

LYNDON T. NKOMO AND FORTY THREE OTHERS
versus
ZIMBABWE ELECTRICITY SUPPLY AUTHORITY

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE 15 OCTOBER 2003 AND 31 MARCH 2004

Mr G. Machingambi, for the plaintiff
Mr J.C. Muzangaza, for the defendant

HUNGWE J : Plaintiffs issued summons against the defendant seeking the following relief-

- "A. An order directing the defendant to effect transfer into the plaintiffs' names certain properties situate at Megawatt Court, 119 Josiah Tongogara Avenue, Harare as itemised in Annexure 'A' to the Declaration and which properties were sold by the defendant to plaintiffs in the months of September to December 2001, against payment by the plaintiffs of the purchase prices thereof and tender of performance by the plaintiffs of their obligations under the said sale agreements.
- B. In the alternative, plaintiffs claim an order cancelling the sale agreements concluded with the defendant, repayment of the sum of \$6 000 000 (six million Zimbabwe dollars) being the total amount paid by certain of the plaintiffs to the defendant towards the purchase price for the properties and the sum of \$156 150 000.00 (one hundred and fifty six million one hundred and fifty thousand Zimbabwe dollars) representing the total damages suffered by all the plaintiffs for breach of contract which damages are calculated as the difference between the contract or purchase price for each property and the open market value of each property at the time of breach as more fully itemised in annexure 'A' to the declaration.
- C. Interest at the prescribed rate from 4 January 2002 being the date of demand to the date of full payment.
- D. Costs of suit."

In their declaration the plaintiffs state that they are all tenants of the defendant occupying different apartments at Megawatt Court at 119 Josiah Tongogara Avenue, Harare. Defendant let these apartments through Southgate and Bancroft. In September 2001 the defendant addressed letters through its agent Knight Frank to each plaintiff in which defendant offered for

sale to the plaintiffs, the individual apartments let to them at stated prices. The letter indicated the price for each of the three categories of flats at Megawatt Court. It also indicated that those interested in purchasing the flats were to contact the agents by 19 October 2001 so that all formalities of the sale and transfer of the property are concluded by 30 November 2001.

Some of the plaintiffs entered into written agreements, the others alleged that they entered into oral agreements. Those who had signed their Agreements of Sale with defendant paid deposits totalling \$6 000 000.00. The rest did not pay deposit as the defendant's agents declined to accept such deposit when it was tendered. All forty four plaintiffs sued for the above order.

Defendant opposes the grant of the order sought.

In its plea defendant admits that it made an offer to sell flats to sitting tenants. It offers three explanations in respect of the three categories of tenants. It admit that written agreements of sale were concluded between it and 1st, 2nd, 24th, 32nd, 37th, 40th, 42nd and 44th plaintiffs. It however avers that at that stage it advised that it would sign the agreements of sale once ministerial approval was obtained. It applied for that approval but was refused. That rendered the conclusion of the sale agreements impossible.

As for 3rd, 4th, 5th, 9th, 12th, 13th, 16th, 21st, 25th, 29th, 30th, 38th and 41st plaintiffs, defendant admitted that this group paid their deposit in response to the offer. At that stage they were advised by defendant that the sales of the flats would only be concluded upon the grant of ministerial approval. That approval was applied for but was refused rendering the conclusion of the agreements of sale impossible. They paid the deposits aware of the suspensive condition therefore could not hold the defendant liable in damages.

As for the third group i.e. 6th, 7th, 8th, 10th, 11th, 16th, 15th, 17th, 18th, 19th, 20th, 22nd, 23rd, 26th, 28th, 31st, 33rd, 34th, 35th, 36th, 39th plaintiff admits that offers were made for the sale of the flats which they occupied in terms of lease. Defendant denies that such offers were accepted by the plaintiffs in any form or within the stated time limit. Defendant therefore denies that any agreement was entered into between this group and the defendant.

At the pre-trial conference, settlement was achieved between the first two groups and the defendant. The matter proceeded to trial between the third group and defendant on two issues. The first issue was whether the offers for sale made by the defendant to these plaintiffs (21 of them) were accepted by the plaintiffs and whether sale agreements were thereby concluded.

The second issue was whether the defendant is liable to each of the plaintiffs as claimed in the summons and if so what damages were suffered by the plaintiffs?

It is necessary at this point to restate the plaintiffs positions at the time the trial opened. As I said the first two groups had altogether disappeared from the pictures on the day trial opened. Of the remaining twenty one plaintiffs only 6th, 8th, 15th, 17th, 18th, 19th, 22nd, 23rd, 26th, 27th, 28th, 31st, 33rd, 34th, 35th and 39th gave evidence(sixteen).

In deciding the first issue it is necessary to examine the evidence tendered in proof of acceptance of the offer made.

The letter constituting the offer is exhibit I dated September 25, 2001 from Knight Frank, the defendant's agent. It reads as follows,

"Our client, ZESA Pension Fund, has instructed us to sell the individual flats in Megawatt Court. As a sitting tenant, we have been instructed to give you a two months right of first refusal, from 1st October to 30th November 2001, to purchase the flat you are leasing on the following prices:-

- Bachelor flat \$650 000
- 1 bedroom \$900 000
- 2 bedroom \$1 200 000

If you are interested in purchasing your flat, please contact us by 19th of October 2001 in order to conclude all the formalities and transfer of the property by the 30th November 2001. The flats are being sold through a sectional title scheme and title deeds will be made available to cash purchasers on transfer.

Tenants with rent and water arrears will be expected to clear them before being considered to purchase the leased flat."

The letter informs the tenant at Megawatt Court that the agent has been instructed to sell the individual flats. The recipient, being the sitting tenant has been offered two months within which to exercise his/her rights of

first refusal beginning 1st October 2001 ending 30 March 2001. The price of the individual flat is stated. The letter goes on to advise what the sitting tenant who wishes to exercise the right of first refusal should do. The tenant should contact the seller's agent by 19 October 2001. The process should be concluded by 30th November 2001. Title deeds will be made available to cash purchasers on transfer.

On 29 November 2001 the offer of the right of first refusal of the purchase of the flats was extended to 20 December 2001. The letter of the 29th November in which the extension of the period within which the offers could be accepted was preceded by a letter by plaintiffs to the defendants agents dated 28 October 2001. That letter is also proof of acceptance of the offer to exercise the right of first refusal. The letter of 28 October 2001 by plaintiffs was received by defendant's agents the next day. Defendant's agent then address a letter to its principal in which is highlighted the stages it had reached with some of the plaintiffs towards the conclusion of the agreements of sale.

These states are:

- a) agreements of sale have been executed between the parties after payment of deposit by the purchasers.
- b) Deposits had been accepted and agreements of sale drawn although these have not been signed by the parties
- c) Offers made by the agents had been accepted and agreements were in the process of being drawn up.

Exhibits 25 and 26 set out the above stages graphically.

It will be clear from what I said above that the first two groups whose claims have since been settled fit into the first two stages (a) and (b). The trial concerned the process in stage (c).

The sixteen plaintiffs gave evidence in person.

The evidence of the plaintiffs was that they both orally contacted the defendant's agents indicating their willingness to purchase their flats. They were then advised in those discussions, to pay cash or deposit. None of the plaintiffs at the time had the required deposit. Each plaintiff resorted to

different means to raise his or her deposit. The period stipulated in the first letter expired. It was then extended to 20 December 2001. By that date none of them had signed an agreement of sale on payment of a deposit.

They all seek to hold defendant to the contract of sale.

It seems to me that when deciding whether Exhibit 1 constitutes such an offer which on acceptance binds both parties it is important to consider the type of the contract envisaged, the detail required in that type of contract and most importantly whether both parties intended to be bound by a contract once the plaintiffs accepted the offer.

The subject of this contract was sale by sectional title, individual flats consisting a block of flats. It would require individual contracts to be drawn up. It would require the parties to satisfy themselves on the description of the particular type of flat in question and an agreement as to the method of payment.

In respect of these plaintiffs none of them had had sight the agreement of sale which they would be required to enter into should they be invited to pay a deposit. In short all that there was an offer by the defendant's agent, for a right to purchase flats at a specified price within a specified period.

In contract a person is said to make an offer when he puts forward a proposal with the intention that by its mere acceptance, without more, a contract should be formed. The intention of course may be express or implied. (See Christie, *The Law of Contract in South Africa*)

What distinguishes a true offer from any other proposal or statement is the express or implied intention to be bound by the offeree's acceptance. In other words looking at the terms of the offer without more, one should be able to come to the conclusion that the intention to contract *animus contrahendi*, is manifest in the offer.

There is a view that to be an offer, a statement of the price by the seller must be made with the intention of being bound by the offeree's acceptance. (*Hottantos Holland Motors (Pty) Ltd v R 1956 1 PH K 22 (C) per Van Winsen J*)

The courts have progressively employed the language of business and described an offer as a firm offer. In *Wasmuth v Jacobs* 1987 (3) SA 629

(SWA) at 633 LEVY J said,

"It is fundamental to the nature of any offer that it should be certain and definite in its terms. It must be firm, that is, made with the intention that when it is accepted it will bind the offeror."

Although the agents letter is specific as to the price of the flats being sold in the absence of a full agreement setting out the details of the sale of this block of flats I cannot hold that the features of the offer when made to all the plaintiffs was such that the defendant intended that upon its mere acceptance without more it should bind it. In my view, this letter which the parties have termed an "offer" was strictly speaking a request of an offer. I am fortified in that conclusion on the facts because firstly it merely stipulated the defendant's intention to sell at a given price and asked for expressions of interest. Secondly, on the plaintiffs own word, on giving the expression of interest a requirement on a deposit was given as a minimum condition otherwise this was a cash sale unless acceptable arrangements for the payment of the case price had been indicated. Before a plaintiff could be able to claim that defendant was bound, he ought to show that he was in fact of the same mind with him in respect of the material aspects of the contract. He must demonstrate *consensus ad idem*. Terms were set in respect of dates by when the contracts ought to have been concluded. These were not met. They were extended. At the time the defendant granted an extension, it cannot, in my view, be said with regard to these sixteen plaintiffs that an offer was in existence the mere acceptance of which bound the defendant. They needed more in order to create binding obligations.

Having found that although designated an offer exhibit 1, the letter by the defendant's agents is not a firm offer whose mere acceptance would have bound the defendants.

Having found against the plaintiffs on the first issue, it will not be necessary for me to decide the second issue.

In the result the plaintiffs claim is dismissed with costs.

G. Machingambi, plaintiffs' legal practitioners

Muzangaza Mandaza & Tomana, defendant's legal practitioners