

REPORTABLE ZLR (15)

Judgment No. 24/08
Civil Appeal No. 232/07

BARBARA MASIWA v (1) ROADNET TRANSPORT (PVT) LTD
(2) DONALD NYASHA MASIWA

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & ZIYAMBI JA
HARARE, FEBRUARY 12 & OCTOBER 7, 2008

J B Wood, for the appellant

E T Matinenga, for the respondent

CHEDA JA: The appellant was married to the second respondent. When the parties divorced, an order concerning their immovable property was made by the High Court against which she appealed.

On appeal the Supreme Court ordered among other things that she be awarded 25% of the net value of the house and that her former husband would retain the house after paying her the 25% share.

The house was advertised by an estate agent appointed by the parties and an offer of \$1.7 billion was made for the purchase of the property. The offer was communicated to the appellant. On a number of occasions she advised that there was a higher offer and refused to consent to the sale of the property.

First, she accepted the price of \$1.7 billion. This amount was a negotiated price following the valuation price of \$1.8 billion. She later showed reluctance to proceed with the agreement of sale.

The offer was raised to \$2.2 billion. She again claimed that there was a higher offer of \$2.4 billion. When the purchaser agreed to match this price, the appellant refused to sign the agreement of sale.

The purchaser eventually went to court and sought an order to compel her to accept this price and sign the agreement of sale. The Court granted the order.

She has now appealed against the decision. Her grounds of appeal read as follows:

- “1. The court *a quo* erred in finding that the appellant had accepted the first respondent’s offer to purchase.
2. The court *a quo* erred in finding that the appellant had entered into a binding agreement with the first respondent.
3. The court *a quo* erred in finding that the first respondent had discharged the onus on it.
4. The court *a quo* erred in any event in awarding costs on a higher scale.”

Subsequent to that, the appellant applied to amend its grounds of appeal as follows:

- “1. By the insertion of the following paragraph after paragraph 1 –
 - 1A. The court *a quo* erred in finding that the appellant has no right to make an offer for the subject property.

- 1B. The court *a quo* erred in finding in effect that the appellant had made counter offers that were open to acceptance or rejection by the first respondent.”

On appeal, and in her Heads of Argument, the appellant adopted the argument that she had every right to make an offer for the property. There was no binding agreement concluded between her and the first respondent, and the counter-offers were open to acceptance or rejection by the first respondent.

In my view, the correct position is this –

- (a) The house was being sold, not by the appellant but by the estate agent, after the former husband failed to buy her out.
- (b) The price was based on an evaluation which she did not contest.
- (c) Once her former husband failed to buy her out she could have made her offer to the estate agent as the advertisement was an invitation to any person who had money to purchase the property.

The fact that she kept telling Mrs Mtetwa that there was a higher offer shows that she was referring to an offer from other persons not herself. If she had wanted to purchase the property herself she could, as advised by Mrs Mtetwa, have approached the estate agent and made her offer to purchase the property. She did not take that advice.

Further to that, if she had intended to purchase the property herself, her action of advising that there was a higher offer is inconsistent with her intention to purchase the property. There is no reason why she would want to pay a higher price if she was purchasing the property herself.

When the party who had offered to purchase the property offered to match the prices she reported, she would still not agree to consent to the sale.

In my view, her consent was not actually crucial as the property was being sold on the basis of a Court order, and the price was based on an evaluation as opposed to a price set by her former husband or any other person.

The evidence of Mrs Mtetwa, which is not disputed, shows that she wanted a higher price in order to enhance her 25% share. The starting price was \$1.7 billion, but through her efforts it rose to \$2.4 billion.

There was no basis for her to refuse to accept that price and sign the relevant documents for the sale and transfer.

The appellant never, at any stage, suggested that she had the money to pay any of the prices mentioned. All she did was to say there was a higher offer and never came up with anybody who made any of the higher offers.

In any case, if she simply wanted a higher price for the property, the purchaser was willing to accommodate her and he did.

If the appellant rejected the initial offer of \$1.7 billion, she has not shown why she could not accept the payment of two subsequent prices that were set by her.

While I agree with some of the findings of the court *a quo*, I do not agree that the appellant had no right to purchase the house.

The right to buy the other party out was granted initially to the former husband, but once he failed to exercise that right, the appellant could have done so if she had the money. There was nothing to stop her from purchasing the property through the estate agent who advertised the property.

The record shows that Mrs Mtetwa gave her this advice but she did not follow it. She cannot now claim that she was refused the right to purchase the property.

The question of the appellant entering into a binding contract with the first respondent is irrelevant. The sale was on the basis of a court order, and the main actor in the sale was the estate agent that was authorized to sell the property.

The appellant did not have a special right to determine who was to purchase the property.

The appellant also complained that the court erred in awarding costs on a higher scale. There is no such order in the judgment. In fact the court declined to award costs on a higher scale.

The submission that the appellant refused to sign the agreement because she had rejected the offer is unreasonable since she is the one who set the level of the two higher prices which the purchaser agreed to match. She has not explained how she could reject a price set by herself. She did not bring forward any person who wished to purchase the property at any of the prices she set.

The appellant only raised the issue of higher offers in order to stop the first respondent from purchasing the property. At no stage did she advise the estate agent that she was buying the property herself.

Even if the suggestion by Mrs Mtetwa that she could seek a variation of the court order to allow her to purchase was not necessary she ignored it and also never made her offer to the estate agent who had been authorized to advertise and sell the property.

I therefore find that there is no merit in the appeal. It is dismissed with costs.

MALABA DCJ: I agree

ZIYAMBI JA: I agree

Byron, Venturas & Partners, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners