

TEMBANI CLEVER SITHOLE
versus
CHRISTOPHER CHIGWANDA N.O.
and
THE MASTER OF THE HIGH COURT N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 15 July 2022 & 31 October 2023

Opposed Application –

Mr *C Mandizvidza*, for the applicant
Mr *A Nyamukondiwa*, for the 1st respondent

MUSITHU J: This is an application for a *declaratur* in terms of which the applicant seeks the following relief against the first respondent:

“IT IS DECLARED AND ORDERED THAT:

- (i) The 50% shareholding in Maurizim Investments (Pvt) Ltd in Stand 10245 Glenview Township measuring 2383 square meters were validly sold to the Applicant by the 1st Respondent on the 20th October 2015 when the Applicant’s offer was accepted by the 1st Respondent.
- (ii) 1st Respondent to pay costs of suit.”

Background to the Applicant’s Case

The applicant and one Phillip Chigumira, who is now deceased, were business partners with equal shareholding of 50% each in an entity called Maurizim Investments (Pvt) Ltd (hereinafter referred to as Maurizim or the company). They acquired an immovable property called Stand 10245 measuring 2383 square metres (the property). The property was registered in the name of the company. Following the demise of the late Phillip Chigumira in 2011, his estate was registered with the second respondent under DR 1265/11. The first respondent was appointed the Executor Dative.

The first respondent has apparently taken long to wind up the estate prompting the applicant to engage him on several occasions to expedite the process, as an interested party. The

first respondent was not cooperating. The applicant engaged an Estate Administrator called Zimbabwe Inheritance Services through a power of attorney to represent him in the matter. On 28 February 2012, the applicant authorized the sale of his share through a letter of 28 February 2012 by the Estate Administrator to the first respondent. On 13 March 2012, the applicant wrote to the first respondent, through the Estate Administrator, proposing a dissolution of the partnership or alternatively that the estate buys him out of the business. The first respondent responded advising that the beneficiaries were not keen on selling the immovable property. They were only amenable to the disposal of the mill.

In 2015, the applicant suggested to the first respondent that since the property was incurring expenses, it was only proper to liquidate it and pay off creditors whom the applicant had singlehandedly taken care of over the years. The first respondent acceded to the request. On 9 March 2015, the applicant placed his offer to purchase the property. The letter reads as follows:

“RE: OFFER TO PURCHASE STAND 10245 GLENVIEW TOWNSHIP, GLENVIEW, HARARE”

I refer to our previous discussion in which we resolved that the above property should be sold to settle the bills that Maurizim owes various creditors.

I hereby offer to purchase the property and my firm offer is sixty five thousand dollars (65 000) for the whole property. Technically, this means I would pay thirty two thousand five hundred dollars (\$32 500.00) for the half share which is owned by the estate late Phillip Chigumira. I am therefore willing to buy out the estate from the property.

Kindly advise me of your position regarding my offer so that I can arrange to proceed with settlement of the same.”

The applicant did not receive a response to the offer. He made a follow up on the offer in October 2015. He was advised to resubmit his offer as the earlier offer could not be located. The applicant resubmitted his offer on 19 October 2015, and he claims that it was accepted on 20 October 2015. The acceptance letter invited the applicant to make the necessary payment. It reads in part as follows:

“RE: OFFER TO PURCHASE STAND 10245 GLENVIEW TOWNSHIP, GLENVIEW, HARARE”

Reference is made to the above and to your letter to us mistakenly dated 20th October 2015 as it was received by us on the 19th October 2015.

We accept the offer of US\$32 500 (Thirty Two Thousand Five hundred United States Dollars) to buy out the half share owned by Estate Late Phillip Chigumira DR 1265/11.

May you proceed with payment of the said amount into our trust account. Our bank account details are as follows:-...”

The applicant made two payments being US\$10 000 and US\$9 800 by way of bank transfer from Barclays Bank to give a total of US\$19 800. The payment was going towards the purchase of the property.

The applicant states that on 5 February 2019, he received a letter from the first respondent advising that the beneficiaries of the Estate Late Phillip Chogumira had been granted consent to sell 50% shareholding in the companies that included Maurizim. Maurizim is the same company whose shares the applicant bought and was in the process of paying for. The first respondent gave the applicant the first option to buy the shares. The option was valid for 30 days. The applicant contends that the consent to sale issued by the second respondent was granted to the first respondent and not the beneficiaries.

On 12 February 2019, the applicant wrote to the first respondent advising him that he had already purchased the shares in Maurizim Investments through the offer and acceptance of October 2015. The first respondent replied alleging that the applicant had not purchased the shares in Maurizim Investments. The applicant sought to set the record straight through further correspondence with the first respondent. The back and forth culminated in a meeting held on 3 May 2021 where the applicant maintained his position. He tendered payment of the balance of the purchase price in the sum of US\$12 000. The first respondent rejected the payment.

The applicant avers that the first respondent was wrong in rejecting his payment of the balance of the purchase price. An offer had been made and accepted. There had been substantial performance. It was on that basis that he approached this court for a *declaratur*

The First Respondent’s Case

The first respondent urged the court not to exercise its discretion to award the *declaratur*. There was no *prima facie* proof of a transaction pertaining to the property. There was never a discussion concerning the sale of the property. The proposal to sale the property had been rejected by the first respondent and the beneficiaries. The first respondent pointed to his letter of 13 March 2012 in which he advised the applicant’s agent that the beneficiaries were not keen on selling the property.

The first respondent further averred that the transaction for the sale of the shares in Maurizim fell away after the applicant failed to exercise his right of first refusal or sign the agreement for the sale of those shares which was forwarded to him on 5 February 2019. The applicant failed to pay the purchase price for the shares. The agreement was never consummated. The alleged payment of the purchase price did not give birth to any agreement. No agreement ever came into force in 2015 or 2019.

At any rate, assuming the applicant's claim that an agreement was consummated in 2015, the claim would be prescribed by operation of law. Further, it was also averred that any arrangement that was made without the second respondent's consent was *void ab initio*. The second respondent's consent was not there in 2015. It was only granted in 2019. The court could not sanitise an arrangement that was null and void for want of consent.

The first respondent also argued that assuming an agreement was concluded in 2015, then the applicant breached that agreement of sale by failing to pay the purchase price within a reasonable time. The applicant never made a tender for the alleged balance of the purchase price for at least five years. No such offer was made even in 2019 when the applicant was invited to exercise his right of first refusal.

The first respondent blamed the applicant for the delays in finalizing the estate. He accused the applicant of meddling in the affairs of the estate and acting in bad faith by discussing the sale of the assets of the estate behind the first respondent's back. One such instance was the agreement between the applicant and the beneficiary to sell the mill situated at the property behind the first respondent's back. The first respondent only got to know of the transaction when a dispute arose between the applicant and one of the beneficiaries.

The applicant is also accused of failing to disclose or remit to the estate the income earned by the two companies, Maurizm and Raquinn following the leasing of the property to tenants. The applicant and his agents were also allegedly denying the first respondent access to the property.

The first respondent claims that before the applicant made the alleged offer, there had been discussions about the exercise of the right of first refusal to be extended to the applicant. That right was to be exercised as and when the time was ripe for the disposal of the properties. That culminated in the offer which was made for the exercise of the right of first refusal. The applicant's offer was received by the first respondent on the understanding that it was arising out of discussions

on the issue of the right of first refusal. The applicant had indicated that he would pay a commitment fee on the exercise of his right of first refusal. The sum of US\$19 800 was treated as a commitment by the applicant to exercise his right of first refusal, at the appropriate time when the requisite approvals had been obtained. The amount paid remained in the first respondent's trust account.

The first respondent admitted writing to the applicant advising him that the necessary authority had been obtained, and that he could proceed to exercise his right of first refusal to purchase the shares in Maurizim and other companies. The first respondent also averred that the applicant changed course on 12 February 2019 by alleging that he bought shares in Maurizim. Only US\$19 800 had been paid in 2015. For a good three years the balance remained unpaid. According to the first respondent, the balance was not paid because there was no agreement. The only agreement was with respect to the exercise of the right of first refusal.

The first respondent also claimed that it was quite telling that the applicant remained mum about the agreement of sale which was sent to him for proof reading and signing. He did not act on the document when he knew well that no agreement had been entered without the consent of the second respondent. The first respondent admitted that he rejected the tender of the balance of the purchase price in 2021 because no agreement had been reached as the applicant had not exercised his right of first refusal extended to him in 2019. The engagements in 2015 and the period before were in the context of the exercise of the right of first refusal.

The first respondent claims that he revalued the shares in 2019 when he obtained the second respondent's consent to dispose of the shares. This he did in order to safeguard the interests of the estate.

The Applicant's Reply

In his reply, the applicant insisted that the transaction was completed on 20 October 2015 when there was an offer and acceptance. It was the first defendant who never demanded the balance of the purchase price. On his part the applicant believed it proper to pay the balance of the purchase price as and when it was needed. The transaction was not restricted by time and the applicant was just waiting on the first defendant in order to pay off the balance, which had since been tendered. The attempt to sell the same shares to the applicant on 5 February 2019 was irregular as it constituted a double sale.

It was also averred that the second respondent's consent was not a prerequisite for the disposal of company assets. In any case, the consent was granted to the first respondent and not the beneficiaries. The applicant denied that he remained silent on the draft agreement, but was waiting for the first respondent's call to attend the signing ceremony. At any rate, an agreement of sale was constituted through an offer and acceptance and not by signing a document. The applicant denied the alleged existence of a right of first refusal in any of the communication shared between the parties.

The Submissions

Mr *Mandizvidza* for the applicant submitted that the letters of 20 October 2015 all but confirmed the existence of an offer and acceptance. The subject matter of the sale was clearly identifiable as the property. The purchase price was also agreed upon. The first respondent even directed the applicant to proceed with payment and furnished the bank and account details into which payment was to be made. It therefore boggled the mind to deny that there was an agreement of sale.

On whether the second respondent's consent was required for the disposal of the property, Mr *Mandizvidza* argued that what was on sale was an asset of a company which required no consent to sale from the second respondent. The first respondent was representing the estate and the interests of shareholders. An asset of the company could be sold in order to pay off creditors. Counsel further submitted that a company was a separate legal person. The deceased was entitled to shares in the company. What was on sale was an asset of the company and not its shares. According to counsel, it was the first respondent who brought up the idea of the sale of shares and not the asset.

In response, Mr *Nyamukondiwa* for the first respondent submitted that there was no offer and acceptance to talk about. The parties had some discussions pertaining to the exercise of the right of first refusal, prior to the alleged agreement. Counsel further submitted that in his letter of 20 October 2015, the first respondent was inviting the applicant to exercise his right of first refusal. That letter was not accepting any offer.

In his heads of argument, the first respondent argued that even assuming there was a sale, that sale was void for want of compliance with s 120 of the Administration of Estates Act.¹ The second respondent's authority was required before such alienation.

The Analysis

Three key issues arise for determination herein. The first is whether the applicant made an offer for the purchase of the property, which offer was accepted by the first respondent. The second is whether the consent of the second respondent was required for the disposal of that property. The third issue is dependent on the findings the court makes on the first two issues. It is whether a valid agreement exists between the applicant and the first respondent. I now turn to determine these issues seriatim.

Whether the applicant made an offer which was accepted by the first respondent

The applicant claims that his offer for the purchase of the property was initiated through the letter of 9 March 2015. The applicant made a follow up through another letter of 20 October 2015. The letter highlighted that the parties had "resolved" that the property be sold in order to settle amounts owed to various creditors by Maurizim. The first respondent's response of the same date accepted the offer of the US\$32 500 to buy out "the half share owned by Estate Late Phillip Chigumira..." The applicant's offer was clear that he was buying out the estate's half share in the property since the business that owned the property was jointly owned by the applicant and the deceased.

In opposition, the first respondent denied that the applicant's letter of 20 October 2015 constituted an offer to purchase the property. According to him, he understood it to be an offer to exercise the applicant's right of first refusal to purchase the property. This was because in prior discussions, the applicant's right of first refusal to purchase the property had been discussed. The amounts paid by the applicant were merely some commitment fee showing his intent to exercise that right. That line of argument was persisted with during oral submissions.

In his book *Business Law in Zimbabwe*², Author R.H. Christie analysed an offer as follows:

"An offer, in the specialized sense in which that word has come to be used in the law of contract, is identifiable as being accompanied by *animus contrahendi*, the intention of putting the conclusion of the negotiations out of one's further power and enabling the offeree, by mere acceptance, to create the contract."

¹ [Chapter 6:01]

² Juta & Co, Ltd 1998 at page 33

Speaking of an acceptance, the same author had this to say:

“To be effective in creating a contract, acceptance must be so clear and unequivocal as to leave no reasonable doubt in the offeror’s mind that his offer has been accepted: *Selected Mines and Marketing (Rhodesia) Ltd v Trees Asbestos Mining Co Ltd* 1952 SR 57. The reason for requiring a higher degree of certainty than the standard of proof on the preponderance of probability that is universally accepted in civil as opposed to criminal cases is that the offeror is entitled to expect an answer on which he can immediately act, without interrupting his business while he weighs up conflicting probabilities in order to decide whether he has a contract or not.....”³

Thus, what is central to both an offer and acceptance is the accompanying state of mind in which the communication of the offer or acceptance is made. The communication must be clear and unequivocal about what is being offered or what is being accepted and at what price. The applicant’s letter of 20 October 2015 clearly stated that he was offering to purchase the Glenview property. He set out the terms of his offer. The first respondent’s letter of the same date cited the same reference used by the applicant. It accepted the offer as communicated by the applicant and gave the account details into which payment was to be made. The first respondent’s letter made no reference to past discussions involving the parties on the same property. It made no reference to the exercise of the right of first refusal. It made no reference to the need to secure the second respondent’s permission to sell the property.

An offer, once accepted, gives rise to a binding agreement between the parties. It creates rights and obligations between the parties. I have no doubt in my mind that the first respondent’s response to the applicant’s letter of 20 October 2015 constituted an acceptance to the offer contained in that letter. To construe the applicant’s letter of 20 October 2015 as communicating an intention to exercise the applicant’s right of first refusal, is in my view preposterous. The same goes for the first respondent’s own response to the offer. To construe the response as merely affirming the applicant’s right of first refusal and nothing else is equally mind boggling.

Counsel for the first respondent was at pains to explain what it is that the first respondent was accepting, if it was not the clear offer made in the letter of 20 October 2015. The two letters are clear on what was being offered and accepted. The court therefore determines that the applicant made an offer to purchase the property and this offer was accepted by the first respondent.

³ At p 39

Whether the Master's consent was a pre-requisite to the disposal of the property

It was argued on behalf of the first respondent that even assuming that the applicant's offer was indeed accepted by the first respondent's letter of 20 October 2015, whatever agreement that ensued was *void ab initio* for want of compliance with s 120 of the Administration of Estate Act. That section states as follows:

“If, after due inquiry, the Master is of opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.”

The applicant's counsel submitted that the above section was not applicable to this case because what was on sale was an asset of a company and not shares held by the deceased in the company. I agree with that interpretation of the law. The position advocated for by the first respondent and the case authority cited in his heads of argument applies where one seeks to sell the assets or property of the deceased. Assets of a company in which deceased person held shares do form part of the deceased's estate. The second respondent's consent is required under s 120 in respect of those assets that form part of the deceased's estate. In *Salma Ebrahim v Attiya Ebrahim (In Her Capacity as Executrix Dative of Estate Late Basheer Ahmed Ebrahim) & 6 Ors*⁴, CHITAKUNYE J (as he was then), made the following pertinent remarks:

“It is trite law that a company is a separate legal entity, which conducts its own affairs separately from its shareholders. The case of *Salomon v Salomon & Co. Ltd* [1897] A C 22 (HL) long established the legal fiction of the corporate veil, which enunciates that a company has a legal personality separate and independent from the identity of its shareholders. In that regard, any rights, obligations or liabilities of a company are discrete from those of its shareholders, where the latter are responsible only to the extent of their capital contributions, known as ‘limited liability’.”

Further down in the same judgment, the learned judge observed as follows:

“The deceased's interest as a shareholder extended only to the shares that the deceased had in those companies. It is thus only where the sale pertains to the sale of the deceased's shares in the companies that the fifth respondent's consent would be required.”⁵

It is trite that upon its incorporation, a company assumes a separate legal personality, which enables it to conduct its own affairs independent of its shareholders or directors. It can acquire assets and dispose of such assets on condition that the relevant legal instruments that regulate its

⁴ HH 448/18 at p10

⁵ At p 11 of the judgment

own affairs have been engaged and complied with. Whether the acceptance of the offer was made pursuant to a resolution of the directors of the company was never an issue before the court. The applicant's letter of 20 October 2015 shows that in previous discussions between the parties, it had been "resolved" that the property be sold in order to settle the debts that Maurizim owed to creditors.

For the foregoing reasons, the court determines that the authority of the second respondent was not required before the property could be sold. The property is an asset of the company and does not form part of the deceased's estate. The second respondent's authority was only required in the event of the sale of the deceased's shares in the company.

Is there a valid agreement between the applicant and the first respondent?

The court further determines that the first respondent's letter of 20 October 2015, which was a response to the applicant's offer to purchase Stand 10245 Glenview Township, Glenview, Harare, constituted an acceptance of the offer. The acceptance of the offer created a legally binding agreement between the parties.

The period within which the purchase price ought to have been paid is not stated. The first defendant admitted receiving in trust the sum of US\$19 800. The first respondent however averred that the payment was merely a commitment fee for the exercise of the right of first refusal once all the requisite approvals had been obtained. I have already determined that there is nothing before the court to suggest that the exercise of the right of first refusal was a condition precedent to the sale of the property. The mere fact that the applicant had not paid the full purchase price at the time that this application was launched does not invalidate the offer which was accepted by the first respondent. Having accepted the offer and the part payment of the purchase price, it was incumbent upon the seller to place the applicant in *mora* before terminating the agreement.

Costs of Suit

Costs follow the event. I find no reason to depart from this general rule. The applicant must be awarded costs of suit as the successful party.

DISPOSITION

Accordingly it is declared and ordered as follows:

1. The offer by the applicant and the acceptance by the first respondent to sale half share of Stand 10245 Glen View Township, Glenview, which is registered in the name of a

company called Maurizm Investments (Private) Limited, created a binding contract of sale.

2. The first respondent shall pay the applicant's costs of suit.

DNM Attorneys, applicant's legal practitioners

Chigwanda Legal Practitioners, first respondent's legal practitioners