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Judgment No. SC 9/06

Civil Appeal No. 186/05

TONY MAKOSHORI v

(1) SAVIE NYAMUSHAMBA (2) MHANGURA COPPER MINES LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & GWAUNZA JA
HARARE, FEBRUARY 16 & APRIL 6, 2006

S Mushonga, for the appellant

O C Gutu, for the first respondent

No appearance for the second respondent

SANDURA JA: On 10 June 2005 the High Court set aside the sale of a community hall ("the property") by the second respondent ("Mhangura") to the appellant ("Makoshori"), and ordered Mhangura to sell the property to the first respondent ("Nyamushamba") for $80 000.00. Aggrieved by that decision, Makoshori appealed to this Court.

The background facts are as follows. In September 2001 Mhangura and Nyamushamba concluded a lease agreement, in terms of which Mhangura let the property to Nyamushamba from 1 November 2001 to 31 October 2003 for the purpose of running a dressmaking school.

On 10 May 2002 Mhangura wrote to Nyamushamba as follows:

> "This note serves to inform you that your lease agreement with us will be terminated on 15 June 2002. You are expected to have vacated the house and handed over the keys to Mrs Nyakachanga at MCM General Offices on or before 15 June 2002."

Subsequently, on 20 May 2002 Nyamushamba's lawyers wrote to the general manager of Mhangura ("the general manager"). The relevant part of that letter reads as follows:

> "We have perused the agreement of lease between the parties, clause 1 of which clearly states that the lease is due to expire on 31 October 2003. It has also been brought to our attention that all immovable properties in the Town of Mhangura are being offered for sale to sitting tenants by your company. Indeed, our client made her intention to purchase the community hall known to your office in writing. As she was waiting to be advised of the purchase price and terms of payment, she was surprised to receive a letter dated 10 May 2002 signed by your administration officer wherein you were ordering her to vacate the 'house' by 15 June 2002 and to surrender the keys to a Mrs Nyakachanga. We would like to make it abundantly clear to your office that our client will not vacate the community hall as demanded since there is absolutely no lawful reason why your company denied her the opportunity to purchase the same. You are aware that the community hall is presently used as a dress-making school by our client and, therefore, there is no reason why you should proceed to sell the same premises to a third party who is not a sitting tenant."

About sixteen days later, on 6 June 2002, Mhangura and Makoshori concluded an agreement in terms of which Mhangura sold the property to Makoshori for $80 000.00.

Thereafter, on 9 July 2002 the general manager wrote to Nyamushamba's lawyers as follows:

> "Your letter dated 20 May 2002 refers.

Our reasons for terminating the lease agreement were as follows –

1. (The) lessee was using (the) hall as (a) church and not for dress-making.

2. (The) premises were used as (a) community hall but ideally it is a house in the middle of a residential area and not (a) commercial area.

3. The lessee had an opportunity to purchase residential property in Mhangura and

they exercised their right as they bought number 11 9th Avenue.

4. The property in question is being sold to a deserving schoolteacher who does not have any decent accommodation and has offered to do renovations.

> Ever since the property was leased to your client, she has not used it for what she applied to use it for and has not made any effort to improve the outlook of the property."

After denying the allegations made by the general manager in the letter set out above, Nyamushamba's lawyers filed a court application in the High Court on 10 September 2002 seeking an order setting aside the sale of the property to Makoshori, and directing Mhangura to sell the property to Nyamushamba for $80 000.00.

The court application was served on Makoshori personally, but service of the court application on Mhangura was effected "by affixing (the court application) to (the) outer principal door at the (respondent's) place of business after (an) unsuccessful diligent search".

Makoshori filed a notice of opposition and an opposing affidavit, but Mhangura did not. In due course, the application was heard by the learned Judge in the court *a quo*, and Nyamushamba was granted the order she had sought.

In my view, there are three main issues to be determined in this appeal. The first is whether Nyamushamba was offered the right of first refusal in respect of the sale of the property. The second is whether the lease was lawfully terminated. And the third is whether Makoshori was an innocent purchaser of the property. I shall deal with the three issues in turn.

With regard to the first issue, it seems to me that the answer must be in the affirmative. I say so for two reasons.

The first is that in his letter dated 9 July 2002, which was a reply to the letter written to him by Nyamushamba's lawyers dated 20 May 2002, the general manager did not deny Nyamushamba's allegation that all the immovable properties in the town of Mhangura had been offered for sale to sitting tenants.

In addition, the general manager did not deny that Nyamushamba had communicated her intention to purchase the property to Mhangura, and that as she was waiting to be advised of the purchase price and terms of payment she received the letter dated 10 May 2002 terminating her lease with effect from 15 June 2002.

In my view, the failure by the general manager to deny in his reply the

allegations stated above must mean that the allegations are true. That conclusion undoubtedly confirms the averments made by Nyamushamba in the founding affidavit that she was offered the right of first refusal, and that she accepted it and communicated to Mhangura her acceptance of the offer in writing before she received the letter dated 10 May 2002 which purportedly terminated the lease with effect from 15 June 2002.

The second reason why I say that Nyamushamba was offered the right of first refusal is found in the third reason given by the general manager for the termination of the lease in his letter dated 9 July 2002. It reads as follows:

> "3. The lessee had an opportunity to purchase residential property in Mhangura and they exercised their right as they bought number 11 9th Avenue."

In my view, the reference to the exercise of "their right" must be a reference to the right of first refusal which had been exercised by Nyamushamba's husband when he bought the house in which he and his family had been living. That again confirms the averments made by Nyamushamba that sitting tenants of immovable property were offered the right of first refusal.

I now wish to consider the second issue, which is whether the lease was lawfully terminated. I have no doubt in my mind that it was not. Even if we assume that Nyamushamba had breached the terms and conditions of the lease, the termination of the lease would still be unlawful. I say so because in terminating the lease Mhangura did not comply with clause 16 of the lease, which reads as follows:

> "In the event of the rent of the premises being unpaid, or in the event of the lessee committing a breach of or disregarding any of the other terms and conditions of this agreement and failing to make payment or remedy such breaching … then the owner shall be entitled to cancel this lease forthwith …".

It is clear from this provision that before the lease is terminated for a breach of any of its terms and conditions the lessee must be given an opportunity to remedy the breach, which Mhangura did not do.

I now wish to consider the third issue, which is whether Makoshori was an innocent purchaser who was unaware that Nyamushamba had been offered the right of

first refusal with regard to the sale of the property. I do not think he was.

Makoshori, who was a schoolteacher in Mhangura town, must have been aware that sitting tenants of the immovable property in Mhangura town had been offered the right of first refusal. Mhangura did not deny having offered that right, and the offer must have been a matter of common knowledge in the small town of Mhangura at the relevant time.

In my view, Makoshori's denial that he was aware of the right of first refusal granted to all sitting tenants is significant, in that it indicates that he cannot be believed when he says he purchased the property innocently.

In the circumstances, Mhangura had no right to sell the property to Makoshori. The essence of the right of first refusal or the right of pre-emption is that the grantor of such a right binds himself to the grantee of the right not to sell the object of the right to a third party unless the grantee of the right has been given an opportunity to purchase the object of the right and has not offered to do so. See *Madan v Macedo Heirs and Anor* 1991 (1) ZLR 295 (SC) at 302 A-B; and *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (AD) at 316 C-D.

In the present case, as Nyamushamba was ready and willing to purchase the property it should have been offered to her at the price offered by Makoshori, which was $80 000.00, and which was acceptable to Mhangura.

In the circumstances, the appeal is devoid of merit and is therefore dismissed with costs.

CHEDA JA: I agree.

GWAUNZA JA: I agree.

Mushonga & Associates, appellant's legal practitioners
Gutu & Chikowero, first respondent's legal practitioners