

MISHECK MUZA	Applicant
versus	
REGGIE FRANCIS SARUCHERA (in his capacity as liquidator of J W Jagers WHOLESALEERS (PVT) LTD	1 st Respondent
and	
PRICE TRUST	2 nd Respondent
and	
MASTER OF HIGH COURT	3 rd Respondent
and	
REGISTRAR OF DEEDS	4 th Respondent

HIGH OF ZIMBABWE
MATANDA-MOYO J
HARARE 5 June 2017 & 28 June 2017

TRIAL

Applicant, in person
Mrs *M G Hare*, for the 1st respondent

MATANDA-MOYO J: This is an application to interdict the first respondent from transferring a certain piece of property namely number 8 Prices Road, Emerald Hill Harare to the second respondent, pending resolution of the rights of the applicant in the property. Applicant also sought reversal of the sale and that he be given the right to purchase the property.

First respondent opposed the order sought on the following grounds:

1. That the applicant had no right of first refusal but rather the right to first offer.
2. That the applicant failed to make an offer within the five days given to him.

At the date of hearing the court was advised that transfer of the property to the second

Respondent had already gone through. This meant therefore that this application had been overtaken by events. The order sought by the applicant could no longer be granted.

Applicant sought to amend the order sought to one of cancellation and reversal of transfer. This is impossible as all evidence on paper deal with sale and not transfer.

The brief facts of this matter are that the applicant is a former employee of J W Jaggars Wholesalers (Pvt) Ltd herein after referred to as Jaggars. Jaggars was placed under liquidation. As an employment benefit the applicant was offered tenancy of the above property at subsidised rates. He was still residing in the house at the time of liquidation. The first respondent as liquidator of Jaggars went about disposing off Jaggars assets including the property in question. Ultimately the property was sold to second respondent who has since taken transfer and occupation of the property.

The applicant as a sitting tenant complained that the first respondent breached his rights by failing to accord him the right of first refusal. He believed as a sitting tenant he had the right of first refusal. On 5 March 2013 a letter was written to applicant advising him that the property was up for sale. The asking price was US\$140 000.00. It read;

“As a sitting tenant you are hereby offered the right to make your offer for the same should you be interested. Kindly urgently let us know of your position but not later than 5 days of this letter.”

On 7 March 2013. The applicant wrote to the first respondent as follows;

“Consider Real Estate have approached me advising me of the sale of the above stated house where I reside for \$140 000.00. I intend to use my share from liquidation towards the above house purchase.”

He requested to know how much he would be getting from proceeds of liquidation so as to make an offer to the Estate Agent. On 12 March 2013 a letter was written on applicant's behalf by Quic Quick Systems. Applicant termed such letter a guarantee letter which he termed on acceptable offer to purchase the said property. The letter read;

“RE: LOT 71 MOUNT PLEASANT/8 PRICE ROAD EMERALD \$150 000 GUARANTEE FOR MISHCEK MUZA.

We write to guarantee the balance of the above amount after set offs for Mr Misheck Muza towards his proposed scheme towards landing that property under liquidation Mr Muza came through to us and we are undertaking under our terms and conditions to make available the amount he needs so that he gets the above residential property where he has been living as a long time Jaggars employee but now under liquidation

Signed”

Applicant argued that the above letter constitutes an offer and such offer was made within the 5 days provided by the first respondent.

It is correct that the said letter was written within the 5 days provided. The only issue for determination is whether such a letter constitutes an offer. Firstly what applicant was called upon to do was clear. Applicant was advised that an offer for the property had been made for \$140 000. Applicant was invited to make an offer of \$140 000 for the property.

Van der Merwe, van Huyssteen, Reinecke and Lubbe in their book *Contract: General principle* defines an offer as follows;

“An offer is an expression of will, made with the intention of creating an obligatory relationship on certain or ascertainable terms with another, and brought to the attention of the addressee, so as to enable him to establish a contract by accepting the offer as it was made. See *Bourbon-Lefley v WPK (Londboul Bpk 1999 (1) SA 902 C; Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour, Curaphic 2001 (3) SA 1028 (D)- -*”

LENY J in *Wasmuth v Jacobs 1987 (3) SA 629 (SWA) 633 E – G* had this to say on offers;

“The rules applicable to the interpretation of an offer, or ---, are not necessarily the same as the rules which are applicable in the interpretation of contracts. In *Borene v Harris 1949 (1) SA 793 (A) AT 799*, after stating the aforesaid position, GREENBERG JA added: ‘Thus, although a contract, even if it be ambiguous, may be and generally is binding, -- the offer itself must be unequivocal, i.e. positive and unambiguous.’”

An offer ought to be definite and complete. If there is no certainty in what was promised or

offered and when it was to be fulfilled – there can be no valid offer. See *Nestows v Innscor Africa Ltd 2007 (20 ZLR 267 (H))*.

Applying the above principles to the letter of 12 March 2013 from Quic Quick Systems it is clear there could have been no valid offer. The letter is not clear as to how much in terms of price, the applicant was offering for the property. The applicant also spoke of a set off. It is not clear how much the set off was. I am satisfied that, that letter did not constitute an offer. Thereafter applicant engaged lawyers who wrote letters to the Estate Agent offering same. On 17 May 2013 first respondent’s lawyers advised that the property had been sold. The applicant in that letter was given 3 months notice to vacate the premises. Applicant then filed an urgent chamber application seeking to stop the sale. This court refused to hear the matter on an urgent

basis as it had the impression that the applicant had not proved the right of first refusal on papers filed. The applicant then filed this application on the ordinary roll.

The right to first refusal was explained in the case of *Eastview Gardens Residents Association v Zimbabwe Reinsurance Corporation Ltd and Others* SC 30/62 when MALABA JA as he then was said,

“A right of first refusal or pre-emption is created when in an agreement one party (the grantor) undertakes that when he decides to sell his property he will give the other party (the grantee) the opportunity of refusing or buying the property at a price equal to that offered by another person. The grantor is then said to be under an obligation to do, at the time he sells the property, what he voluntarily bound himself to do, that is, offer the property to the grantee first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be buyer. The grantee is said to have acquired the correlative right to have the property offered to match the price offered by the third party or refuse the offer.”

He cited the case of *Manchester Ship Canal Company* (1901) 2 [Chapter 37] at 46-47; *Sher v Allan* 1929 OPD 137 and *Madan v Macedo Heirs and Another* 1991 (1) ZLR 295 (S).

The right of first refusal can therefore only be said to emanate from an agreement. The applicant had the onus to prove the existence of such right.

Let me now proceed to determine whether applicant managed to prove that he had the right of first refusal. As I reiterated above the right of first refusal is created through contract or agreement. The applicant has not produced any contract showing the existence of the right. I am of the view that the applicant mistakenly believed that the mere fact that he was a sitting tenant, entitled him to a right of first refusal. Being a sitting tenant does not automatically confer upon the tenant the right to his first refusal. There existed no such agreement between applicant and Jagers.

That brings me to the letter of 5 March 2013. That letter in my view did not give the applicant the right of first refusal. What that letter did was to give the applicant the right to make an offer to purchase the property at a price of \$140 000.00. For an agreement to be reached the applicant was supposed to make the offer which was to be accepted by the first respondent. From the evidence supplied by the applicant no such offer was made. Instead the applicant sought to inquire from first respondent the amount he would get from liquidation. Once he had such information he was going to make an offer.

For an offer to be valid it must be clear and unambiguous. The letter by the applicant of the 7th of March 2013 did not represent an offer in law. Therefore there was no agreement reached between the parties. See also *Hativagone and another v CAG Farms (Pvt) Ltd and Ors* SC 42/15. In the present case an agreement would have been concluded upon presentation of set off figures to the applicant. No such figures were presented by the first respondent. Unless and until the outstanding issue of what was due to the applicant from Jagers was settled – there was no consensus between the parties. See also *Premier, Free State v Firechem Free State (Pvt) Ltd* 2000 (4) SA 413 (SCA) *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A), *CGEE Alsthom Equipments et Enterprises South African Division v GNK Sankey (Pvt) Ltd* 1987 (1) SA 81 (A) at 92 E where COOBELT JA said;

“Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances”.

Looking at documents supplied the conduct of the parties and the surrounding circumstances it is clear that no right of first refusal existed. Even after the applicant was given an opportunity offer to purchase the property, no such offer was made. No acceptance was done by the first respondent. The house was subsequently sold to someone else.

I am satisfied that the applicant has failed to discharge the onus on him of proving the existence a right of first refusal. Applicant has failed to show that he had a clear right and I am unable to grant the interdict sought.

Accordingly it is ordered that;
The application is dismissed with costs.

C Nhemwa & Associates, respondents’ legal practitioners