

DISTRIBUTABLE (47)

Judgment No. SC.41/06
Civil Appeal No. 112/00

**LANGTON NYANDORO v
(1) MAFUNDA ENTERPRISES (PRIVATE) LIMITED (2)
JAMES SITHOLE (3) PHINISI SITHOLE**

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & NDOU AJA
BULAWAYO, MAY 3 & DECEMBER 5, 2006

T Cherry, for the appellant

H Zhou, for the respondents

CHEDA JA: This is an appeal from the judgment of the High Court, Bulawayo, delivered on 20 March 2000.

The case has a very long history. It stretches over a long period and many legal practitioners were involved in the matter at different stages, but the matter remained unresolved for a long time.

The matter eventually went to trial, and the appellant noted an appeal to this Court. Having noted the appeal, the matter could not take off as the appellant failed to have the record properly prepared for appeal, despite several postponements and requests for him to comply with appeal rules.

Instead the appellant kept on changing legal practitioners and applying for directions.

BACKGROUND

The appellant was the owner of certain immovable property known as No 17 and No 18 Gladys Avenue, Kennilworth, Sauerstown, Bulawayo.

According to the appellant's own affidavit, he sold stand No 17 to one Abel Baloyi "Baloyi". Baloyi later arranged with the appellant that the appellant could rent the property while Baloyi was in South Africa.

While the appellant confirms this in his evidence, he puts it this way:

"I bought this shop, that is No 17 around 1984. I ran the shop after that Mr Baloyi from South Africa came and asked to rent the property which I did (*sic*). Further he asked if I could sell it to him. I agreed and sold it to him for \$27 000-00. Baloyi had a debt with the bank which (he) could not pay. He arranged that he gave me back the shop that I could pay his debts. He sold me the goods in the shop, that is, fittings, tills and stock in the shop. The agreement was that after paying his debt at the bank and also finished paying for the fittings we were going to change the title deeds which were still in the hands of the bank."

Part of the common background, which is supported by written agreements, and the evidence of the appellant himself, is that during the time he was renting the shop from Baloyi he sublet part of the property that is, the supermarket and bottle store to one James Sithole, the second respondent, as well as other persons. This is confirmed by Baloyi's complaint in his affidavit that the appellant did this without his permission.

The appellant indicated to Baloyi that he was interested in buying back the property. Baloyi advised the appellant that he could sell the property back to the appellant if the appellant produced a sum of \$300 000-00.

Thereafter, several people visited the premises to see the appellant when there was information that the premises were on sale.

It is not clear who gave out this information, but most of the prospective buyers were coming to see that appellant.

The second respondent ("Sithole") also got to hear that people were visiting the appellant in connection with the premises as they were up for sale.

When Baloyi came on a visit, Sithole asked Baloyi about it, and Baloyi confirmed that the shop was indeed up for sale. Sithole entered into negotiations with Baloyi and eventually offered to purchase the property. Sithole asked Baloyi if Baloyi advised the appellant about Sithole's agreement to purchase the property and Baloyi told Sithole that since the appellant was his tenant, he, Baloyi, would advise the appellant himself after Sithole paid the price of the property.

Baloyi also advised Sithole that he had asked the appellant to produce \$300 000-00 if he wanted to purchase the shop, but the appellant had failed to do so for a long time.

Sithole then proceeded to purchase the property and took transfer.

After purchasing the property Sithole stopped paying rent to the appellant. When the appellant raised the issue of rent he was met with a counter-claim for his eviction, as the property now belonged to Sithole.

Thereafter the parties were involved in various disputes and allegations, some of which resulted in arrests being made following complaints to the police by the appellant.

When the matter finally went to trial the appellant lost and judgment was granted for the respondents, who were also allowed to evict the appellant as he was not paying rent to the respondents.

This is the decision against which the appellant has appealed.

FINDINGS OF THE TRIAL COURT

The trial court had the benefit of hearing evidence from the appellant and the present respondents.

The court found the appellant's evidence to be "more difficult to understand". He could not be believed.

He claimed that he settled Baloyi's debts. On the other hand, the legal practitioners file note referred to in the judgment suggests that the property had no liabilities.

Sithole's evidence, which the court accepted, is to the effect that when he spoke to the appellant about the shop being on sale for \$300 000-00 Nyandoro queried why Baloyi wanted \$300 000-00 when he had purchased the property from the appellant for only \$27 000-00. This seems to indicate that although, the appellant had been told to raise the sum of \$300 000-00 if he wanted to purchase the property from Baloyi, the appellant never accepted or agreed to purchase the property at that price.

In fact, in his evidence, he never stated when any agreement was entered into between him and Baloyi.

When the parties went to consult a legal practitioner, (Mr Perry) the following was recorded:

"It was agreed that Baloyi and Nyandoro would call on me today regarding the sale of the immovable property for \$300 000-00. Both called with a third party. They do not want to go into a sale agreement now but Nyandoro is leasing the entire property which consists of about 5 different shops etc and rent has been paid in advance to March 1995."

Later in the same minute the following is recorded:

"Mr Nyandoro is very well known and I don't think he has the cash at this time but rather than sell the shares to him now there is going to be no agreement now but Nyandoro will look for a purchaser in the region of \$600 000-00 for shares. This could mean two separate agreements of sale of shares from Baloyi to Nyandoro and from Nyandoro to the third party but I said that another method would be for (*sic*) once a buyer had been found for the immovable property (or rather the shares in the property owning company) the shares could be sold straight by Baloyi to the purchaser for \$600 000-00 and Nyandoro is now therefore looking for a purchaser".

These file minutes reflect a summary of the discussion that took place in Mr Perry's office. He points out that the parties were not entering into any agreement at that stage, and that the appellant was to look for a purchaser.

I do not think a legal practitioner would record the minute in that form if the parties had entered into an agreement of sale. Otherwise he would have either drafted an agreement of sale or recorded that the parties had agreed on the sale of the property to the appellant at a certain price. The appellant was looking for a purchaser for the property. He could not have been doing so if he himself had purchased the property.

The appellant's claim that he purchased the property and paid \$55 000-00 and that there was a balance of \$60 000-00 was equally confusing.

It is clear that the parties chose not to enter into any agreement although the matter was discussed. In view of that, Baloyi's claim that the appellant was told that he could be allowed to purchase the property if he produced the sum of \$300 000-00 is more probable.

It is also clear that the appellant did not have the money and never tendered any payment for the property but invited people who would purchase the property as claimed by Mr Perry.

After going through the record and the appellant's evidence, I am satisfied that the appellant failed to make a case that could result in a decision in his favour.

He claimed that he paid certain sums to settle Baloyi's debts; he later suggested that this was payment for the property. After that he again claimed that he paid the \$300 000-00 for the property. It turned out that some of the payments he made were for arrear rental and for repairs to the shops and renovations.

At the most, it seems that Baloyi did indicate that if the appellant was interested in purchasing the property he should produce the required \$300 000-00. The appellant either failed or neglected to do so.

Baloyi had obviously set a condition on which the appellant could purchase the property if he wished to, but that condition was never met by the appellant. There was therefore no legally binding agreement of sale entered into by the parties which the appellant can enforce.

There is nothing to indicate that Baloyi gave the appellant the first option that the appellant claims.

If a party offers to sell property on certain conditions, and those conditions are not met, there can be no binding sale agreement.

There was therefore no misdirection on the part of the trial court.

I therefore see no merit in the appeal. It is dismissed with costs.

MALABA JA: I agree.

NDOU AJA: I agree.

Sansole & Senda, appellant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners