

DISTRIBUTABLE (33)

EX-TEMPORE

MOREBLESSING NHIWATIWA
v
**(1) SHADRECK NHIWATIWA (2) THE REGISTRAR OF
DEEDS (3) THE SHERIFF OF ZIMBABWE**

**SUPREME COURT OF ZIMBABWE
GUVAVA JA, MAVANGIRA JA & MAKONI JA
HARARE: 3 FEBRUARY 2022**

A. *Dracos*, for the appellant

S. *Simango*, for the first respondent

MAKONI JA:

1. This is an appeal against the whole judgment of the court *a quo* in which it granted the first respondent's claim for a cancellation of a deed of transfer No. 4370/2015 dated 22 August 2018 which had been made in favour of the appellant. After hearing submissions, by both counsels, the court delivered an *extempore* judgment dismissing the appeal with costs. A request has been made for a copy of the handed down judgment. It is set out hereunder.
2. The brief facts which are pertinent for the determination of this appeal are as follows:

The appellant and the first respondent, who were married in terms of the Marriage Act [*Chapter 5:11*], divorced on 20 September, 2017. The divorce order incorporated the parties consent paper signed by both parties on 19 September, 2017.

3. In terms of clause 2.1.4 of the consent paper the parties agreed that the first respondent would be granted the option, within 60 days of the court order, to purchase one of the parties' immovable properties being Stand 191, Good Hope Township of Subdivision D of Good Hope (the property) by paying 50 per cent of the net value to the appellant "less his net share of the value of Chitungwiza Property".
4. In the event that the first respondent failed to purchase the property within 60 days of the grant of the court order the property would be sold to the highest bidder and the net proceeds paid to the parties in equal shares.
5. The parties also agreed that they would take all necessary steps to ensure that the sale and transfer of the property takes place. In the event that the first respondent failed to sign any document for the sale, the Sheriff would sign on his behalf.
6. The first respondent failed to purchase the property within the 60 days of the grant of the order.
7. The property was valued in terms of the consent paper and the upper range was given at US\$200 000. Various efforts were made by both parties to dispose of the property culminating in the offer by the appellant to purchase the property in the sum of

US\$225 000, by the payment to the first respondent of \$112 500 being his 50 per cent share.

8. The appellant's offer was communicated to the first respondent's legal practitioners by email dated 17 July 2018, to which was attached the agreement of sale for the respondent's signature. The appellant gave the first respondent 3 days within which to sign the agreement of sale.
9. The first respondent's legal practitioners acknowledged receipt of the email and indicated that they were forwarding the agreement of sale to their client.
10. On 24 July, 2018, 7 days after the appellant's offer was communicated, the Sheriff signed the agreement of sale and the necessary papers to effect transfer. This was in the absence of a response from the first respondent. The property was duly transferred to the appellant. Aggrieved by that development the first respondent approached the court *a quo* seeking cancellation of the title deed and this was granted.
11. Mr Dracos, for the appellant, made the following submissions; The matter rests to be resolved primarily on the consent paper in particular clause 2.1.4 thereof. The appellant indicated to the respondent, through email correspondence, her bid to purchase the property. Her offer was the highest bid at the material time. The letter mandated the respondent to sign the agreement within three days of receipt of the agreement. The respondent's legal practitioners acknowledged receipt of the offer and the agreement of sale and that they had forwarded it to their client. There was no objection that the appellant's offer was the highest offer and to the time within which the respondent should have signed the agreement. After the expiry of the three days the Sheriff's role,

in terms of the consent paper, was activated. The court *a quo* therefore erred in cancelling the transfer made in favour of the appellant.

12. Mr Simango, for the respondent, submitted as follows; An agreement cannot come into existence unless the offer has been accepted. The acceptance must be clear and must be communicated to the offerie to effect the meeting of the two minds. This did not happen *in casu*. The appellant's legal practitioners did not inquire from the respondent's legal practitioners his position before involving the Sherriff. This shows that the sale was characterised by bad faith. In any event the consent paper had no provision allowing the Sherriff to sign the agreement of sale. The appeal had no merit and should be dismissed.
13. The crisp issue that falls for determination is whether or not the court *a quo* erred in granting the order of cancellation of the title deed.
14. We are satisfied that in the circumstances of this case the court *a quo* did not err. We arrive at this finding for the following reasons:
 1. The appellant gave the first respondent an unreasonably short period of time within which to respond to her offer.
 2. Whilst we fully understand the appellant's frustration, which is well documented in the record, there was no justification for her to act in the manner that she did.
 3. The appellant did not give the respondent an opportunity to accept or reject her offer.
 4. It is our view that it would have been prudent for the appellant to alert the first respondent of her intention to approach the Sheriff in terms of the consent paper.

5. The consent paper did give the Sheriff the authority to substitute the respondent and “sign the necessary documents to effect transfer” of the property. Clearly the appellant jumped the gun. Had the appellant given the first respondent adequate time and notice to respond she would have established a clear basis upon which the Sheriff could act in place of the first respondent.

15. Accordingly, there is no basis upon which the court *a quo*'s judgment can be impugned.

16. The respondent has successfully defended the appeal and costs must follow the cause.

17. It was for those reasons that the following order was issued:
“The appeal be and is hereby dismissed with costs.”

GUVAVA JA:

I agree

MAVANGIRA JA:

I agree

Honey & Blanckenberg, appellant's legal practitioners

Nyikadzino, Simango & Associates, 1st respondent's legal practitioners