

R CHITRIN & COMPANY ZIMBABWE P/L

Versus

REBECCA ELIZABETH HUMPAGE & 6 OTHERS

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 5 JULY 2004 AND 21 APRIL 2005

Advocate T. Cherry for Applicant
Mr Denbury for 1st – 6th Respondent
Mr Phulu for the 7th Respondent

Judgment

CHEDA J: On 18 August 2003 applicant filed a chamber application in which it sought a provisional order which order was granted in the following terms:

“Interim Relief Granted

Pending the confirmation of this provisional order, the applicant be and is hereby granted the following interim relief:-

7. The first to fifth respondents be and are hereby interdicted from transferring the entire issued shares and/or their loan accounts in Potential Investments (Pvt) Ltd to the 7th respondent or any other party.
8. The sixth respondent be and is hereby interdicted from transferring the immovable property being stand 188 Bulawayo Township of Bulawayo Township Lands situate in the District of Bulawayo which is held by it under deed of transfer number 968/1992 to the seventh respondent or any other party.”

This order is now being opposed by all respondents. Applicant is a registered company with limited liability in terms of laws of Zimbabwe carrying on its business in Bulawayo. First to fifth respondents are shareholders in 6th respondent company who at all material times was represented by Raymond Paul Louw who is also a director of the said company. Sixth respondent is a registered company with limited

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liability according to the laws of Zimbabwe whose registered office is c/o F & C S Accounting Services P/L in Bulawayo.

The seventh respondent is Nerger Properties (Pvt) Ltd a company incorporated according to the laws of Zimbabwe and is represented by Mr J B Nyathi. Applicant and 6th respondent entered into a lease agreement on 28 January 1997 in terms of which applicant hired a portion of stand 188 Bulawayo Township, Bulawayo. Sixth respondent was being represented by Raymond Paul Louw. The said lease agreement was open-ended as it was to continue until it was properly terminated by either party on due notice.

On 23 April 2003 F & C S Accounting Services issued out notice to all tenants of stand 188 Bulawayo Township, advising them that the property was now on sale. Immediately upon receipt of the said notice, applicant represented by its Managing Director Mr Chitrin telephoned Mr R Louw of F & C S Accounting Services (Pvt) Ltd reminding him of a verbal agreement between the two that applicant would have a right of refusal should the property come up for sale.

It is his evidence that it was implied in that verbal undertaking by Mr R Louw that the said right of refusal could be exercised whether the sale was by way of a sale of the property or the sale of the shares and any loan account in the company. He stated in his affidavit that during the conversation Mr Louw acknowledged the existence of the said right of first refusal but went further to state that in as much as he was aware of the existence of the said right he was of the view that it was just to make an offer to all other tenants. A short while later Mr Chitrin telephoned Mr Louw requesting him to furnish him with a list of all the tenants on the premises together with the rentals they were paying. This information was duly supplied by Mr

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Louw on 7 March 2003. At the same time, applicant was being invited to make proposals if it was interested in purchasing the shareholding in 6th respondent within 14 days.

Mr Chitrin then advised Mr Louw that he was going to be out of the country for a while. On his return he was contacted by Mr Louw who advised him that he had then received a certain offer from another tenant, he further asked him to revert to him at least by 25 June 2003. He, however, received a telephone call on 20 June 2003 from Mrs Zurnamer who is Mr Louw's associate or employee advising him that the sellers were looking for at least \$100 000 000 net and consequentially they would require at least \$130 000 000.

Mrs Zurnamer went further and advised him that another tenant was sending a cheque before 1pm that day. It turned out that the other tenant was in fact 7th respondent whose director is an indigenous business man who belongs to a pressure group known as the Affirmative Action Group

On the same day 20 June 2003, applicant through his legal practitioner wrote a letter to 6th respondent offering to purchase the entire share holding in 6th respondent simultaneously with the property for \$151 000 000-00. This offer according to them was made with full knowledge that applicant had a right of first refusal. The said letter was delivered at 6th respondent premises on 20 June 2003 at about 1pm by Mr Chitrin himself whereupon he was advised that Mr Louw, whom he was dealing with all along was in a meeting with some "people". These "people" turned out to have been representatives of 7th respondent as confirmed by Mr Louw in his later discussion with Mr Chitrin. It is also his evidence that Mr Louw advised him that Mrs Zurnamer was under immense pressure from the Affirmative Action Group

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(hereinafter referred to as the “AAG”) and that 7th respondent had been harassing and intimidating him.

On 23 June 2003 Mr Louw advised him that in fact 7th respondent was only interested in a small portion of the property and therefore wanted to find out whether applicant would be interested in sub-dividing the property in the event of it purchasing the property. This suggestion was turned down by Mr Chitrin.

On Tuesday 24 June 2003 Mr Louw telephoned him and advised him that 1st respondent had accepted 7th respondent’s offer because of intimidation although their offer was lower than that of applicant. Mr Chitrin subsequently met 1st respondent who acknowledged the existence of applicant’s right of first refusal and further intimated that she had always contemplated that the property would be sold to applicant.

On 25 June 2003 Mrs Zurnamer telephoned Mr Chitrin cancelling a prior appointment which had been made for the reason that the property was then being contested. On the same day 25 June 2003 1st respondent again telephoned Mr Chitrin and advised him that she had wanted to sell the property to applicant but had then succumbed to pressure and had therefore accepted 7th respondent’s lower offer. This resulted in applicant instituting these legal proceedings against 1st – 7th respondents.

The facts as presented by Mr Chitrin are largely common cause. First respondent and Mr Louw although accepting the chronological events in this matter, their evidence differ sharply with that of Mr Chitrin.

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Mrs Humpage acknowledges that she recalls her discussion with Mr Chitrin but does not quite remember whether she acknowledged the existence of the agreement of the right of first refusal in favour of applicant. She also acknowledges that both Messrs Ndlovu and Nyathi visited her but denies ever being either threatened or intimidated by them.

She further admits that indeed Mr Louw held numerous discussions with Mr Chitrin but he did not have a mandate to enter into negotiations with anybody with regards to the sale of the property.

Both Mr Louw and Mrs Zurnamer tried to support each other about the events in this matter but to no avail. Mr Nyathi's evidence is that 7th respondent was interested in a small portion of the property. He engaged in negotiations with Mr Louw but no harassment or intimidation ever took place. The fact that applicant was the lessee in this property admits of no doubt. I find as a fact that:-

- (a) Mr Louw was the administrator of this property for and on behalf of 6th respondent. Mrs Humpage had always been aware of this fact and had in fact recognised his role hence her acceptance of an offer by 7th respondent which was as a result of negotiations between them and Mr Louw.
- (b) There was in existence a right of first refusal which had been offered to applicant.
- (c) That applicant was offered a right of first refusal by Mr Louw and 1st respondent was aware of it.

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- (d) Mrs Humpage was under pressure as a result of intimidation and harassment by Messrs Nyathi and Ndlovu who were negotiating for and on behalf of 6th respondent.

This is so, because it does not make any economic sense for a seller to sell her property for less when there is a higher offer.

This, fact Mrs Humpage, Mr Louw and Mrs Zurnamer acknowledged not in so many words though that they were put under pressure by the members of the Affirmative Action Group. In fact it is stated that at one point one of them pointed out that the property must not be sold to Mr Chitrin because he had many properties. They claimed that their memories where in some instances failing them. They chose to remember some incidents very clearly while they chose not to remember others. In my view, it was a clear case of deliberate diligence in ignorance. The truth of the matter is that Mr Louw had the mandate and authority to deal with both Mr Chitrin for and on behalf of applicant and 7th respondent. There, therefore, existed a special relationship between the two in the form of principal and agent and as such 1st respondent can no doubt successfully escape the conduct of Mr Louw.

The question, is, whether or not applicant had a right of first refusal on this property. Mr Louw negotiated the lease agreement. He remembers that Mr Chitrin kept on referring to the right of first refusal. However, his insistence that, he together with 1st respondent had a totally different perception of this principle, does not sound and/or appear true bearing in mind their continuous acknowledgement of its existence without either seeking its definition from either Mr Chitrin himself or their own legal

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practitioners. Their conduct can only lead to one inescapable conclusion being that they were aware of what they were talking about but due to undue pressure had to yield to that pressure to the prejudice of applicant.

All the parties were aware of the existence of applicant's right of first refusal to purchase this property. The right of first refusal is a contract on its own and at times and not always is in writing. However, the most important requirement is that it must be exercised by the option holder during the existence of the lease. In *casu*, it was exercised timeously. Once applicant had exercised its right of first refusal to purchase the property, 1st and 6th respondent had no option but to fulfil their part of the bargain.

With regards to the agreement between 6th and 7th respondents it is clear that Messrs Nyathi and Ndlovu exerted a lot of undue pressure in the form of intimidation and harassment on 1st respondent, and Mr Louw. This is evidenced by the conversation between Mr Chitrin, 1st respondent and Mr Louw. An agreement entered into as a result of such undue pressure is both illegal and against public policy (*contra bonis moris*) and is therefore unenforceable. Seventh respondent could not match the offer made by applicant but despite their financial shortcoming they still exerted a lot of pressure on both respondents to an extent that they were forced to accept a lesser offer. Whatever argument under the sum one can submit in favour of such change of heart on the part of 6th respondent it can not find favour in any commercial setting as it is tantamount to resigning oneself to financial prejudice and poverty.

A seller of property has a right to choose whom he wants to sell to. He should not be forced to sell to particular individuals under the guise of affirmative action.

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While affirmative action is indeed noble in the circumstances it should be practised within the law.

While pressure groups in any society are necessary as an exercise of democracy their conduct and activities should be within the law. The Affirmative Action Group has unfortunately turned their aims and objectives into a group of people who use their advantageous positions over the vulnerable minority groups of our society for their own selfish interests. By so doing they have no doubt abandoned the otherwise good ideals of the pressure group. Minority groups of our society should find protection in our courts as this is their constitutional right.

Seventh respondent can not therefore be allowed to get away with such behaviour in our civilised society.

Applicant, contrary to the averments made by respondents acted properly in this matter and accordingly the provisional order is confirmed with costs as prayed.

Joel Pincus for applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners for 1st – 6th Respondents legal practitioners
Coghlan & Welsh 7th Respondent legal +practitioners