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Judgment No. SC 76/06
Civil Appeal No. 306/05

GLOBAL ELECTRICAL MANUFACTURERS v (1) NEXBAK INVESTMENTS (PRIVATE) LIMITED (2) ANDREW NGONI CHIRIKURE (3) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
MALABA JA, GWAUNZA JA & GARWE JA
HARARE, OCTOBER 9, 2006 & APRIL 3, 2007

F M Katsande, for the appellant

A A Debwe, for the first and second respondent

No appearance for the third respondent

GARWE JA: At the conclusion of the trial of this matter the High Court dismissed with costs the appellant's claim for an order compelling the first two respondents to pass transfer to it of stand 62 Mbuya Nehanda Street, Harare. The court found that it was highly improbable that an agreement had been reached in terms of which the appellant was to take transfer of stand 62 Mbuya Nehanda Street, Harare. The court also found that the appellant had not contributed financially towards the purchase of stand 63 Mbuya Nehanda Street, Harare. The appellant now appeals against this decision and for judgment to be granted in its favour with costs.

The appellant's version in the court *a quo* had been that he was offered stand 63 for a price of $4 000 000,00. The appellant had been leasing the stand in

question but was then given the right of first refusal. The appellant paid the required deposit of $2,000,000,00 but was not able to raise the balance of $2 million. The appellant then approached the second respondent who agreed to pay the balance of the purchase price but insisted that the property be transferred into the first respondent's name as requested by his bank. The second respondent was a director of the first respondent. The second respondent thereafter indicated that the first respondent had also acquired stand 62 Mbuya Nehanda. That stand is opposite stand 63. After a discussion it was agreed that the appellant would become owner of stand 62 in *lieu* of its share of stand 63.

The second respondent gave a different version. That version was as follows. The first respondent shared stand 63 with the appellant. The stand in question was owned by the Fernandes Brothers. The appellant's director a Mr Mahlatini advised that the Fernades Brothers were selling the stand for $4 million and invited the respondents to participate in the purchase in equal shares with the appellant. The first and second respondents paid the sum of $2 187 500 on 7 July 2000 but the appellant was not able to raise its share of $2 million. As a result the two parties signed a further agreement in which the appellant acknowledged receipt of $2 million. The balance, agreed as $2 500 000, was to be paid by the first respondent on transfer. The sum of $2 500 000 was subsequently paid to the seller's legal practitioners. Although the second respondent accepted during the trial that the appellant had been given the right of first refusal he maintained that the latter had failed to raise the money. It had then been agreed that the first respondent would pay the amount in full after which transfer would be effected in its favour. Thereafter the first respondent also acquired stand 62 and the appellant was requested to move and

occupy a portion of that stand. In *lieu* of such occupation the appellant was to pay the rates and other charges due to the City Council. Matters came to a head when the appellant was asked to move from stand 62.

On the above evidence the trial court was asked to determine two issues. These were, firstly, whether the appellant occupied stand 62 as owner pursuant to an agreement between it and the first respondent and, secondly, the parties' respective contribution towards the purchase of stand 63 Mbuya Nehanda Street. At the conclusion of the trial, the court *a quo* found in favour of the first and second respondents and dismissed the appellant's claim with costs.

The appellant has attacked the judgment of the court *a quo* on three main grounds – firstly, so it was contended, the appellant never repudiated its right of first refusal and the original agreement of sale remained in force; secondly, that the appellant is entitled to take transfer of stand 62 pursuant to the agreement entered into between the parties; and thirdly that the trial court erred in holding that the first and second respondents had paid the purchase price in full and that the appellant had not contributed at all to the acquisition of stand 63.

I will deal firstly with the question whether or not the court *a quo* was correct in finding that the appellant did not make any payment towards the purchase of stand 63 Mbuya Nehanda Street, Harare. Mr *Katsande*, who appeared for the appellant, submitted that the trial judge "irrationally upheld the first respondent's claims that they had financed the full purchase price". For reasons that will follow shortly this submission is not supported by the evidence.

The appellant's evidence was that it paid the deposit of $2 million in respect of stand 63 and that the first respondent paid the remaining $2 million. However no documentary proof of any kind was tendered to confirm the payment of the sum of $2 million by the appellant. No attempt was made to call the appellant's erstwhile legal practitioners, Messrs Dube, Manikai & Hwacha, to confirm that indeed they received this sum from the appellant and that they paid it to the sellers. On the contrary the evidence led before the court *a quo* suggested that the entire purchase price had been paid by the first and second respondents. The sum of $2 187 500 represented the proceeds from the sale of the second respondent's two properties. The two receipts issued in respect of this sum – for $450 000 and $1 750 500 – indicate that the money was intended for the Fernandes Brothers. It is common cause that the Fernandes Brothers were the sellers. It is also clear from the appellant's letter dated 10 July 2000 that of the sum of $2 187 500 00 the sum of $2 000 000 went towards purchasing the property whilst the remaining $187 500 went towards other expenses. Further it is not in dispute that the first respondent made a payment of $2 500 000. This sum must have been paid pursuant to the agreement signed between the appellant and the first respondent on 20 September 2000. Indeed in paragraph 2.2. of the agreement the appellant acknowledges that the first respondent had paid the sum of $2 million into the trust account of Messrs Honey & Blackenberg (the seller's legal practitioners) and that there remained a balance of $2 500 000. In terms of that agreement the sum of $2 500 000 00 was payable by 4 October 2000. Two bank cheques with a face value of $2 500 000 were made out in favour of Messrs Honey & Blackenberg on 3 October 2000. On 31 October 2000, Messrs Dube,

Manikai & Hwacha, who were the appellant's legal practitioners, wrote to the seller's legal practitioners advising that:

> "the funds to purchase the property were sourced from Nexbak Investments. Global Investments does not have the capacity to repay the amount of the purchase price to Nexbak and the two have agreed that the property be transferred to Nexbak Investments …".

Then on 18 October 2004 the appellant's legal practitioner wrote to the first respondent demanding transfer of stand 62, Mbuya Nehanda Street. In paragraph 3, the legal practitioner says that:

> "Nexbak advanced a loan facility of $4 000,00 (four million dollars) ('the loan') to Global Investments to pay for the purchase of stand 162. As consideration for the loan Global authorised the registration of stand 162 in Nexbak's name …". (Emphasis is mine)

In its heads of argument the appellant does not suggest that it paid $2 000 000 as deposit for the purchase of stand 63. The heads of argument suggest that the appellant was entitled to "co-ownership of stand 63, by virtue of its right of pre-emption" and that:

> "the right of pre-emption conferred an asset for the appellant which it traded in exchange for acquisition of stand 142."

The court *a quo* was satisfied on the evidence that the first and second respondents had paid the purchase price in full. That conclusion was consistent with the facts. Not only had the appellant failed to show that it had paid the deposit of $2 000 000 but the probabilities and the documentary evidence produced by the first and second respondents clearly established that the appellant had not made any financial contribution towards the acquisition of stand 63 Mbuya Nehanda Street. The learned

trial judge found it highly improbable that the appellant's managing director, being an experienced estate agent, would have agreed to forego his half share of stand 62 and become sole owner of stand 62 without reducing such an agreement to writing. In my view the court *a quo* was correct in finding that no such contribution took place. The suggestion made that the trial judge misdirected herself in this regard has no merit.

The second issue raised, namely whether there was an agreement between the two parties in terms of which the appellant was entitled to take transfer of stand 62 Mbuya Nehanda Street, Harare, is interlinked with the issue whether or not the appellant contributed financially to the purchase of stand 63. Having found, quite correctly, that there was no such contribution, and considering that the alleged agreement was never reduced to writing, the trial judge found that the appellant had not proved the existence of such an agreement on balance. I am satisfied that the trial judge was correct in arriving at this conclusion. Nowhere in the evidence was there anything to suggest that such an agreement had been reached. The instruction to the City Council for rates to be forwarded to 62 Mbuya Nehanda Street, Harare cannot by any stretch of imagination be said to be evidence of such an agreement.

In general the court *a quo* was correct in finding that the appellant's version was full of improbabilities and inconsistencies and further that the appellant's witness was not credible.

Turning to the last issue raised, namely whether the appellant repudiated its right of first refusal it is apparent that the appellant's submissions in this

regard are muddled. It appears to have been the appellant's case at the beginning that it is entitled to transfer of stand 62 pursuant to an agreement it reached with the first and second respondents in terms of which the appellant was offered stand 62 in *lieu* of its half-share of stand 63. However, the appellant's heads of argument seem to suggest that this is not in fact the position. In the heads of argument the appellant says that it had the right of first refusal in respect of stand 63. The appellant further says that the right of pre-emption conferred on it an asset which asset "it traded in exchange for the acquisition of stand 142". The appellant further says:

> "The appellant's right of pre-emption has commercial value akin to goodwill or other intellectual property. The appellant traded that commercial value entitling the first and second respondents to acquire full ownership of stand 162 … ."

The suggestion in the heads of argument appears to be that the appellant is entitled to take transfer of stand 62, not because it was entitled to a half-share in stand 63, but rather because by agreement with the respondents it traded its right of first refusal in respect of stand 63 for stand 62.

Although the trial court did not specifically deal with the appellant's right of first refusal in its judgment, it is clear that the court accepted that the right had been waived by the appellant and that the first respondent had been allowed to take transfer of stand 63 after paying the full purchase price to the sellers.

There can be no doubt on the facts that the appellant expressly repudiated its right of first refusal. The appellant wrote letters to this effect and indeed facilitated the transfer of stand 63 to the first respondent. The appellant accepts

that it gave instructions to transfer stand 62 to the first respondent. By so doing the appellant expressly repudiated its right of first refusal.

The appellant seems to suggest that, notwithstanding the fact that it allowed the first respondent to take transfer of stand 63, it nevertheless retained its right of first refusal. The appellant goes further and says only when the appellant and seller of the property in question "have dissolved their relationship can a third party contractually supercede the appellant". I do not understand this submission. If one has a right of first refusal and instead of exercising that right allows the seller to transfer the title to another person who has effected payment of the purchase price, one repudiates that right. The right comes to an end the moment one agrees that transfer should go to someone else. One cannot allow title to pass to someone else but still retain the right of first refusal. In other words, one cannot enforce a right of first refusal after instructing the seller to pass transfer to someone else. If the appellant's claim that it still retains a right of first refusal were to be accepted for a moment, such a right would be enforceable against the seller and not a third party. The seller is not a party to these proceedings and no relief has been sought against him. It is clear however that the seller acted on the appellant's specific instructions to transfer the property to the first respondent. That was the end of the matter.

In all the circumstances I am satisfied that this appeal has no merit and that it cannot succeed.

Before concluding, however, one further matter calls for comment and that is the language used by the appellant's legal practitioner in attacking the decision

of the trial court. Whilst it is accepted that legal practitioners act on instructions, the use of intemperate language is not in keeping with the ethics of the profession and must be censured. The suggestion that the trial judge "irrationally" upheld the first and second respondents' claim; that the trial judge "undeservedly" found for the first and second respondents; that had she "judicially conceptualized" (whatever this means) has no place in a courtroom. Whilst legal practitioners are entitled to attack court decisions they are not happy with, it is obvious that they should employ appropriate language in the process. To suggest that a judge has acted irrationally is to make a most serious allegation. The need for legal practitioners to moderate their use of language becomes even more pronounced in a case, such as the present, where the attack is found to be completely without foundation.

The appeal is dismissed with costs.

MALABA JA: I agree.

GWAUNZA JA: I agree.

F K Katsande & Partners, appellant's legal practitioners

Debwe & Partners, first and second respondent's legal practitioners