

CYRIL CHIKADAYA  
vs  
ZAKEYO CHIKADAYA  
and  
CITY COUNCIL OF HARARE

HIGH COURT OF ZIMBABWE  
SMITH J,  
HARARE, 3, 4 September, 2001 and 9 January, 2002

Mr *Musariri* for plaintiff  
Mr *Madya* for defendant

SMITH J: The applicant (hereinafter referred to as "Cyril") issued summons seeking an order that the 1st defendant (hereinafter referred to as "Zakaya") cede his rights, title and interest in Stand 6059 Glen View Township, Harare (hereinafter referred to as "the Stand") to Lydman Chikadaya. In his declaration Cyril says that the 2<sup>nd</sup> defendant (hereinafter referred to as "the Council") sold rights in the Stand under a lease-to-buy scheme, to Kufa Oswin Danda (hereinafter referred to as "Danda") on 26 September, 1979 and he bought Danda's rights in the Property sometime in 1980. Because, at that time, Cyril had another property within the Council area and it was the policy of the Council not to permit any one person to have two properties registered in his name, Cyril agreed with Zakaya that the Stand would be registered in the latter's name. In due course it would be registered in the name of Cyril's children. On 26 January 1982 the Council approved the cession of Danda's rights in the Stand to Zakaya. On 19 May 1998 Cyril asked Zakaya to cede the rights to his son, Lydman Chikadaya, but Zakaya refused. Zakaya alleges that it was one, Banda Kanaka, who had rights in the Stand, and not Danda. Banda sold the rights to Zakaya and after the latter had paid half the purchase price, the two of them went to the Council offices where Zakaya's rights in the Stand were recorded. It was some years after that that Cyril brought up his claim to the Stand.

Cyril was the first witness. His testimony was as follows. Zakaya is his younger brother. On 26 September, 1979 the Council sold the Stand to Danda. He met Danda when he took his sister, who was mentally ill, to Danda's uncle for treatment. Danda said that he wanted to sell his rights in the Stand. He sold them to Cyril for \$800. At the time it was a bare stand, with no development. He paid Danda the full amount in 1981, after he had settled other accounts. Zakaya was serving in the Support Unit of the ZRP and was not in Harare. He bought bricks and cement and built a 2-roomed structure. In 1982 he went with his sister, a distant relative called Lawson and Zakaya to the Council offices to apply for a change of ownership of the Stand. Zakaya signed the papers for Danda's rights to be ceded to Zakaya. He had asked Danda to cede the rights into Zakaya's name because he had another stand in Glen View registered in his name. Zakaya agreed to sign the papers on the basis that later he would cede the rights back to Cyril who would surrender the Stand to one of his children. The Council did not allow people to own more than one stand. After he finished building the house he was surprised to hear Zakaya say that he wanted the Stand. Zakaya had financial problems and wanted some money. Zakaya became belligerent and threatened to assault him; so he decided to approach the courts to resolve the matter. The house has 5 bedrooms and a kitchen, sitting room and verandah and is of brick with an asbestos roof. He employed builders to build the house and he did the roof. Zakaya did not assist financially or in any other way. He got money from lodgers at his house, his wife grew maize which she sold and he got a loan from his employer. Danda's full name is Oswin Kufa Danda Kunaka. He is not called Banda. In the agreement of sale of the Stand the purchaser is said to be Kufa Oswin Bamda, but that was a mistake, it should have said Danda.

Cyril was subjected to a lengthy and searching cross-examination in the course of which he made the following responses. Although he had bought the Stand in 1980, he did not get Danda to cede the rights therein until 1982 because the Council would not agree to any cession until there was some development on the stand. His brother and sister were ganging up with Zakaya to say that the Stand is his because they want to share the proceeds with him. There are lodgers in the house and Zakaya is paying them part of the rent he receives. It was he, Cyril, who had collected the rest from the lodgers from 1982 to 1996. In 1996 Zakaya had started to collect the rest and is still collecting it. He only instituted proceedings in 1998 because he was trying to locate Danda, who had moved to Bulawayo. He did not go and break windows of the house on the Stand. Zakaya did get a peace order against him in 1998 but that was in order to prevent him approaching the Stand.

The next witness was Danda who testified as follows. He had bought the Stand from the Council. He sold it to Cyril for \$800. He met Cyril when Cyril brought his sister, who was sick, for treatment. He did not know Zakaya. When Cyril paid the \$800 Zakaya was not present. There was no building on the Stand when he sold it to Cyril. He and Cyril went to the Council offices to register the cession of his rights. There were some men with Cyril when they went to the Council offices but he did not know who they were. After he signed the paper he left the office and did not see what happened thereafter. He could not remember who had signed first. By that time Cyril had built a 2-roomed house on the Stand. His name is Danda, not Banda. The clerk at the Council office made a mistake when he recorded his name as Banda. He did not sell his rights in

the Property to Zakaya and it was not Zakaya who paid him. He intended to cede his rights to Cyril.

Danda was subjected to cross-examination during which he gave the following responses. He sold the rights in the Stand because he needed money for school fees. After he signed the cession documents he gave Cyril the card relating to the Stand and left the Council office. Cyril was the only person he knew when they went to the Council office. He did not see Cyril after he left the Council office until last year when Cyril contacted him and said that the Stand had created problems with his younger brother. The first time he saw Zakaya was outside the court room.

Zakaya was the next witness and he testified as follows. He was a member of the Support Unit of the ZRP and has retired. He had first heard about the Stand from his sister, Angeline. She told him that Cyril had learnt about a stand that was being sold by Danda. Cyril had no money to buy the stand as he withdrew \$700 from his account and gave it to Angeline to give to Cyril to pay on his behalf. The purchase price was \$500. This happened in October 1981. Angeline told him that the money had been paid to Danda. In January 1982 he returned to Harare and Angeline told Cyril that he was prepared to pay the balance of the purchase price which was \$200. Cyril duly advised Danda and he paid Danda the \$200 when he met him at the Council offices to register the cession on 28 January 1982. He arrived first at the Council offices and then Danda came. Cyril was not yet present. Danda told him that he had been advised to meet Cyril's younger brother at the Council offices and asked if he was the younger brother. He said that he was. Later he handed Danda \$200 in the presence of Cyril. He and Danda then went into the office to have the cession registered. Cyril wanted to join them but was told

that only the seller and the buyer were allowed to enter the office. The officials asked them some questions and then each signed the paper in the presence of the other. He was asked if he was in a position to develop the stand and if he was in employment. He confirmed that he was asked to produce his payslip. After his return from Bulawayo he went to look at the stand. Cyril took him. There was no development on the stand. They engaged people to dig the foundations and their father built the foundations. He left money with Angeline to buy the materials and she gave the money as it was needed to give to their father or to Cyril. It was their father who built the house, which was finished in 1985. During this period he, himself, was stationed outside Harare. He returned to Harare in 1996. There were lodgers in the house and Cyril collected the rent. He told Cyril to give part of the rent to their father for doing the building and the rest went to their mother in the communal lands. On his return to Harare he told Cyril that he would be going on pension and so he needed the rent himself. Cyril wanted to keep the rent for another 2 or 3 years but he refused. The house was not fully developed because there was no electricity supply. He installed electrical fittings and then told Cyril that he did not want him to collect the rent. That was when the dispute between the two of them arose. Cyril went to the house and caused problems with the lodgers; he threatened to fight them and told them to leave. He, Zakaya, had to go to the police and get a peace order to keep Cyril away from the house. Cyril would rip off the locks and break windows. Zakaya said that there was an agreement with Cyril that he would cede his rights in the stand to Cyril's child. Whilst he was out of Harare he left withdrawal slips that he had signed with Angeline and his other brother, Lisbon so that they could get money to guild the house.

Zakaya, under cross-examination, gave the following responses. He did not remember Danda, when he saw him in court. It could have been Danda who sold him the Stand or it could have been another person. He and his family were lodgers in a house at New Tafara. He had not moved into the house on the Stand because Cyril plays with black magic and he could be hurt. He had paid Danda \$500 for the stand. Danda had been bribed to say that the purchase price was \$800.

The next witness was Angeline who testified as follows. Cyril is her elder brother and Zakaya the last born in the family. She was staying with Zakaya at Morris Depot when Cyril came to them and said he had found 2 stands. One was taken by their father and Cyril said that, because he already had a stand, the second was for his brother. As Zakaya was not then married he had money. Zakaya and their brother, Lisbon, went to see Cyril about the stand. Zakaya gave her \$300 and said that he was to pay the balance of the purchase price when he returned from patrol. Zakaya made the arrangement with Danda at the Council offices. Their father then started building the house. Zakaya left withdrawal slips with her so that she could pay for materials. Cyril would then take a slip, withdraw money from Zakaya's account and given the money to their father. It was Zakaya who bought the Stand, although Cyril was the one who had found it. She said that she loved both her brothers and had no reason to lie against Cyril.

Under cross-examination Angeline gave the following responses. She had never met Danda. Zakaya told her that he had bought the Stand from someone called Banda. He showed her the papers he had signed. She as not present when the parties negotiated. Zakaya gave the money to Cyril. Danda could be mistaken when he said he sold the Stand to Cyril because, at that time, Zakaya was much smaller than he is today and Cyril

was very big. She suspected that there was some deal between Cyril and Danda to try to get the Stand for Cyril to try to get the Stand for Cyril. She was not present when Cyril, Zakaya and Danda went to the Council offices. At that time there was no building on the Stand. Later a 2-roomed house was built and Cyril said that he would get lodgers. She first visited the Stand in the 1990s, when Cyril took her there to show her the house he had built. Cyril collected the rent. He used it for school fees for his children, and sent some to their parents in the communal lands and used some for the building work. The price paid for the Stand was \$500 not \$800. When money was needed for building materials, Cyril came to her house and collected Zakaya's pass-book and a signed withdrawal slip.

The last witness as Lisbon. The younger brother of Cyril and Zakaya. He testified as follows. When Cyril found that there were 2 stands for sale, their father took one and Cyril suggested that he should buy the other and build a house on it. As he had just got married and had no money, he said that he would tell Zakaya when he returned. He said that he would tell Zakaya when he returned. He later told Zakaya about the Stand and Zakaya said he was interested. The price was \$500. Zakaya withdraw \$300 and gave it to Angeline who took it to Cyril to give to the seller. The balance as paid in 1982 when the parties were going to get the cession registered at the Council offices. After Zakaya bought the Stand he withdrew money from his account and gave it to Cyril. He left withdrawal slips with Angeline and, at first, she would go to the bank and withdraw money. Later Cyril asked for the withdrawal slips and passbook so that he could go direct to the bank and get the money without going to Angeline. Cyril had complained that, when he needed money, he would go to see Angeline and she would not be there.

Their father was a qualified builder and he built the house. Cyril never told him that he was buying the stand. When Zakaya was approaching retirement in the mid 1990s he told Cyril that he wanted to take control of the Stand. Lisbon said that he had no reason to be against Cyril. He was not benefitting from the rent paid by the lodgers in the house. He was employed as a driver and was getting enough money for his needs. He did not need extra money.

Lisbon was subjected to lengthy cross-examination, in the course of which he gave the following responses.

He did not think that Danda was telling the truth. He admitted that he was not present at the various meetings of the parties and all that had happened was told to him by Cyril and Zakaya. He believes that the first payment for the Stand was made by Cyril but it was money that had been withdrawn from Zakaya's account. That was what he was told. Both Cyril and Zakaya told him that they had paid the full price and were waiting for the seller to come so that he could sign the cession papers. Cyril had collected the rent paid by the lodgers from the beginning. He was in charge of the work on the house. He used the rent to pay bills and rates to the Council and to buy building material. After the house was completed in 1985 he pocketed the rent for the next 10 years. Zakaya had allowed Cyril to keep the rent for such a long period because he appreciated what Cyril did to get the Stand for him.

Cyril was, in my opinion, a good witness. He gave his evidence well and was not shaken under an extensive and thorough cross-examination. His testimony that Danda had sold the Stand to him was confirmed by Danda. Danda is not a member of the family and would appear to have no reason to lie in favour of Cyril. It seems that he and Cyril

were not friends when they met and agreed on the sale of the Stand in 1979. Then, after the cession was registered in 1982, Danda moved to Bulawayo and he and Cyril did not meet again until Cyril went looking for him last year in order to be able to call him as a witness. Zakaya, on the other hand, was not as good a witness as Cyril. To me he appeared somewhat evasive at times. His witnesses, Angeline and Lisbon, were relative of his, being his sister and his brother respectively. Admittedly they had the same relationship with Cyril. Neither of them had first-hand knowledge of the discussions between Cyril, Zakaya and Danda and neither of them were at the Council offices when the cession was registered. Furthermore it would appear that both of them visited the Stand on very few occasions. All of this evidence is based on what they allege they were told by Zakaya and Cyril. On balance, I am of the view that the evidence of Cyril and Danda is to be preferred. Accordingly, I find that it was Cyril who bought the Stand from Danda and that the cession was registered in the name of Zakaya in order to get round the policy of the council that a person who already owned a stand in the townships should not be able to acquire a second stand.

The facts in this case are similar to those in the case of *Dube v Khumalo* 1986 (2) ZLR 103 (SC). In that case GUBBAY JA held that the parties were *in pari delicto* insofar as they had purported to buy the stand in question in the name of Khumalo when in fact it was Dube that was buying it. They had defrauded the Municipality of Bulawayo. However he then went on to hold that the *par delictum* rule should be relaxed in order to do justice between the parties. In view of the similarities between the two cases, I feel that the *pare delictum* rule should likewise be relaxed in this case in order to

do justice between the parties. The case of *Latimer Manley & Associates(Pvt) Ltd v Laverne Investments (Pvt) Ltd* 1990 (1) ZLR 204 (HC) is clearly distinguishable.

It is ordered that :

1. The first defendant, within 10 days of the date of this order sign all papers necessary to cede his rights, title and interest in Stand 6058 Glen View Township, Harare, to the applicant.
2. If the first defendant fails to comply with paragraph 1 of this order, the Deputy Sheriff, Harare, is authorized to sign such appears on his behalf.
3. The first defendant pay the costs.

*Musariri & Co*, legal practitioners for plaintiff