

TIMOTHY GRASIANO MUWANDI

versus

R. D. MOYO

and

BULAWAYO CITY COUNCIL

and

THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE

KAMOCHA J

BULAWAYO 16 NOVEMBER 2001 and 1 & 14 FEBRUARY 2002

Opposed Application

*G. Nyoni* for the applicant

*T. Ndlovu* for the first respondent

No appearance for second and third respondents

KAMOCHA J: After reading documents filed of record and hearing both counsel I delivered an *ex tempore* judgment and ruled that the provisional order be confirmed with costs.

The first respondent has requested for my written reasons for judgment. These are they.

On 17 August 1999 the applicant and his wife acquired the rights, title or interest in number 11542 Redthorn Road, Thorngroove, Bulawayo – “the property” from Ernest Peters and Naomi Nomsa Peters who were husband and wife. The agreement was reduced to writing. It was agreed by the parties that they would proceed to the City of Bulawayo on 19 August with a copy of the written agreement and request that the rights, title or interest in the property be transferred to Muwandi (“the applicant”).

On the appointed date the parties proceeded to the Housing Office at Mzilikazi. They had with them a copy of the Memorandum of Agreement of Sale made and signed by them and sought transfer of the property. The Director of Housing and Community Services confirmed, in his letter dated 7 April 2000, that the parties did attend at their Mzilikazi Housing Office. However, due to the workload at their offices the transfer had not yet been effected. The parties were advised to leave the necessary documents at the housing Office and that the transfer would be effected in due course. As far as the parties were concerned the sale was *perfecta*.

It was part of the agreement that the purchase price would be paid on the date of the signing of the agreement. Further the agreement stipulated that Muwandi would have vacant possession of the property on 30 September 1999. Hence Muwandi has been in occupation of the property ever since.

On 16 March 2000 Mr R D Moyo (“the first respondent”) was the highest bidder at an auction, conducted by the third respondent, resulting in him being duly declared to be the purchaser of the said property.

It so happened that Ernest Peters was indebted to one Nancy Joyce van Heerden who ended up obtaining a judgment against him. This same property was attached by the third respondent in December 1999. Apparently, as is confirmed by the Director of Housing and Community Services, Bulawayo City Council had not effected the transfer of the property to Muwandi’s name. He therefore cannot be blamed for the failure to formalise the transfer of the rights, title or interest in the said property. The hold up was due to the second respondent’s officers who were overwhelmed by the amount of work which they had during that particular period.

It is also clear from the papers filed of record that both first and third respondents were not aware that the property had been sold to Muwandi and his wife. They were labouring under a genuine mistake that the rights, title or interest in the property were still held by the original owner Ernest Peters.

Similarly Muwandi was not aware that the property was going to be sold at the auction. He only learnt of that when the first respondent went to the premises and claimed to have acquired such rights, title or interest at an auction. Since Muwandi is already in occupation the first respondent was prepared to rent the property out to him.

It is common ground that Muwandi was not a party to the matters that led to the sale in execution. It cannot be disputed that by selling the property to Muwandi, Peters had disposed of all his beneficial interest in the property. He had none left and there was none left for sale at the auction conducted by Deputy Sheriff.

Consequently both the first and third respondents were mistaken when they purported to enter into a contract of sale at the auction under the mistaken belief that the property still belonged to the judgment debtor. This mistake related to an essential element of the agreement and, in my view, it rendered from the outset, the intention of the first and second respondents, incapable of taking effect. I therefore agree with Mr *Nyoni* that the purported contract of sale in execution, was in fact a nullity, as the parties were mistaken as to the existence or availability of the property intended to be auctioned.

The applicant would still have succeeded even if I had found that the two respondents had entered into a valid contract because it is now trite that where there is an issue of double contract of sale to be decided, the first in time has, in the ordinary course of events, a priority. MACDONALD J, as he then was, explained how the rights of the first purchaser is to be preferred in *B P Southern Africa (Pty) Ltd vs Desden Properties (Pvt) Ltd and Another* 1964 (2) SA (R) at 25H:

“In my view, the policy of the law to uphold the sanctity of contracts 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 this would be the invariable rule, but I agree ... that save in special circumstances the first purchaser is to be preferred.”

No special circumstances exist *in casu* why the first purchaser should not be preferred. This leaves the first respondent without any leg to stand on as well on the second ground.

Consequently, the applicant was successful and was granted an order confirming the provisional order with costs.

*James, Moyo-Majwabu & Nyoni* applicant's legal practitioners  
*Cheda & Partners* first respondent's legal practitioners