

SHADRECK NHIWATIWA  
versus  
MOREBLESSING NHIWATIWA  
and  
REGISTRAR OF DEEDS  
and  
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MANZUNZU J  
HARARE, 1, 2 & 25 June 2020

### **Civil Trial**

*S. Simango*, for the plaintiff  
*G.Nyamayi*, for the 1<sup>st</sup> defendant

MANZUNZU J: The plaintiff issued summons on 19 September 2018 against the defendants seeking the cancellation of the deed of transfer No. 4370/18 in first defendant's name. The facts of this case are mostly common cause. The plaintiff and first defendant (the parties) were husband and wife and their marriage was dissolved at the instance of the first defendant in a divorce action on 20 September 2017 in Case No. HC 10562/16. The parties' divorce was regulated by consent paper which was made an order of the court. Paragraph 3 of the order reads in part;

“..... the proprietary rights of the parties are to be governed and regulated in terms of the consent paper entered into by the parties on the 19<sup>th</sup> September 2017 and filed of record.”

Paragraph 2 of the Consent paper, which gives rise to the present dispute between the parties reads as follows:

“2.1 IMMOVABLE PROPERTY

2.1.1 The parties jointly own a certain piece of land situate in the district of Salisbury measuring 2 327 square metres called Stand 191 Good Hope Township of subdivision D of Good Hope, commonly known as 191 Willow Creak Westgate, Harare which property is currently registered under Deed of Transfer 5945/2006 which property is currently mortgaged in favour of Tottengram Invesments (Pvt) Ltd as security for a loan extended to the parties. The parties are each entitled to a 50% share of the property and are liable to meet the mortgage loan, the electricity bill as at the 31<sup>st</sup> of January 2017 in the sum of \$10 766.89 as well as the rates bill as at the 31<sup>st</sup> of January 2017 in the sum of \$2 652.00 in equal proportions.

- 2.1.2 The Plaintiff is the registered owner of 11 Muchongoyo Close, Zengeza 1 Chitungwiza which property is currently mortgaged in favour of Untu Microfinance as security for a loan extended to the plaintiff. The Defendant is cited as the guarantor on the loan. The Parties are each entitled to a 50% share of the property and are liable to meet any and all utility bills owing on the property in equal proportions. The loan extended shall be recovered by Untu Microfinance, if need be, in terms of the loan agreement.
- 2.1.3 Within 10 days of granting of the Court Order, **BOTH** properties shall be valued by Top Market Real Estate and Heaven and Earth Real Estate and the parties shall jointly meet the costs of the said valuations.
- 2.1.4 Within 60 days of the Court Order the Defendant shall pay 50% of the net value of the Westgate Property to the Plaintiff and less his net share of the value of Chitungwiza Property. The Defendant shall meet the costs of transferring the Plaintiff's half share in the Westgate Property into his name. Should the Defendant fail to make payment to the Plaintiff as outlined above within the stipulated time:
- (a) the Westgate Property shall be sold to the highest bidder and the net proceeds shall be paid to the Parties in equal proportions. The parties shall take all necessary steps for the sale and subsequent transfer of the property, failing which the Sheriff of the High Court of Zimbabwe shall be substituted for the defendant and shall sign the necessary documents to effect transfer.
  - (b) The plaintiff shall pay the defendant his net share of the value of the Chitungwiza within 60 days of such failure, failing which the property shall be sold to the highest bidder and the net proceeds shall be paid to the parties in equal proportions. The parties shall take all necessary steps for the sale and subsequent transfer of the property, failing which the Sheriff of the High Court of Zimbabwe shall be substituted for the Defendant and shall sign the necessary documents to effect transfer.”

It is common cause that the property is now registered in the name of the first defendant under Deed of Transfer No. 4370/2018 dated 22 August 2018.

The plaintiff challenges, as irregular, the process leading to the registration of the property in favour of the first defendant. The basis being that the process did not comply with the terms of the consent paper.

The first defendant's position was that everything was done in line with the consent paper and seeks for dismissal of plaintiff's case with costs.

At the joint pre-trial conference only one issue was identified and agreed to by the parties. The issue is;

“whether or not the disposal of the property called Stand 191 Willow Creak, Westgate, Harare measuring 2 327 square metres was in accordance with the terms of the consent paper which the plaintiff and first defendant signed on the 19 September 2017, as part of the court order in case No. HC 10562/16.”

At trial the parties were the sole witnesses in their own case. Critical is clause 2.1.4 (a) of the consent paper cited supra: The clause gave the plaintiff (defendant then) the option to buy out the first defendant (the plaintiff then) her 50% share less his own share of the value of Chitungwiza property. The payment was to be within 60 days of the date of the court order which was 20 September 2017. It is common cause that plaintiff failed to make such payment within 60 days. The question now is what should happen to the property in the event of failure by the plaintiff to pay first defendant within the agreed 60 day period. The answer lies in para 2.1.4 (a) which I need to recite:

“Should the defendant (Shadreck) fail to make payment to the Plaintiff (Moreblessing) as outlined above within the stipulated time;

(a) the westgate property shall be sold to the highest bidder and the net proceeds shall be paid to the parties in equal proportion. The parties shall take all necessary steps for the sale and subsequent transfer of the property, failing which the Sheriff of the High Court of Zimbabwe shall be substituted for the defendant (Shadreck) and shall sign the necessary documents to effect transfer.” (I inserted parties’ names to easy reference).

It is the manner in which the property was sold and its subsequent transfer to the first defendant which has become the centre of the dispute between the parties. The plaintiff’s evidence, on the disputed issue was that, following his failure to buy out the first defendant the property was to be sold to the highest bidder, despite the fact that there was no agent appointed by the parties to do the sale. He said while the first defendant claimed there were some offers of up to \$200 000 no such potential buyers were brought to his attention. His own understanding of the consent paper was that the Sheriff was to facilitate the sale and transfer of the property. However, he did not receive any communication that the Sheriff was now selling the property. He does not know who sold the property, he accused the first defendant of singly bidding the property to her-self and finally buying it. He denied having participated in the sale. His understanding of clause 2.1.4 (a) was that “necessary steps for the sale” meant appointing an agent to do the selling failing which the parties were to seek the intervention of the court for the Sheriff to sell. In one breath he said the Sheriff sold the property and in another breath he said first defendant sold property to herself.

The plaintiff was cross examined at length. He admitted there was an exchange of offers between his lawyers and those of the first defendant. He admitted the consent paper did not

preclude the first defendant from participating in the bidding process. His evidence relating to the appointment of an agent to do the sale or coming back to court for the Sheriff to sale was challenged. He could not point out where it was spelt out in clause 2:1:4. Indeed, the consent paper does not spell out as suggested by the plaintiff. What is clear from both parties' evidence is that there was exchange of correspondence explaining the offers being made.

First defendant's evidence was that the sale of the property was in accordance with the terms of the consent paper. She said both parties were to find the highest bidder. Only then, if plaintiff failed to play his role, would the Sheriff be roped in to sign transfer documents.

In her interpretation of the consent paper "transfer documents" includes the agreement of sale. She said the signing of the agreement of sale by the Sheriff was proper.

It is important to look at the activities of the parties following the failure by the plaintiff to buy out the first defendant. That will assist the court in establishing the intention of the parties.

The plaintiff's position is that an agent was to be appointed to do the selling failing which parties were to go back to court for the Sheriff to do the sale. That did not happen, neither are such steps spelt out in the consent paper. On the other hand, the first defendant said the signing of the agreement of sale by the Sheriff was proper. She said a sale agreement is part of the transfer documents. The consent paper does not seem to support that. It singles out a sale and transfer documents.

It is clear that the parties took upon themselves to look for buyers. These are the "necessary steps" spelt out in the consent paper. Indeed, offers were received from each side of the parties and communicated to the other party. The sole purpose of such communication was to seek acceptance by the other party so that an agreement of sale could be drawn.

First defendant says she was the highest bidder who subsequently bought the property. It is trite, in the law of contract, that where there is an offer there must be an acceptance for a valid contract to exist. The offer is an invitation which is addressed by the one party to the other to create a specific obligation and the acceptance is a positive answer by the party to whom the invitation was directed.

The first defendant said in evidence that her offer was for \$225 000 and was the highest offer which plaintiff has disputed. Even if it is accepted that she made an offer for that amount and that it was the highest, the issue is was the same accepted by the plaintiff. If the offer was made in writing, the expectation is that the acceptance would be in writing. Under cross-

examination she was asked how her offer was accepted by the plaintiff. She said, “the offer was communicated to the plaintiff’s agent and there was no refusal of it and an agreement was then signed.” She never came out clear in her answer when she was asked a follow up question, whether non-communication meant acceptance. Under re-examination she was asked if plaintiff rejected to her offer of \$225 000. Her response was “NO.” A follow up question was whether she took his failure to respond to mean acceptance and she said “yes.” Such cannot be an acceptance.

Counsel for first defendant relied on the authority of the case of *JCDECAUX Zimbabwe (Pvt) Ltd v City of Harare* HH 400-17 where the court cited the case of *Sun Radio & Furnishers v Republic Timber & Hardware* 1969 (4) SA 378 (TVL) and stated that:

“ It is trite that silence does not necessarily amount to acquiescence. Each case must be decided upon its own circumstances. However, where the circumstances are such that a party was reasonably and fairly expected to respond and does not do so, then the court may infer acceptance of an offer. This is especially so where the document sent to a party referred to the establishment of a legal relationship.”

That case is distinguishable from the present case in that it dealt with the respondent failing to respond to or decline applicant’s exercise of its option to renew the lease agreement when it had a duty to do so.

It is interesting to see how 1<sup>st</sup> defendant’s offer was conveyed to the plaintiff. On Tuesday 18 July 2018 an email was drawn by the 1<sup>st</sup> defendant’s lawyers to the plaintiff’s lawyers in the following words; “ your client has clearly failed to buy our client out of her share of the property. Our client has offered to buy your client’s share for \$112 500 (full price is \$225 000). The offer is clearly the highest offer received so far. In that regard please find attached hereto the agreement of sale for signature by your client. Please return the signed copies within 3 days of the date of this email.”

On Thursday 19 July 2018 the lawyers for the plaintiff replied thus, “oky received. Have forwarded same to clients.”

Without any further inquiry the first defendant’s lawyers on 23 July 2018, being the third day in which they asked the return of a signed copy of the agreement, proceeded to request the Sheriff to sign an agreement on behalf of the plaintiff.

An agreement of sale was signed by the Sheriff on 24 July 2018 who also was the seller on behalf of the plaintiff. That was improper. The parties according to the consent paper, took the

necessary steps for the sale. There was exchange of correspondence with offers as already stated. The Sheriff was to come in the event of the defendant (now plaintiff) failing to do his part.

The sale and transfer are two different acts. The “failing which” in my view relates to the transfer documents. I say so for three reasons.

The first is that the parties took necessary steps to sale save there was no acceptance by the plaintiff to the offer by the first defendant. Secondly the first defendant lead no evidence at least on a balance of probabilities to show that plaintiff failed to do his part giving rise to the involvement of the Sheriff. Thirdly clause 2:1:4 (a) qualifies the role of the Sheriff i.e. to “sign the necessary documents to effect transfer.” I disagree that an agreement of sale is part of transfer documents as suggested by the first defendant.

This is a matter where the plaintiff has made a good case for the cancellation of the deed of transfer it having been irregularly acquired contrary to the consent paper. As regards to costs I see no justification to award costs on a punitive scale.

IT IS ORDERED THAT

1. The plaintiff’s claim succeeds with costs.
2. The deed of transfer No. 4370/2018 dated 22 August 2018 in favour of Moreblessing Nhiwatiwa be and is hereby cancelled.
3. The 1<sup>st</sup> defendant is ordered to surrender the said Deed of transfer to the Registrar of Deeds within 48 hours of service of this order by the Sheriff on the 1<sup>st</sup> defendant or her legal practitioners to enable the Registrar of Deeds to endorse such cancellation.

*Nyikadzino, Simango and Associates*, plaintiff’s legal practitioners  
*Honey and Blanckenberg*, 1<sup>st</sup> defendant’s legal practitioners