

BRIAN JUSTICE ENTERPRISES (PRIVATE) LIMITED
versus
H.E.R. (PRIVATE) LIMITED
and
NITSA ANDREA OLYMPIOS
and
PARIS OLYMPIOS
and
CHRISTOS VENTURAS
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 31 January and 3 February 2012

Urgent Chamber Application

Advocate *L Uriri*, for the applicant
Advocate *JB Wood*, for 1st – 4th respondents

HUNGWE J: This matter was placed before me through the Chamber Book on 25 January 2012. After I perused the papers I directed that the matter be set down for hearing the next day. On this day the parties addressed me on the issue of urgency. I found the matter to be urgent and the respondents asked for more time to prepare and file their opposing papers which indulgence was granted. The hearing was postponed to 31 January 2012.

Applicant seeks the following interim relief;

INTERIM RELIEF

Pending the determination by this Honourable court of the issues referred to above, it is ordered that:

1. The First to Fourth Respondent be and are hereby interdicted from disposing of the immovable property in the name of the First Respondent to any third party, registered under Deed of Transfer Number 1598/11, pending confirmation of this order.

SERVICE OF PROVISIONAL ORDER

Copies of this Provisional Order shall be served upon the Respondents by the applicant's legal practitioners.

In its founding affidavit the applicant's director makes the following averments. The applicant bought 50% shareholding in the first respondent on or about 9 June 2009 under a sale of shares agreement for US\$600 000, 00 under certain terms and conditions. This sum, it is contended, has been paid in full. The first respondent is resisting the transfer of shares in favour of the applicant. As a result the applicant has instituted proceedings in this Court compelling transfer.

In the meantime the applicant has learnt that the respondents are seeking to dispose of the only immovable asset owned by the first respondent being a business premises. The applicant's director confirms that people in the oil industry have visited the service station to inspect the premises. The applicant fears that if this asset is sold, it will suffer irreparable harm as it is the only asset in the first respondent's books. The applicant states that it has no other remedy besides seeking the present relief.

On the other hand, the third respondent as director of first respondent stated the following; the agreement of sale was concluded in August 2009. The full purchase price was to be paid by 1 November 2009. The applicant failed to pay the full purchase price by that date. As a result, the agreement of sale was duly cancelled and a refund of the payment made towards the purchase price tendered to the applicant's legal practitioners. The applicant has not made any effort to supply its bank account details to the respondents to facilitate transfer of the said payments. Because the sale was cancelled, the first and second and third respondent believes the applicant has no right to be at the premises. The third respondent states that the second respondent who is his mother is entitled to sell her shares in the first respondent but does not wish to do so at this point in time.

The third respondent avers that the premises are owned by three shareholders. He states that he is entitled to sell his shares since they are not subject to any legal dispute and in any event even if the applicant were to succeed in the matters before the courts, all applicant will be

entitled to is only 50% share of the premises and not the entire property. He confirms that he is seeking to sell his 40% share but goes on to assure the court that since the second respondent does not wish to sell her shares till the matter pending before this court is resolved, there is no prejudice to the applicant's interests should he succeed in selling his assets. According to the third respondent the applicant seeks to interdict the sale of immovable property, wherein it has no *prima facie* right, and therefore not entitled to the title deeds.

Mr *Uriri*, for the applicant, pointed out that there is a matter pending before this court in HC1589/12. The issue for decision in that matter is whether the sale of shares agreement entered into by the parties is liable to be cancelled or whether the applicant is entitled to take transfer of the shares in the first respondent. The first respondent is the registered owner of the immovable property, a petrol station, subject of this application. The third respondent holds the other 40% and there have been attempts to sell this shareholding. The fourth respondent confirms this in his affidavit. Should the applicant succeed in HC4208/12 then it would be entitled to the 50% shareholding in the first respondent, which translate to a right to claim 50% share of the immovable asset subject of these proceedings. By article 5(b) of the first respondent's Articles of Association, the applicant will be entitled to a right of pre-emption of the remaining 50% shareholding in the first respondent which the third respondent has attempted to sell. Such sale in the present situation would result in irreparable harm to the applicant. On the facts admitted by the respondent, Mr *Uriri* agreed, applicant is entitled to the relief it seeks.

Mrs *Wood* for the respondents argued that on these facts, the applicant is not entitled to the remedy of an interim interdict since, to start with, the sale which would have entitled the applicant some *prima facie* right to the immovable property was cancelled. In short according to this argument, the applicant has failed on its first hurdle. Second, there has to be an actual or reasonably apprehended injury. As the applicant's rights were extinguished by the cancellation of the sale, the applicant could not possibly reasonably entertain such fear of injury to non-existent rights. In any event even if the court held that the applicant has some right capable of injury, since any sale of property under administration by the executor is a nullity, the applicant could easily seek the setting aside of the sale with ease. As such, there are other remedies should the applicant's rights suffer any harm at the hands of the respondents. Mrs *Wood* argued that the

application before this court related to immovable property whereas the conduct giving rise to the urgency was the third respondent's dealings with his shares in the first applicant. If I understood her correctly, which I am sure I did, her argument is that the present application seeks to interdict the sale of the immovable property. As there is no application being made against the third respondent's dealing with his shareholding in the first respondent, then the application, in its present form, cannot succeed. I need not show to counsel the effect of the order sought but it seems necessary to do so. The claim by the applicant is that the third respondent seeks to sell his shares in the first respondent. This entails a share transfer. Such sale of shares is in effect sale of the immovable property in question because share transfer arises where the property is owned by a company as its sole asset. Instead of transferring the property from the company to the purchaser, the company retains ownership of the property and the shares in the company are sold to the purchasers. It seems to me seeking to interdict the sale of immovable property by the respondents will achieve the same result which an interdict against share transfer would achieve.

I agree with Mr *Uriri* that the applicant has established a *prima facie* right to some share in the immovable property owned by the first respondent. The validity of this share is subject of the litigation in HC4208/12.

Having decided that the applicant has established a *prima facie* right, does he have a well-grounded apprehension of irreparable injury? The third respondent says that the second respondent, his mother, has no intention of selling her shares till the final determination of the matter which is pending in this court. However, he alleges that he has every right to sell his shares in the first respondent as they are not subject to any legal dispute. The fact that one of the respondents such as he commands control in the first respondent company should give the applicant grounds for some apprehension that the third respondent intends to sell the whole immovable property for his own advantage. I say this because the second respondent is now beyond the court's jurisdiction. The executor who holds a power of attorney for the mother confirms these attempts at sale. Clearly nothing will prevent the third respondent putting himself in a position where he could dispose of it without the concurrence or knowledge of the executor. It is clear, moreover, that an interdict is the only remedy that can protect the applicant from the harm that he apprehends may be inflicted.

In *Eriksen Motors (Welkom) Ltd v Protea Motors & Anor 1973 (3) SA 685 (A) at 691* HOLMES JA said that the granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. After referring to the requisites laid down by INNES JA in *Setlogelo v Setlogelo 1913 AD 221 at 227* he said:

"In exercising its discretion the court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience."

The second respondent, it has been indicated, is prepared to await the final determination of the matter pending between her and the applicant before selling her shares. Therefore if an interim interdict is granted in the terms prayed for, she would hardly suffer any prejudice. On the other hand, as I have demonstrated above, should this court not grant the interim interdict, there is a very real danger that the applicant's rights in the first respondent will most likely be jeopardised irreparably. On the balance of convenience therefore I consider that the court should exercise its discretion in favour of the applicant and grant an interim interdict in the terms prayed for.

It is ordered:-

1. The First to fourth Respondent be and are hereby interdicted from disposing of the immovable property in the name of the First Respondent to any third party, registered under Deed of Transfer Number 1598/11, pending confirmation of this order.
2. There is no order as to costs.

Atherstone & Cook, applicant's legal practitioners
Venturas & Samukange, 1st – 4th respondents' legal practitioners