ERNEST NCUBE

Versus

PETER PATULA NYONI

And

ELEANOR LENAH MABWE MOYO
(In her capacity as executrix dative of the
Estate Late Shadreck Moyo DRBY 1529/00)

And

THE ADDITIONAL ASSISTANT MASTER OF
THE HIGH COURT

And

THE MUNICIPALITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 7 SEPTEMBER & 7 OCTOBER 2021

Civil Trial

L. Nyamapfene with T. Masiye-Moyo, for the plaintiff
S. Sithole with C. Nyathi, for the 1st defendant
No appearance for 2nd – 4th defendants

KABASA J: On 13 September 2017 the plaintiff issued summons against the defendants wherein he claimed:

> "1. An order that 2nd defendant signs all the necessary papers for the cession of the right, title and interest in and to stand A32 Njube, Bulawayo, into the name of the 1st defendant who is hereby ordered to simultaneously cede the rights into the said property into the name of the plaintiff which property was purchased from the late Shadreck Moyo by the 1st defendant who in turn sold the property to the plaintiff in or about 1998 and who despite demand has failed and or neglected to cede the rights into the property to the plaintiff.(*sic*)

2. An order that in the event any of the defendants fail to effect (1) above, the Sheriff or his lawful deputy be and is hereby authorized and directed to sign the necessary documents to effect same.
3. An order that 1st defendant pays the costs of suit on an attorney and client scale."

The plaintiff's claim as expounded in the declaration is premised on the allegation that he purchased A32 Njube from the 1st defendant sometime in 1998. The first defendant had earlier purchased the same house from Shadreck Moyo, who is now deceased. Cession had not been completed as at the time of Shadreck Moyo's death and so the property was still in Shadreck's name. Shadreck's estate was being administered by Eleanor Lenah Mabwe Moyo.

The plaintiff paid the full purchase price of ZW$82 000 and received vacant possession of the property in 1998. He has resided thereat since 1998. The parties had agreed that cession was to be effected in due course but the 1st defendant became evasive and subsequently challenged the sale agreement alleging that the plaintiff was a mere tenant. The sale agreement went missing due to the plaintiff's loss of sight.

The 1st defendant's attitude necessitated the bringing of this action meant to compel him to cede the property to the plaintiff.

The 1st defendant's answer to this claim was that he never sold the house to the plaintiff. The plaintiff was a mere tenant and came to be so by virtue of his marriage to the 1st defendant's daughter. The 1st defendant sought to evict the plaintiff as the marriage to his daughter collapsed. The plaintiff's claim is just a ploy to resist eviction.

As for the 2nd defendant, her response was that cession has since been effected into the 1st defendant's name and the property is now in the 1st defendant's name.

With the closure of pleadings the parties attended a pre-trial conference and the matter was referred to trial on the following issues.

1. Whether or not 1st defendant sold stand number A32 Njube, Bulawayo to plaintiff.
2. Whether or not plaintiff paid the full purchase price for stand A32 Njube to the 1st defendant.
3. Whether or not plaintiff has since 1998 been occupying stand number A 32 Njube, Bulawayo not as an owner but as a tenant.

The onus on the first two issues was placed on the plaintiff with the third issue on the 1st defendant.

At the trial, evidence was led from the plaintiff and his brother, whilst for the defendant, he was the only witness.

The plaintiff testified to the effect that he got to know that the 1st defendant was selling his house through conversations with some women. He approached the defendant who confirmed such sale and the two negotiated from the ZW$85 000 which was the asking price to ZW$82 000. He paid the money from disbursements he was receiving from the War Veterans Fund and got vacant possession upon payment of the full purchase price. The agreement of sale and receipts acknowledging payments were kept behind a picture frame hanging on the wall.

His brother's wife, one Glenda Patula Nyoni who happens to be the 1st defendant's daughter and got married into their family on a date he could not recall, later stole the agreement of sale after they had had a misunderstanding and gave it to her father. He therefore lost the agreement of sale and the documents wherein the 1st defendant acknowledged payments of the ZW$82 000. He however had written to the 1st defendant regarding cession of the property and the response he received from him, including an affidavit deposed to be Glenda confessing to taking the agreement of sale, were tendered in evidence as exhibit 2 and 3. The Beverley Bank pass book into which the War Veterans Fund disbursements were deposited was also produced as exhibit 1.

It was the witness' evidence that since paying the full purchase price and taking occupation of the house he never paid any rentals to the 1st defendant as he was not a tenant. All he paid were Council rates. He had made efforts to fetch Glenda from the rural areas where she is residing with his brother so she could come to court and testify but when they arrived in Bulawayo, she left, ostensibly to look for her sister but never returned. He had wanted her to testify regarding the disappearance of the agreement of sale.

This witness gave his evidence well. Where he could not recall dates he readily accepted he could not recall. The lack of recollection was understandable given the passage of time from 1998 to 2021 when the trial commenced. He gave his evidence without rancour, understandably he was unhappy at the turn of events which had necessitated him issuing summons and coming to court but I got the distinct impression that his failure to respond to questions as asked was

due to his frustration at being questioned on matters he genuinely believed the 1st defendant was aware of but was just bent on trying to deny for the sake of it.

His straight forward account of what happened until he purchased the property and what prevented him from getting the same ceded to him could only have been because he was testifying to what he knew to have happened and not a fabrication from the figment of his imagination.

Granted the sale agreement could not be produced nor the proof of payment of the purchase price but his explanation as to why he no longer had these documents was credible.

Credence was lent to his evidence when it became clear that this Glenda was only about 10 years old in 1998 and so could not have been married to him or to his brother as the evidence revealed.

The second witness also corroborated the plaintiff's evidence materially. It was this witness' evidence that he went with the plaintiff to see the first defendant who they saw standing beside a motor vehicle. This tallied with the plaintiff's evidence that he found the defendant repairing a motor vehicle. The witness did not participate in the sale negotiations but he was able to pick up from the conversation that the purchase price was agreed at ZW$82 000.

He was later shown the agreement of sale which the plaintiff kept behind a picture frame. He however did not read it but only saw that there were figures in the body of the document. He moved to stay with the plaintiff at A32 Njube following the purchase of this property. The 1st defendant's daughter Glenda, who was very young at the time, would come to the house to pick up their family's mail. She later fell in love with one of their brothers who she is still married to.

It was contended that this witness was not credible because he could not have been shown the agreement of sale and fail to read it. It was his evidence however that he cannot read English and so he could not read the agreement of sale's contents. Without evidence to controvert the fact that he cannot read English, I do not see how it can be said his evidence is not credible just because he was unable to read the contents of the agreement of sale.

On the contrary, his candidness in accepting that he did not read the agreement of sale shows that he was not bent on supporting the plaintiff's case at all costs. He could easily have rehearsed the evidence and no matter how illiterate one is, there would be not much to militate against memorizing that he saw the agreement of sale and also saw the plaintiff putting it behind the picture frame. It would have been equally easy to say of the payments made to the 1st defendant

he only witnessed 2 because the rest of the payments were made when he was at work. The witness was however candid and said he witnessed none of the payments.

His credibility was also shored up when it became clear that their brother is still married to the 1st defendant's daughter Glenda and that Glenda was only 10 years old at the time he and the plaintiff occupied A32 Njube. Glenda was therefore not married to their brother at the time and so their occupation of A32 Njube was not because of the marriage between Glenda and Ndodana, their brother.

The witness acknowledged that should the plaintiff be evicted he would be equally affected as he is currently staying with him. He however moved back to stay with the plaintiff so as to assist him since he has lost his sight.

I am however not persuaded to hold that the witness was bent on helping his brother's cause out of a sense of self preservation. Had that been the case he would have easily said more than he testified to, out of a determination to ensure the plaintiff does not lose out.

I am aware this case consisted of the plaintiff's version as supported to a limited extent by his brother and the defendant's version which is irreconcilable to the plaintiff's version as regards the plaintiff's claim to A32.

In *Stellenbosch Farmers' Winery Group Ltd* v *Martell et Cie* 2003 (1) SA 11 (SCA) at 14-15, the court had this to say:

> "To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence (iv) external contradictions with what was pleaded or put on his behalf, or with established fact … (v) the probability or improbability of particular aspects of his version …"

With this in mind, I turn now to consider the 1st defendant's evidence. His testimony was to the effect that he owns A32 Njube and never sold it to the plaintiff. He came to know the plaintiff when he came looking for a place to stay. He acknowledged exhibit 2, the letter he wrote to the plaintiff but explained that

he wrote it because he owed the plaintiff money and had delayed in paying it back. He however could not recall how much he borrowed but he needed the money as a "top up" for a plot he wanted to buy.

He does not enjoy a good relationship with his daughter, Glenda, from the time his wife passed on in 2014. He has not spoken to her since she relocated to South Africa and although she is now back in Zimbabwe network challenges have prevented any communication between them. The witness also said he started having problems with the plaintiff when he wanted to evict him from A32 Njube as he wanted to sell the property and relocate to the rural areas. It was then that the plaintiff resisted eviction claiming that since he had stayed at the house for over 20 years Council policy stipulates that he was now entitled to own the property.

Exhibit 2, the letter which the defendant acknowledges writing to the plaintiff reads:

> "I want to apologise sincerely for not getting an opportunity to come and finish that which I left during its course.
>
> The main reason is that I am still trying to put together some money so that I go and pay off Railways money. I believe you are aware that I failed to get the house I wanted to buy due to the delay of the money which happened. I was reluctant to disappoint you, I ended up getting a house which costed me more than what you had given me. I paid a deposit and remained with a debt which I am to pay off so that my children/family may take occupation as per the agreement. …"

Why would the 1st defendant talk about a house he failed to get and his fear of disappointing the plaintiff to the extent of deciding to get a house which cost him more than what the plaintiff had given him. The plaintiff was a mere tenant to whom he owed no explanation as to his plans, or so the defendant would have the court believe. This letter exposes the defendant's lack of candour.

The import of this letter lends credence to the plaintiff's version that the defendant was responding to the plaintiff's letter with regards to finalizing their transactions over A 32 Njube.

Whatever amount of money the defendant had obtained from the plaintiff, as acknowledged in this letter, was not a trifling amount but substantial, very substantial as such amount was meant to go towards the purchase of a house for the defendant. There can be no other meaning to this statement "I ended up getting a house which costed me more than what you had given me."

If it was a measly amount which had been given just as a loan to be repaid, why was the defendant going at length to talk about the purchase of a house so that his family could move and the delay it had taken for him to come back and "finish that which I left during its course?"

This letter goes on to say:

> "I am still tied up by looking for a house as the one I wanted ended up being bought as a result of me delaying with the money."

What concern was it of the plaintiff whether the defendant had money to buy the house he wanted or not. If he was a mere tenant who was only in defendant's house out of the defendant's benevolence, why was the defendant apologizing and mentioning money plaintiff had given him but which proved less than what he required to buy another house?

In *Tapiwa Nalomwe* v *Nicholas Van Hoogstraten* HH-444-18 ZHOU J had this to say;

> "This is a case in which the versions of the plaintiff and the defendant are mutually destructive. The approach of the court in the face of such a scenario is as stated by SANDURA JA in *Matiza* v *Pswarayi* 1999 (1) ZLR 140 (S) at 143A-C;
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> "Commenting on mutually destructive stories, WESSELS JA (as he then was) had this to say in *National Employers Mutual General Insurance Association* v *Gany* 1931 AD 187 at 199:
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> "Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the onus rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every aspect. It must be clear to the court of first instance that the version of the litigant upon which the onus rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A. Gany …'

Turning to the evidence *in casu*, the plaintiff and the second witness' credibility cannot be questioned or compared to the 1st defendant. Merely observing him and listening to his story even under cross-examination, it was clear his was a story with very little truth in it.

I propose to further demonstrate this by showing that not only did he not impress as he related his evidence but what he had to say was a manifestation of that exhibited lack of credibility.

1. In his plea he said the plaintiff came to stay at his home, A32 Njube, because of his (plaintiff) marriage to his (defendant's) daughter. It turned out that this ought to have been stated as marriage to plaintiff's brother. I did not read too much into this but what is crucial is the fact that Glenda was 10 years old in 1998, the year the plaintiff started staying at defendant's house. The plaintiff's brother was in South Africa at the time and only impregnated the defendant's daughter when she was 17 years old. This must have been around 2005. It follows therefore that the plaintiff was already in occupation of this house by that year, about 7 or so years of such occupation.

There is therefore no truth in the defendant's assertion that the plaintiff only came to stay at his house as a result of this marriage between his daughter and plaintiff's brother.

2. Under cross-examination he said he accommodated the plaintiff after he was referred by his (defendant's) wife and this was in 1998. He did not know the plaintiff prior to this, so they were strangers. He however allowed him to stay without paying any rentals ostensibly because he had no family.

   He had no qualms leaving that stranger with his wife and young children whilst he moved to Victoria Falls and he then wrote the letter I have already alluded to whilst he was in Victoria Falls.

   There had been no mention of any money exchanging hands between the two. In his plea he had categorically stated that;

   "The 1st defendant never received a single cent from the plaintiff."

   From this one extreme he moved to the other extreme, that in fact money had exchanged hands but as a loan. When this stranger had given him that loan and on what terms remained a mystery.

   For over 20 years this stranger was staying at his house without paying a dime in rentals and yet the 1st defendant had money problems as evidenced in the letter he wrote to the plaintiff.

This is one tale which if one were to believe it, it could be said one can believe anything and everything, displaying a gullibility that knows no bounds.

If the plaintiff came to reside at A32 Njube because the defendant saw him as a stranger who was single and would therefore not give him problems then this explanation ought to have been the only explanation regarding the matter.

For the defendant to then seek to say the reason was because of marriage betrays a lack of credibility of momentous proportions. The lack of consistency only speaks to lack of candour and comes from a desire to misrepresent facts, more so when regard is had to the fact that Glenda was too young to be married at the time.

3. In that same plea the 1st defendant said, "It is inconceivable that the 1st defendant will sell his property to someone whom he had not even met. 1st defendant met plaintiff at a later date in early 2000."

   In his evidence he said he met the plaintiff in 1998. This can only mean that the defendant has problems sticking to one story and this happens when a person is not telling the truth. Being consistent and building on a lie is not an easy task and the story soon unravels, as happened *in casu*.

4. If the money 1st defendant says was a loan was indeed a loan, how come he has no recollection of how much it was and why has he not paid it back, almost 24 years later. His explanation was that he has not paid it back because currency kept fluctuating but what has that got to do with paying back a loan?

5. The 1st defendant gave the reason for wanting to evict the plaintiff as the breakdown of the marriage between the plaintiff's brother and his daughter. It came out in evidence which was not controverted that that marriage still subsists. The 1st defendant under cross-examination alluded to the fact that the plaintiff's brother never paid lobola and now his daughter has 3 children. This tends to contradict his story that he has lost contact with his daughter because she dislikes him. Again, the lack of consistency is indicative of the 1st defendant's little respect for the truth. Just as he was economical with the truth his mental faculties became equally economical as regards retention of these untruths to enable him to repeat the same with some measure of consistency.

Under a barrage of questions from counsel for the plaintiff, the defendant's story all but crumbled.

The onus to prove that the plaintiff was only but a tenant lay with the defendant. He miserably failed to discharge that onus.

This being a civil case the standard of proof is on a balance of probabilities. In *Zera* v *Dera* 1998 (1) ZLR 500 (S) at 503E-504D the Supreme Court had this to say:

"It is a startling, and in my view, an entirely novel proposition, that in a civil case the standard of proof should be anything other than proof on a balance of probabilities … In a civil case one is concerned to do justice to each party. Each party has a right to justice, and so the test for that justice has to balance their competing claims. Hence the 'balance of probability test …"

The plaintiff managed to discharge that onus. Besides the very telling letter from the defendant, the excerpt from the Beverly account showing not that he paid the defendant but that he had a source of income from which he derived the resources to pay, the undisputed affidavit sworn to by Glenda confirming the hand behind the disappearance of the agreement of sale and the plaintiff's witness confirming the visit to defendant's house for the sole purpose of negotiating the purchase of A32 Njube, all went towards the successful discharge of the onus reposed in the plaintiff.

The plaintiff managed to prove that the 1st defendant sold A32 Njube to him and that he paid the full purchase price for it.

The defendant on the other hand miserably failed to show that the plaintiff occupied A32 Njube only as a tenant.

Counsel for the defendant aptly cited the case of *West Rand Estates v New Zealand Insurances Co. Ltd* 1925 AD 245 at 263 where the court said:

"It is not mere conjecture or slight probability that will suffice, the probability must be of sufficient force to raise a reasonable presumption in

> favour of the party who relies on it. It will be of sufficient weight to throw the onus on the other side to rebut it."

This is exactly what the plaintiff managed to do, leaving the 1st defendant to rebut the plaintiff's evidence showing he bought the property and paid the full purchase price for it and was therefore staying in that property not as a tenant but an 'owner'.

The plaintiff is therefore entitled to the relief he seeks. By defending the matter, the defendant unnecessarily put the plaintiff out of pocket by seeking to deny that which he knew was true.

His conduct is deserving of censure. In *Crief Investments (Pvt) Ltd and Anor* v *Grand Home Centre (Pvt) Ltd and 4 others* HH-12-18 MUSHORE J had this to say:

> "The awarding of costs at a higher scale is within the discretion of the court. Our courts will not resort to this drastic award lightly, due to the fact that a person has a right to obtain a favourable decision against a genuine complaint. The learned authors Herbstein and Van Winsen in *The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5 ed: Vol 2 p954 stated the following:
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> "The award of costs in a matter is wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at. The law contemplated that he should take into consideration the circumstances of each case, correctly weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such orders as to costs as would be fair and just between the parties …"

Where a party defends what ought not to be defended and seeks to take advantage of the disappearance of a crucial document which document he is well aware of, such conduct is deserving of censure. The plaintiff has had to approach the courts to assert a claim which the defendant was determined to defend, thereby putting the plaintiff out of pocket.

I therefore do not hesitate to exercise my discretion in allowing costs at a punitive scale.

In the result I make the following order:

Judgment is entered for the plaintiff in the following terms:

1. That 1st defendant signs all the necessary papers for the cession of the right title and interest in and to stand A32 Njube, Bulawayo into the plaintiff's name, within 14 days of this order.
2. In the event that the defendant fails to comply with (1), the Sheriff or his lawful deputy be and is hereby authorized and directed to sign the necessary papers to effect the same.
3. The 1st defendant shall pay costs of suit at attorney-client scale.

Masiye-Moyo & Associates Inc. Hwalima, Moyo & Associates, plaintiff's legal practitioners
Mutatu, Masamvu & Da Silva Gustavo Law Chambers, 1st defendant's legal practitioners