SCAPELOX TRADING (PVT) LTD
versus
MASHANGWA FAMILY TRUST
and
UPENYU MASHANGWA
and
BLESSING MASHANGWA
and
COMMISSIONER GENERAL, ZIMBABWE REVENUE AUTHORITY
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 26 February 2014 and 5 March 2014

Opposed application

T. Nyamasoka, for the applicant
T. Govere, for the 1st, 2nd and 3rd respondents
4th and 5th respondents in default

MATHONSI J: Undercutting, is what this dispute is all about, a disputing pitting 2 established law firms, which are suddenly at each other's throats over conveyencing instructions carrying a very healthy tab in conveyencing fees. It is a battle where no prisoners have been taken but which exhibits much confusion of mind, premised as it is on the selfish interests of lawyers than those of their clients. In our law, undercutting, just like "naked short selling" is not only obscene but also unlawful.

The applicant sold its house, being Stand 655 Borrowdale Brooke Township of Stand 137 Borrowdale Brooke Township, Harare ("the property") to the first respondent, duly represented by the second and third respondents, for $700 000-00, in terms of a written agreement signed on 17 April 2012. The purchase price was to be paid in terms of the following clause of the agreement:-

> "The purchase price of $700 000-00 (seven hundred thousand dollars) will be paid in the following manner:-
>
> (a) $300 000-00 (three hundred thousand dollars) will be paid into Homelux Real Estate Trust Account on signature of the agreement of sale by both parties and will be released to seller upon the seller surrendering Deed of Transfer No

6402/2003 to the conveyancer and signing all transfer documents with the conveyancer.

(b) $400 000-00 (four hundred thousand dollars) will be paid in cash to Atherstone and Cook Legal Practitioners Trust Account within 30 days from the last date of signature of this agreement of sale and will be released to seller on transfer."

The purchaser duly paid the initial $300 000-00 to the Estate Agent, and the seller released the title deed to Ahterstone and Cook the conveyancer appointed in terms of the same written agreement of the parties who were tasked with the responsibility of undertaking the conveyencing.

The payment terms in respect of the balance of the purchase price were eventually varied in recognition of the purchaser's failure to comply by virtue of an addendum and acknowledgement of the debt signed on 26 January 2013. Trouble started when on 9 May 2013, Atherstone and Cook rendered a proforma invoice for transfer fees totalling US$ 51 585-00 incorporating stamp duty due to fourth respondent, the Registrar of Deeds, and conveyencing fees computed in terms of the Law Society of Zimbabwe Conveyencing Tarriff, SI 24/13.

The purchaser may have made advances seeking terms of payment as the conveyancers relented by e mail of 20 August 2013 giving the purchaser time to pay the transfer fees. Instead of effecting payment, the purchaser may have secured a better deal from another conveyancer, who obviously agreed to attend to the transfer at a lesser fee or more favourable terms, or both. No sooner had the purchaser been given time to pay than the conveyancer was dispossessed of the original title deed to the property on 21 August 2013.

Abigirl Jaricha, a director and company secretary of the applicant, in her founding affidavit to this application, tells of how on 20 August 2013 the second and third respondents had visited the offices of Atherstone and Cook demanding the title deed to the property. They refused to leave until Jaricha managed to calm them down on the pain of showing them the original and then giving them a copy the following morning.

The second and third respondents again came to the conveyancer's office the following day in the company of a man that they allegedly posted at the foyer. Jaricha says that the second and third respondents and the third man in their company

cornered her, manhandled her and forcibly seized the title deed from her, in the process causing her and her colleague to sustain injuries. An act of robbery indeed. Before making good their escape, they threatened them insisting that they were well connected and that the law firm should not try to do anything as they had the offices surrounded by 40 people. That way they were dispossessed of the title deed with the third respondent making it clear that a conveyancer of their choice would do the transfer.

It is that alleged act of banditry which has caused the applicant to approach this court seeking an order for the return of the title deed and ancillary relief. The application is opposed by the second and third respondents on the basis that there are disputes of fact relating to how they came to be in possession of the deed. They maintain that Atherstone and cook voluntarily surrendered the title deed to them.

The second and third respondents go on to argue that the applicant's attempt to bar another law firm from attending to the transfer is contrary to public policy given that not only has it been paid the purchase price, thereby losing the right to choose a conveyancer, but also the relationship between them, the applicant and its conveyancer "has irretrievably broken down and there is no reasonable prospect of restoration as a normal relationship." One would think its a marriage.

They go on to state that undue influence, duress and misrepresentation were brought to bear upon them before they signed the sale agreement appointing Atherstone and Cook. Such duress or undue influence is not particularised and Mr *Govere* who appeared for the respondents, submitted that they were only relying on misrepresentation. He stated that the misrepresentation is not contained in the agreement but was made orally, that is, that once the purchase price was paid, the purchaser would be allowed to choose a conveyancer of its choice.

Nothing more really needs to be said about that claim because it is incoherent and standing on its head. If indeed, the seller represented that to them, then why would the parties still sign an agreement in which the conveyancer was given as Atherstone and Cook?

I am unable to discern any dispute of fact in this matter. Clearly the respondents have the applicant's title deed without its consent. In light of the clear provisions of the sale agreement relating to conveyencing, it is highly unlikely, if not well nigh impossible, that the conveyancer would have voluntarily parted with the

title deed especially given the obvious pecuniary interest she had in attending to transfer. All this lends credence to the story that respondents used violence to divest the conveyancer of the title deed. I am persuaded that an act of banditry was committed in the process.

This matter has been allowed to come this far partly as a result of greed of legal practitioners who would like to undertake a lucrative conveyencing exercise and mainly as a result of a lamentable and indeed unfortunate misunderstanding of basic conveyencing rules. It is trite that a conveyancer represents the seller and as such the practice in this jurisdiction is that the seller chooses a conveyancer of his choice to transfer the property from the seller to the purchaser.

It is for this simple reason that it is the seller who gives a power of attorney to the conveyancer to pass transfer to the purchaser. The pre-amble to a deed of transfer generally states that the property has been sold and that the conveyancer, as the attorney of the seller, does transfer the property to the new owner, the purchaser. If the purchaser would choose the conveyancer, how would such conveyancer transfer the property from the seller without being an attorney of the seller?

The second and third respondents exhibited a dangerous trait by forcibly seizing the title deed the way they did in a clear display of lawlessness, but theirs was always a doomed cause probably fuelled by ignorance of conveyencing rules. Just how they hoped to benefit from such action when it is the seller who has to transfer the property, eludes me. It is a fruit of poor legal advice.

That should also put paid to the respondents' counter claim in which they seek to compel the applicant to release US34 500-00 to their legal practitioners as capital gains tax, even before the fourth respondent has assessed it, and their legal practitioners are not the conveyancers. They also crave an order compelling the applicant to sign transfer documents and other extraneous relief. It is an application founded on no recognisable legal basis and is thoroughly devoid of merit. This court cannot make a contract for the parties. The contract the parties entered into, apart from the inherent right of a seller of immovable property to appoint a conveyancer, provides that the conveyencing would be attended to by Atherstone and Cook.

The point is made by JESSEL MR in *Printing and Numerical Registering Co* v *Sampson* (1875) LR 19 Eq 462 at 465 that public policy demands that:

> "Men of full age and competent understanding should have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily should be held sacred and should be enforced by courts of justice. Therefore you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

See also *Delta Operations (Pvt) Ltd* v *Origen Corporation (Pvt)Ltd* 2007 (2) ZLR 81 (S) 86 F-H.

I now turn to deal with the issue of undercutting in conveyencing which has become thorny in this jurisdiction. Quite often legal practitioners find themselves having to undercut in conveyencing fees because of the cut-throat competitive nature of this country's conveyencing practice usually pitting established law firms who have enjoyed monopoly in that field against small and upcoming firms. The latter firms usually fall into the temptation of accepting to undertake transfers at far less than the tariff prescribed by the Law Society of Zimbabwe, in order to attract clients. It is a shameful practise which has no place in our legal system.

The legal profession in this country is self regulating, meaning that, instead of the state coming in to regulate the activities of legal practitioners, they regulate themselves through the Law Society of Zimbabwe which is established in terms of the Legal Practitioners Act [*Cap* 27:01]. In exercising its regulating authority, the Society is enjoined by s 53 of the Act to represent the views of the legal profession, maintain its integrity and status as well as "to define and enforce correct and uniform practice."

In that regard over and above fixing the scale of legal practitioner and client hourly rate of fees to be charged by legal practitioners practising in this country, the Society also sets the conveyencing tariff to be uniformly followed by conveyancers undertaking transfers. The tariff relevant to this matter was published as SI 24/13. It is the tariff that was employed by the applicant's conveyancers to determine transfer fees to be paid by the respondents in this matter. It is clear, from the criminal manner with which the second and third respondents conducted themselves when they seized the title deed from the conveyancer, that another law firm had promised them service at far less than that offered by Atherstone and Cook in terms of the tariff. It is such conduct by legal practitioners which is called under-cutting. It is unlawful because when the Society sets a conveyencing tariff it is acting in accordance with power given to it by the Act and the regulations made under it. There must be uniform application of conveyencing fees. Anything else is unlawful and represents dishonourable and unworthy conduct by a legal practitioner which should be punishable.

Such conduct by members of the Law Society may lead to the state taking away the self-regulating power of the legal profession in order to protect the transacting public against such malpractices. For that reason it must be condemned in the strongest terms and suppressed by all means possible. In my view, those members of the legal profession who have elected to sacrifice the values of the noble profession for pieces of silver must hang their hands in shame as they are bringing the name of the profession to disrepute.

There may be a big number of those undercutting, but that does not render it lawful. Legal practitioners must be able to draw a distinction between right and wrong. It is wrong to undercut and it shall always be. As stated by Martin Luther King (Junior);

> "We have accepted an attitude that right and wrong are merely relative. Most people can't stand up for their convictions, because the majority of people might not be doing it, so it must be wrong. And since everybody's doing it, it must be right..... So it's a sort of numerical interpretation of what's right. ..... Some things are right and some things are wrong. Eternally so, absolutely so. It's wrong to hate. It always has been wrong and it always will be wrong. Its wrong in America, its wrong in Germany, its wrong in Russia, its wrong in China. It was wrong in 200BC and its wrong in 1954 AD."

Members of the public seeking legal assistance rely on their legal advisors to determine what is right and wrong. It is no good for those advisors, with their eyes firmly fixed on a big legal fee, to take leave of their senses. They should uphold the ethics of the profession at all times instead of advising their clients to commit crime. Such behaviour should be condemned and the Law Society should come hard on such offenders in the name of the profession.

The applicant has made a good cause for the relief sought while the respondents' counter application is without merit.

Accordingly it is ordered that:-

1. The first, second, and third respondents' counter claim is hereby dismissed with costs on a legal practitioner and client scale.
2. The first, second, and third respondents and all persons claiming title through them, are directed to return forthwith, i.e. by close of business same day they receive a copy of this order, to Atherstone & Cook Conveyencing Department, original title deed No. 6402/2003 dated September 2003 in name of SCAPELOX TRADING (PRIVATE) LIMITED in respect of Stand 655 Borrowdale Brooke Township of stand 137 Borrowdale Brooke situate in the District of Salisbury, measuring 4 428 square meters ("the property.")

3. The fourth respondent is authorised to issue a capital gains tax clearance certificate only upon request or application by applicant through Atherstone & Cook as applicant's conveyancers;
4. The fifth respondent is authorised to register transfer of title from applicant to first respondent only from Atherstone & Cook as the conveyancers for transfer of the property.
5. The Sheriff, Harare or his lawful deputy, be and is hereby authorised to take custody and possession of the original title deed No. 6402/2003 in name of Scapelox Trading (Private) Limited and deliver it to the offices of Atherstone & Cook Legal Practitioners conveyencing Department if the provisions of clause 2 above are not complied with;
6. The first, second, and third respondents shall bear the costs of this application jointly and severally on a legal practitioner and client scale.

Atherstone & Cook, applicant's legal practitioners
Govere Law Chambers, 1st 2nd and 3rd respondents' legal practitioners