from a *bona fide* purchaser: see SILBERBERG & SCHOEMAN’S, *supra*, at p 261.

[24] It was for the above reasons that I dismissed the application with costs. As for such hotly contested issues like whose tenants occupied the property at the relevant time, or whether Misheck had knowledge of the alleged prior sale to the applicant before his own successful bid at the auction, were immaterial. They did not decide the case.

6 May 2019



Garikayi & Company, applicant’s legal practitioners
Danziger & Partners, first and third respondents’ legal practitioners