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Judgment No. SC 08/07
Civil Appeal No.
356/04

JAMES HAROLD VAN DER MERWE v (1) ELIZABETH MASAYA (2) VAN DER MERWE AND MASAYA (PRIVATE) LIMITED (3) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, FEBRUARY 20, 2007 & MAY 29, 2007

M Harvey, for the appellant

L Mazonde, for the first and second respondent

No appearance for the third respondent

CHEDA JA: The appellant and the first respondent are joint owners of a business known as Halfway Hotel situated on a piece of land known as Lot 1 of Halfway Hotel Site of Hopewell. The appellant is the majority shareholder with ⅚ of the shares while the first respondent owns ⅙ of the shares.

On 22 May 2002 the appellant's legal practitioners wrote to the first respondent's legal practitioners as follows:

"Messrs Mutumbwa Mugabe & Partners
Legal Practitioners
Harare

Dear Sirs

Re: J.H. VAN DER MERWE v VAN DER MERWE & MASAYA (PVT) AND E. MASAYA – HC 3219/01

We refer to previous correspondence in connection with the above matter and in particular your letter of the 7th May 2002.

Our client was offered $3,500,000.00 for the immovable property over two years ago. This does not include the value of the company. Our client is prepared to accept $3,500,000.00 for both the property and the shares in order to finalise this matter.

Our client is of the view that the property is worth at least $5,000,000.00.

Our client also points out that your client has had the benefit of all the income from the hotel for a considerable period of time and no accounting has been received by our client from yours.

Kindly take instructions and revert.

Yours faithfully

STUMBLES & ROWE"

The first and second respondents' legal practitioners replied and advised that their client was accepting the proposal of $3,500,000.00 for both the property and the shares of the appellant and suggested that an agreement be drawn for signature by the appellant. This was by letter dated 28 May 2002.

On 13 June 2002 the appellant's legal practitioners forwarded to the legal practitioner of the first respondent what they called a fairly simple agreement to be signed by the first respondent. The letter indicated that on payment of the purchase price their client would hand over his resignation as a director, the share certificates, signed transfer form and other company documents that he had, and that the respondent would immediately be able to take transfer of the shares and transfer of the property would occur in the normal manner.

The agreement, duly signed, was returned to the legal practitioners of the appellant on 20 June 2002 with a promise that the purchase price would be paid in full as soon as the copies of the agreement were returned duly signed by the seller (the appellant).

On 25 September, after a round table conference, a reminder was sent to the legal practitioners of the appellant about returning signed copies of the agreement.

One year later, on 14 October 2003, when there was still no response a

further letter was written advising them that the respondents' legal practitioners were still holding the sum of $3,500,000.00 which was in full and final settlement of the matter. When there was no response to this letter the first respondent applied to High Court for an order compelling transfer of the shares and the property.

Although the application was opposed, the High Court, after hearing the parties, granted the application.

This is an appeal against that decision. In its judgement the High Court set out the background clearly and supported its finding by reference to the correspondence, part of which I have already referred to.

It is clear that as far back as 1999 the appellant wanted to sell his shares.

On 19 January 2000 he wrote to the Board of Directors of the company indicating that he wanted to sell his shares and said, "The price of my shares is $1 million Zim dollars (in respect of the business of the company only)". He asked that the offer be part to Mrs Masaya the respondent as she was the only other share holder in the company. He said he required cash payment and was not prepared to accept payment by instalments.

An offer to sell had also been made to one John Manjengwa who made an offer for the property, but up to December 1999 had not made any payment.

On 29 December 1999 the appellant wrote to the first respondent threatening to buy her out as he said she had not responded to some letters and had failed to exercise the option to purchase the shares.

The appellant now claims that he never agreed to sell his shares to the respondent and that his legal practitioner acted outside his mandate in entering into, and drafting an agreement of sale.

The background that I have referred to stands very firmly against him. Even when correspondence was forwarded to his legal practitioners concerning the agreement, it was never disputed that he had agreed to sell his shares to the first respondent.

The appellant subsequently changed legal practitioners for the purpose of this appeal, and there is no affidavit at all from his previous legal practitioners explaining what had transpired and why they had written so many letters on behalf of the appellant if he disputed the agreement.

I am therefore satisfied that the court *a quo* was correct in rejecting his allegations and granting the order sought by the first respondent.

His claim that his legal practitioners did not have the mandate to write the

several letters they wrote to the first respondent's legal practitioners and drawing the agreement of sale was correctly rejected.

The letter of 28 May referred to $3,500,000.00 for both the property and shares (my underlining).

The letter of 25 September shows that the matter was discussed at a round table conference and that appellant had asked for and was provided with the accounts. The same letter also states that "ours shall pay you the agreed amount upon receipt of a signed copy of the agreement".

There is nothing to suggest that the appellant's legal practitioners could have made up all these issues without any instructions from the appellant.

I am satisfied that a proper agreement of sale was drafted on behalf of the appellant but for some reason he changed his mind and declined to sign it.

The refusal to sign or change of mind did not affect the agreement which in law remained binding on the parties.

In conclusion I find that there is no merit in the appeal and it is dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree:

Byron Venturas, appellant's legal practitioner

Messrs Mutumbwa Mugabe, respondent's legal practitioners