CALISTO CHIRENJE
versus
VENDFIN INVESTMENTS P/L
and
H. S. M USHEWOKUNZE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHATUKUTA J
Harare, 9, 12 and 20 December 2005

Urgent Application

Mr *Makoni*, for the applicant
Mr *Maguchu*, Mr *Zhou and* Mr *Chingoma*, for the 1st and 2nd respondent

CHATUKUTA J: This application was brought to me on an urgent basis. The relief sought by the applicant is for a temporary interdict that 1st and 2nd respondents "forthwith suspend all transactions relating to the sale, disposal, alienation or transfer of title in respect of Stand No. 794 Highlands Township, Harare."

The background to the application is that there were protracted legal battles between Divine Homes (Pvt) Ltd, and 1st and 2nd respondents over Stand 3999 Highlands Estate of Welmoed Township. The legal battles resulted in a consent order in HC 1721/03 incorporating an agreement between the two parties. Among other things, the agreement was made for the benefit of third parties including the applicant. Applicant had purchased from Divine Homes, Stand No. 794 Highlands Township, Harare (hereinafter referred to as the disputed property), a subdivision of Stand 3999 Highlands Estate of Welmoed Township. Before the passing of transfer to applicant and others, Stand 3999 Highlands Estate of Welmoed Township was sold in execution to 2nd respondent. Divine Homes challenged the sale in execution. The matter was resolved through a settlement between the parties resulting in the agreement which was incorporated in a consent order.

Clause 4 of the agreement provided as follows:

> "HSM Ushewokunze has, on behalf of the parties, agreed to offer the 62 purchasers (applicants) whose names appear on annexure "A" to this agreement of sale with Divine Homes (Pvt) Ltd in an amount of $60 000.00 per square metre which offer shall be subject to the following terms:-
>
> a) The offer shall be open for a period of seven (7) working days, whereupon if the offeree has not accepted the offer, it shall lapse and the stand shall be offered to the public on the terms and conditions in clause (5) hereunder;
>
> b) Upon acceptance of the offer, an agreement of sale shall be entered into which shall stipulate that the maximum period of payment of the full purchase price shall be 90 days from the date of acceptance."

The agreement further provided that if the offer was not accepted by a stipulated date, 2nd respondent would sell the stands to the public. Following the consent order in HC 1721/03, 2nd respondent transferred Stand 3999 Highlands Estate of Welmoed Township to 1st respondent.

1st respondent invited applicant (and other beneficiaries) through an advertisement in The Herald to accept an offer to purchase the disputed property. The offer price was now $200 000 per square metre instead of $60 000. The $200 000 had been agreed upon by the 1st respondent and Divine Homes after the consent order, reduced to writing and signed by both parties in terms of clause 9 of the agreement. Clause 9 of the agreement provided for the amendment of the agreement and that any variation of the agreement would not be valid unless reduced into writing and signed by the parties.

The applicant and twenty three others sought, in HC 4730/05, to interdict 1st respondent from disposing or in any way alienating the subdivisions of Stand 3999 Highlands Estate of Welmoed Township. Applicant had claimed that he had acquired rights under that contract to purchase the property at $60 000 per square metre. Although he was not a party to the contract, he argued that the variation of the purchase price from $60 000 to $200 000 was illegal because it amounted to a variation of a court order without the approval of the court. The application was dismissed by my brother BHUNU J on the following grounds:

(1) Applicants were not privy to the agreement and did not have rights under the agreement incorporated in the consent order and therefore had not established a *prima facie* case;
(2) The amendment was legal because the court order in HC 1721/03 incorporated the agreement, which agreement in clause 9 envisaged variation of the agreement;
(3) The original offer price in the agreement was not a firm offer to the applicants. Assuming it was, the offer was still open to amendment or variation at any time

Following this order, applicant filed his notice of appeal against BHUNU J's order on 1 November 2005. On the same day applicant, through his lawyer Mr Makoni, advised 1st and 2nd respondents, also through their lawyers *Dube, Manikai and Hwacha* of the notice of appeal requesting them to suspend the sale of the disputed property . The letter was delivered on 3 November 2005. On 7 November 2005 *Dube, Manikai and Hwacha* responded stating that they were of the view that applicant's appeal was without merit and that they had already been instructed to proceed with the sale which was to be concluded shortly. This letter was delivered on 11 November 2005. On 14 November 2005, applicant responded stating that since the Supreme Court had not heard its appeal, the 1st and 2nd respondents' opinion could not be taken as a finding of the Supreme Court and that they had been instructed by applicant to seek urgent relief. The letter was served on 15 November 2005. On 15 December 2005, just after the deadline by Mr *Makoni*, *Dube, Manikai and Hwacha* responded again reiterating that they were going to proceed with the sale.

It was on the basis of these responses by *Dube Manikai and Hwacha* that the applicant is seeking urgent relief to interdict 1st and 2nd respondents from disposing of the property. Applicant has submitted that, firstly, he is entitled to appeal against the decision of the High Court which right is not complete if the subject matter is not protected. The appeal suspends the decision of the court and hence 1st and 2nd respondents cannot dispose of the property in issue. Applicant has further submitted that if he is not granted the interdict, 1st and 2nd respondents will complete the process they have initiated to dispose of the property to a third party and the process as stated in

Annexure "E" will be completed "shortly". The appeal that he has lodged with the Supreme Court will be rendered useless and academic.

First and 2nd respondents, in the oral submissions by Mr *Maguchu* and Mr *Zhou*, stated that the application was not urgent. They submitted that the l*aissez-faire* attitude adopted by applicant's lawyer in communicating with them following the noting of an appeal did not reflect any urgency. Had the matter been urgent, applicant's lawyers should have either faxed the letters or hand delivered the letters on the very day they were written. In any event, they submitted that if the matter was urgent, applicant should have requested the Supreme Court that the matter be set down on an urgent basis.

In response, applicant argued that the delays in the communication were as a result of the belief that 1st and 2nd respondents would respond favourably. Mr *Makoni* also submitted that he had to take full and proper instructions from the applicant and prepare properly for the application. He further submitted that an urgent appeal was not appropriate as the sale of the disputed property was at an advanced stage.

The requirements for an urgent application are that irreparable harm may be suffered by applicant if the matter is not dealt with urgency and that applicant must have treated the matter with urgency. There is no question as to the irreparable harm applicant may have suffered and 1st and 2nd respondents did not submit otherwise. Whilst there appears to have been delays in filing the application, I am satisfied with the reasons given by the applicant. I do not believe that applicant is precluded from submitting an urgent application in the High Court merely because he can make an application to have his appeal heard in the Supreme Court on an urgent basis.

Regarding the question of the interdict itself being sought by applicant, Mr *Makoni* rightly stated the traditional requirements for an interdict, that there must be:

a) a *prima facie* right, even if it is open to doubt;
b) a reasonable apprehension of irreparable harm;
c) proof on a balance of convenience in favour of applicant; and
d) absence of an adequate alternative remedy.

Applicant has satisfied requirements (a), (b) and (c). I find the submissions by Mr *Makoni* to be persuasive. Section 43(2)(d)(ii) of the High Court Act confers on applicant a right of appeal without leave against the granting or refusal of an interdict. As per

CHIDYAUSIKU, J (as he was then) there is need to ensure that a party is not unduly denied of his very important right of appeal from a lower court *Roseland Estate (Pvt) Ltd v Nyakatsa (Pvt) Ltd* HH 47/93 at p2. It is, therefore, not necessary to belabour the issue whether or not applicant has satisfied the first requirement for an interdict that he must establish a *prima facie* right. Further, the noting of an appeal in a civil case automatically suspends the execution of any judgment or order granted by the court of first instance. This rule is intended to prevent irreparable damage to the intending appellant. (See *Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1998 (1) ZLR 149 (H) at page 156C.) Applicant certainly risks destruction of improvements on the disputed property and financial loss if the property is sold to *bona fide* purchasers.

In view of the irreparable harm risked by Applicant, the balance of convenience favours the Applicant more so because the 1st and 2nd respondents can recover any loss by way of damages against the applicant should he fail in his appeal.

However, I am not convinced by Mr *Makoni's* submissions regarding the absence of an alternative remedy. Applicant avers that he risks a destruction of his improvements on the disputed property, financial loss and losing the right to exercise the option granted to him under HC 1721/05. Apart from the nature of loss applicant is likely to suffer, there were no other meaningful submissions on the non existence of an ordinary remedy.

The requirement is well explained in *Neptune (Pvt) Ltd v Venture Enterprises (Pvt) Ltd* HH 127/89. At page 8 ADAMS J quotes LEWIS J in *Reserve Bank of Rhodesia v Rhodesia Railways* 1966 RLR 451 that-

> "…..NATHAN, in his well known works on INTERDICTS, states the position as follows, at p 32-
>
> Lastly as Van der Linden says, there must be no other ordinary remedy by which the applicant can be protected with the same result… The most familiar example, however, which comes to a lawyer's mind is that of damages. It is clear that, if the applicant will have adequate compensation by the award of damages, he will have another ordinary remedy. …….Generally speaking, however, the fact that the applicant has a remedy open to him by way of action for damages is sufficient to bar an interdict where the interference or breach of a right is capable of measurement in money."
>
> The operative part of the quotation-in fact, the essence of it, really-is that there is an existing remedy for the protection of the applicant

> "with the same result"…..if that is the situation, then, so it seems to me, the interdict should be refused."
>
> Taking all the factors into account, there does exist the reasonable probability that at the trial the right sought by the applicant would be vindicated."

As rightly submitted by the 1st and 2nd respondents, applicant does not have a real right in the disputed property and as such, his personal rights can be compensated in full by way of damages claim against the 1st and 2nd respondents.

If I should be wrong in my assessment that applicant has not satisfied the last requirement, meaning that applicant will have established all the four requirements, it is my view that applicant is still not entitled to an interdict. It should be noted that the requirements for an interdict are not considered separately or in isolation but as part of the discretionary function of the court.

In *Econet (Pvt) Ltd v Minister of Information, Posts and Telecommunications* 1997 (1) ZLR 342 (H) page 346 C-E, ADAM J observed -

> "Also in *Limbada v Dwarka* 1957 (3) SA 60 (N), when dealing with the situation where all the requisites of an interdict had been made out, HOLMES J (as he then was) observed at 62:
>
> > "But that does not end the matter, for the court always has a discretion whether to grant or refuse the extraordinary remedy of an interdict…… This means that an applicant who establishes the requisites of an interdict is not necessarily entitled to that relief.""

Applicant avers that case HC 1721 had, through the consent order conferred rights on the applicant to purchase the disputed property at $60 000 per square metre. HC 4730/05, through the *ratio decidendi* extinguished this right. Applicant argues that with the incorporation of the agreement in the court order, the agreement ceased to be an ordinary agreement but became an order of the court. The agreement can no longer be varied, in any way whatsoever, by the parties but by the court. 1st and 2nd respondents cannot sell the property at $200 000 per square metre except with the leave of the court, which leave was not sought at the time the offer was made to applicant.

In response, 1st and 2nd respondents have submitted that applicant seeks to get the interdict they failed to get in HC 4730/05. 1st and 2nd respondents raised two issues *in limine* which they later wisely abandoned, that there was no appeal in the Supreme Court and that Applicant is not entitled to sue both 1st and 2nd respondents. On the main issues, 1st and 2nd respondents submitted that the issue of an interdict had already been determined by the High Court and therefore was *res judicata*. The question whether or not applicant had a right to be protected was determined in HC 4730/05.

The alternative submission by the applicant is that an interdict does not confer rights on any of the parties but seeks to protect rights. However, the court, when it dismissed the application for an interdict conferred 1st and 2nd respondents and Divine Homes with the right to:

(a) amend the agreement;

(b) change the offer price for the disputed property; and

(c) automatically incorporate into the consent order any amendment to the agreement.

Applicant attempts to distinguish the current application from that in case 4730/05 in that in the current case he seeks to have his right of appeal protected whilst in the latter case he sought to have his right to purchase the disputed property at the offer price in the consent order in HH 1721/03. Whilst applicant has a right to appeal, that right (as applicant submitted) is not separate from the subject matter. That is why the question of whether or not applicant had a right to purchase the disputed property at the offer price was extensively dwelt on by the applicant. The question of the subject matter was decided upon by my brother BHUNU, J in HH 4730/05. The effect of the interdict sought by the applicant would be, if granted, to review BHUNU J's decision. As it were, it would result in giving to the applicant through the back door, the same interdict denied by this court. This I cannot do. My review powers are limited to decisions of lower courts.

Both parties argued that costs of the application should be borne by the other party on a higher scale. Applicant alleges that had it not been for 1st and 2nd respondents' decision to continue with the sale of the property in dispute, he would not have made this application. On the other hand, 1st and 2nd respondents have averred that the application

was without merit in that applicant was seeking an order that had already been refused by the same court. In fact the two respondents had asked for an order for costs *de bonis propriis* on the basis that, firstly, the application was not urgent and secondly that there is no merit in the appeal to the Supreme Court.

I am of the view that applicant has shown that he has, to a large extent, met the requirements of an interdict and is entitled to pursue the protection of his rights as best as he can. He therefore should not be penalized for protecting his rights. I do not believe that there is any justification for costs on a higher scale or *de bonis propriis.*

For the reasons above, the following order is made:

1. The application against the respondents is dismissed.
2. There is no order as to costs.

Makoni Legal Practice, applicant's legal practitioners
Dube, Manikai & Hwacha, respondent's legal practitioners