

KUDZAI PWISAI MUKASHURI

Versus

ORDERLY MUSHORIWA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 4 & 17 JULY 2003

N Mahori for the applicant
Ms P Dube for respondent

Judgment

CHIWESHE J: The applicant seeks an order compelling the respondent to transfer to her stand number 490 Mbizo Township of Que Que. The parties entered into an agreement of sale the subject matter of which was the sale by the respondent of the above stand to the applicant.

According to the respondent he prepared the agreement and signed it on 7 May 2002. He dispatched it to the applicant on the same day advising her verbally that she had up to 28 May 2002 to accept the offer by signing the agreement and returning it by that date. The applicant only returned the signed agreement on 27 June 2002 – well out of time. In the meantime the respondent had sold the property to a third party. It also appears that at the time the respondent purported to sell the property to the applicant, the property had not been registered in his name but in the name of another. The question arises whether the respondent had the mandate to dispose of the property.

On the other hand the applicant argues that the agreement was signed by both parties on 7 May 2002 and denies that she had been asked to indicate her acceptance of the offer by 28 May 2002. She avers that she had advised the respondent that she

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was applying for mortgage finance from her employers and that the mode of payment was never an issue. Indeed the agreement is silent on the mode of payment as well as the date of payment. She disagrees with the respondent when he says that payment was to be by way of cash or bank cheque and was to be made by 28 May 2002. She says her application for mortgage finance was finally approved on 27 June 2002 whereupon she immediately advised the respondent of that fact. There is a material dispute of fact in this application. The thrust of the parties' heads of argument clearly demonstrates that the factual dispute is irreconcilable. The applicant's argument is premised on the assumption that there was a valid agreement of sale, that she duly discharged her obligation and is therefore entitled to specific performance. On the other hand the respondent proceeds on the basis that he made an offer which the applicant failed to accept within the stipulated time. According to him for that reason the agreement never was. He thus was entitled to offer the property to third parties.

I agree with the respondent that the applicant given these factual disputes should have proceeded by way of action and that it was foreseeable that the application could not be decided on the papers without hearing evidence *viva voce*. Further there are third parties whose interests cannot be ignored. They should have been joined in the application.

Accordingly it is ordered as follows:

1. That the matter be and is hereby referred to trial with the present papers standing as pleadings.
2. That Laizah Bafana Bhebhe and Zimasco (Private) Limited be joined as the second and third respondents respectively.
3. That costs be costs in the cause.

Messrs Wilmot & Bennett applicant's legal practitioners

Messrs Dazinger & Partners respondent's legal practitioners