

**CASPER TSVANGIRAI**

**Versus**

**ZIMASCO (PVT) LTD**

**And**

**BAOBAB REAL ESTATE**

**And**

**THE REGISTRAR OF DEEDS, BULAWAYO**

IN THE HIGH COURT OF ZIMBABWE

MUTEMA J

BULAWAYO, 10 & 11 OCTOBER 2013 & 30 JANUARY 2014

*P. Chitsa* for plaintiff

*T. Mpofo with him Mrs M. Matshiya* for the 1<sup>st</sup> defendant

*T. C. Masawi* for the 2<sup>nd</sup> defendant

Civil Trial

**MUTEMA J:** The genesis of the dispute between the parties resides in an agreement of sale entered into in respect of stand 1004 Redcliff Township owned by plaintiff which 1<sup>st</sup> defendant purchased on 10 June 2008 via the facilitation of 2<sup>nd</sup> defendant. Both 1<sup>st</sup> and 2<sup>nd</sup> defendants aver that the purchase price, which was paid in full on 11 June, 2008 was Z\$720 trillion. Plaintiff, however, avers that the price was set at the local currency equivalent of US\$180 000,00 based on the prevailing informal market rate obtaining on the date of payment. He further avers that he signed his portion of the agreement of sale first while 1<sup>st</sup> defendant was to sign later. On the same date he signed a power of attorney to make transfer by 2<sup>nd</sup> defendant on the understanding that transfer would only pass upon receipt of the full purchase price. It, however, so happened that 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant or one or other of them removed some pages from the written agreement of sale and altered inter alia, the purchase price and inserted plaintiff's initials without his knowledge or consent and attached the forged pages to the last page plaintiff had signed. Thereafter, 1<sup>st</sup> defendant paid Z\$720 000,00 (revalued) on 13 June, 2008 which amount was at variance with the agreed calculation formula. This amount, according to plaintiff, was an equivalent of only US\$96 000,00, leaving a balance of US\$84 000,00.

In the event, plaintiff prays for nullification of the purported sale agreement, cancellation of the Deed of Transfer No. 1906/08 in favour of 1<sup>st</sup> defendant in respect of the

property and reversal of ownership into plaintiff's name, that he refunds the Z\$720 000,00 (revalued) to 1<sup>st</sup> defendant with interest plus costs of suit on a punitive scale. Alternatively, plaintiff prays for payment of the outstanding balance of US\$84 000,00 with interest and costs on a punitive scale by both 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally, the one paying absolving the other.

Both 1<sup>st</sup> and 2<sup>nd</sup> defendants deny the alleged malfeasance and aver that the agreement is as per exhibit 2 with the purchase price being Z\$720 trillion with no US dollar component. 1<sup>st</sup> defendant counter-claimed for plaintiff's eviction from the house, arrear rentals and holding over damages from plaintiff at US\$400 per month, plus interest and costs on attorney and client scale.

The plaintiff led evidence from only himself which was to the following effect:

Sometime in 2008, Albert Tsikira of the 2<sup>nd</sup> defendant phoned him asking whether his house was still on sale. He confirmed it still was. Tsikira then went and viewed the house with 1<sup>st</sup> defendant's representatives. He communicated that his asking price was US\$220 000,00. The price was negotiated down to US\$180 000,00. He told Tsikira that the purchase price was US\$180 000,00 payable in local currency at open market rates. Tsikira captured that in the agreement of sale that he brought to him. He told Tsikira that the exchange rate was changing daily due to hyper-inflation that he be consulted when payment was being made so that they agree on the rate. He signed the last page of the agreement of sale and initialed all other pages. Tsikira then left with the agreement documents and the next time he heard from him was on 15 June, 2008 when he received payment in his account.

He told Tsikira that the rate had since changed and amount paid was equivalent to only US\$96 000,00. Exhibit 1 is the letter he wrote. He explained that when he signed the sale agreement he had also signed a power of attorney and given the title deeds of the property because Tsikira had said 1<sup>st</sup> defendant required those before it could sign the agreement.

When Tsikira gave him exhibit 2 he discovered that the purchase price of US\$180 000,00 had been substituted with Z\$720 trillion and the pages preceding the last had been initialed differently on his behalf. Tsikira told him that he had effected the alterations to the agreement because 1<sup>st</sup> defendant would not accept an agreement denominated in US dollars. He then wrote exhibit 3 pointing out that the document he was given was not the one he had signed. He did not think that 1<sup>st</sup> and 2<sup>nd</sup> defendants would go ahead with transfer of the property until he received exhibit 4 – a letter from Wilmot and Bennett legal practitioners demanding vacant possession of the house. He then instructed his current legal practitioners who wrote to Mrs Matshiya of Wilmot and Bennett who responded via exhibit 5 admitting that US\$180 000,00 was the agreed purchase price.

He produced exhibit 6 – Deed of Transfer of the property from him to 1<sup>st</sup> defendant which he said was fraudulently done. He said the amount of US\$96 000,00 was arrived at using a rate he was given by Trust Bank. He concluded by saying that 1<sup>st</sup> defendant's counter-claim has no leg to stand on on account of the fact that the house still belongs to him. He then closed his case whereupon the 1<sup>st</sup> and 2<sup>nd</sup> defendants applied for absolution from the instance.

The basis upon which the application was made is three-pronged viz:

1. the date of payment of the purchase price and its effect. It was argued that no reasonable man might find for the plaintiff because the legal position is that if payment is made by cheque or bank transfer, the date of payment when the instrument is subsequently honoured is the date when the application for transfer is made and not when the funds are credited. Plaintiff conceded that on 11 and 12 June, 2008 he did not know what the informal market exchange rate was and he produced no evidence as to what it was. Without knowing the exchange rate no reasonable man might find that the amount he was paid was less by an equivalent of US\$84 000,00 as he claims.

I find that the issue regarding the Zimbabwe dollar equivalent needs first defendant's answer in view of Mrs Matshiyi's letter to plaintiff's legal practitioner dated 17 December, 2008 (exhibit 5) wherein she conceded that the Zimbabwe dollar purchase price was equivalent to US\$180 000,00. There is need for first defendant to also explain what the obtaining exchange rate was on 10 and 11 June, 2008. It is pertinent to note here that Mrs Matshiyi is first defendant's instructing legal practitioner. Also, the mode of payment employed by first defendant was not in sync with the relevant clause in the agreement of sale.

2. the *caveat subscripto* maxim regarding the signed blank power of attorney does not require comment *in extenso* at this juncture save to state that fraud is being alleged.
3. re: first defendant's counter-claim. It is settled law that an order of absolution from the instance does not attract a subsequent plea of *res judicata*. In the application, Mr Mpofo, while praying for absolution regarding plaintiff's claim, also prayed that the first defendant's counter claim for plaintiff's eviction, arrear rentals, hold over damages etc be granted. He submitted that such a novel claim is competent in terms of Rule 185 and *S W M Electrical P/L v Electrical Pulley Component Suppliers P/L* 1996 (1) ZLR 696 (S). The case was thrown in to buttress plaintiff's seeming concession that reasonable rentals for the house in question are US\$250,00 per month. First defendant then indicated its willingness to abandon the counter-claimed US\$400,00 per month, settling for the US\$250,00 per month. While it is difficult to say with any degree of certainty that what plaintiff said amounts to a confession of indebtedness, no authority falling on all fours with what Mr Mpofo's application seeks particularly regarding the counter claim has been cited. It would be a novel precedent if the court were to grant the application in its current form. Granting it would effectively put the entire dispute to rest, with the plaintiff losing his right to reinstitute the suit in the future.

On the totality of the foregoing the application for absolution from the instance at the close of the plaintiff's case and for the first defendant's counter-claim to be granted be and is hereby dismissed with costs.

*Messrs Mkushi, Foroma & Maupa*, plaintiff's legal practitioners

*Messrs Mtetwa & Nyambirai incorporating Wilmot & Bennett*, 1<sup>st</sup> defendant's legal practitioners

*Messrs Masawi & Partners*, 2<sup>nd</sup> defendant's legal practitioners