HB 40/18
HC 2951/97

REGINA NGWENYA

Versus

GEORGINA NDLOVU

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 2 & 3 MAY 2017 & 1 MARCH 2018

Civil Trial

S. S. Mlaudzi with D. Moyo for plaintiff
B. Dube for the defendant

NDOU J: This is a matter characterised by unusual and indeed disturbing delays. From the papers it seems the cause of action arose in the early 1990s. The summons was issued on 28 October 1997 and served on the defendant 5 November 1997. The parties' pre-trial conference joint minute was filed on 11 April 2001. The pre-trial conference was heard on 16 January 2002.

After many false starts the trial eventually commenced before me on 7 February 2006. The matter was head on 8 February 2006 and 13 June 2007. After the latter hearing the plaintiff closed her case. This resulted in an application for absolution from the instance at the close of the plaintiff's case. My ruling on the application was handed down on 22 November 2007 (*Ngwenya* v *Ndlovu* HB-118-07). Thereafter the matter disappeared from the radar so to speak. There were several attempts to resume the trial. These never materialized for a variety of reasons. About twenty (20) years later this court is still seized with this matter. The matter has run into turbulences which in my view were avoidable. This has resulted in a mockery of the justice system. The rules of this court need to be revised and improved to prevent such delayed litigation. From the trenches of retirement all I can say is that there is need of intervention as justice delayed is justice denied. Coming back to the facts of the matter, this is a straight forward dispute between the parties. In the summons the plaintiff claims a follows:

"Wherefore plaintiff claim; *[sic]*

(a) That 1st defendant be ordered to transfer the property being 13412 Nkulumane to the plaintiff.
(b) If 1st defendant fails/resists to effect transfer the Deputy Sheriff be authorized to sign all the necessary transfer/cession documents.

Alternatively
(c) Defendant pays plaintiff the sum of $50 000,00 or an equivalent of the house in dispute as compensation.
(d) Defendant pays the costs of this action."

The facts are the following:

The parties are cousins. In 1991 the plaintiff was employed in South Africa but her children resided in Zimbabwe in the custody of her now late sister Bertha. What seems to be common cause or least beyond significant dispute is that plaintiff rented a house from the Bulawayo City Council referred to as number 58329/3 Mabutweni. The plaintiff did not own the property but it was ceded to her by the Bulawayo City Council. At the relevant time the defendant was on the Bulawayo City Council housing waiting list. She was eventually allocated a stand in Nkulumane high density suburb. The stand was known as number 13412 Nkulumane. The stand had improvements thereon comprising what is termed a "shell house". The shell house comprised a walled structure with a roof. The structure had no door frames (and doors) and window frames (and no windows panes). The person allocated such a structure was expected to install electricity and fit door frames, doors, window frames and windows. The latter structure i.e. is subject matter of these proceedings. When the sell house was offered to the defendant, she was required to pay a deposit of Z$450,00 to the Bulawayo City Council. The defendant did not have this Z$450,00. The plaintiff's sister Bertha paid this Z$450,00 and also paid for other fittings viz door frames, doors, window frames and windows. The crucial dispute is whether Bertha was paying on behalf of the plaintiff in form of some swop arrangement between the parties, or she was merely lending the money to the defendant. According to the plaintiff, Bertha was acting as her agent. It is plaintiff's case that she paid this amount of Z$450,00 and for other above-mentioned fittings on behalf of the defendant through Bertha. The plaintiff testified that she was doing this pursuant to a verbal swap agreement. The said agreement entailed her completing the construction of the Nkulumane property and swapping it

with the defendant for the Mabutweni property. The defendant's case on the other hand is that Bertha advanced the Z$450,00 and paid for the fittings in the form of a loan. As per the loan agreement she later repaid Bertha the money advanced under this arrangement. The defendant vehemently disputed the existence of the swap agreement. What is however common cause is that the plaintiff expended sums of money for the outstanding fittings, improvements and Bulawayo City Council loan repayments. The defendant's plea make this concession. What the plaintiff is claiming is the transfer of the Nkulumane property into her names against the transfer of the Mabutweni property from her names to those of the defendant. In the alternative, the plaintiff claims reimbursement for the sums she expended on the Nkulumane property.

The plaintiff testified in support of her case. She did not personally deal with the defendant. The person who negotiated the deal was her late sister, who unfortunately passed on before she testified. The plaintiff testified that she made all the necessary fittings turning the shell house into a habitable home. She said that she serviced the Bulawayo City Council loan until the property was fully paid up. She stated that her children and her late sister Bertha lived on the property since its inception. After her retirement in South Africa and on her return to the country she also joined her children and now lives in the property. She said that at all times the defendant regarded her as the owner of this property until at the stage when she sought transfer from the name of the defendant to her own.

On the other hand, the defendant testified. The gravamen of her testimony is that she did not deal with the plaintiff. She dealt with her late sister Bertha. Her testimony is that Bertha offered to pay the deposit and an extra $250,00 (making a total of $700,00). This amount was repaid to Bertha. (These facts were pleaded throughout by the defendant). This repayment was done when plaintiff was still resident in South Africa. When the plaintiff returned from South Africa she offered to return the $700,00 paid to her. The defendant said she refused and the dispute arose leading to the current proceedings. She said she tried several times over the past twenty (20) years plus to reimburse costs above that with extra costs for the loans to the plaintiff or her agents to no avail.

Defendant's evidence was supported by that of Sipho Ncube who also testified.

The major problem that the plaintiff faces is proving the existence of the oral swapping agreement and also its terms and conditions without the testimony of Bertha who allegedly entered into the same on behalf of the plaintiff. In this case the dispute is whether the moneys advanced by Bertha to the defendant were in form of loan or pursuant to a swapping contract. The plaintiff's case is premised on the existence of a contract between the parties. The contract is one of swapping houses. The problem is that the Mabutweni property that the plaintiff is offering does not belong to her. It belongs to the City of Bulawayo. The plaintiff was a tenant. I am saying "was" because the City of Bulawayo has since repossessed it due to non-payment of rentals. The Mabutweni houses are not on individual ownership.

It is trite that "in contract the legal bond, *iuris vinculum* is formed by the parties themselves, and within the limits laid down by law, the nature of the obligations is determinable by them. In some cases their agreement is actual, in others apparent, and yet others partly actual and party apparent." – *Levy* v *Banket Holdings (Pvt) Ltd* 1956 per KERR AJ. Further, "every agreement … made deliberately and seriously, by a person capable of contracting, and having a ground or reason is not immoral or forbidden by law, may be enforced by action." – Rood v Wallach 1904 TS.

From the evidence before me, this alleged swapping agreement is flawed as it is not enforceable at law because the property to be swapped does not belong to the defendant but the City of Bulawayo. In fact, the lease agreement between the City of Bulawayo and the plaintiff has long been terminated and the former has repossessed the property. In the circumstances this court cannot make an order that is not enforceable at law especially in a case where the owner of the property was not cited – *Hersman* v *Shapiro & Co* 1926. On this point alone, I find that there is no lawful agreement between the parties to enforce. The main claim therefore fails. It remains for me to consider the alternative claim. In the later claim the plaintiff originally sought compensation in the sum of Z$50 000,00. This claim was later amended. The plaintiff's counsel submits "should a finding be made that all the defendant paid was the deposit and that she did

pay the Z$700 back to Bertha and is entitled to it, this court in our law should be guided by the Reserve Bank Exchange prevailing in 1991". The difficult here is that no evidence was led at all on the rates prevailing in 1991.

In this case it is beyond dispute that the plaintiff paid the deposit for the Nkulumane property and an extra $250,00. Over the years, the defendant tried several times to reimburse these costs. The plaintiff and her agent, Berta declined to accept the compensation insisting on the transfer of the property into the names of the plaintiff. Had this matter been finalised in 1997 or soon thereafter, it would have been easy to grant the alternative claim. The problem I now face is that the matter is now being finalised after over twenty (20) years. The plaintiff has been in occupation of this property in dispute for this period without paying any rent. How do I do justice between "man and man" (or rather woman and woman) as the parties are both women? The evidence placed before me in this regard is scant. There is no factual basis upon which this court can quantify what the plaintiff paid towards the deposit and extra costs expended on the Nkulumane property *vis-à-vis* her rent free occupation of the said property over a period of over twenty years. *Monumental Art Co.* v *Kenson Pharmacy (Pvt) Ltd* 1976 (2) SA 111 (C) at 118E.

In the result the alternative claim, cannot be granted. Accordingly, the plaintiff's claim is dismissed with costs.

Samp Mlaudzi & Partners, plaintiff's legal practitioners
Sengweni Legal Practice, defendant's legal practitioners