MAXWELL MATSVIMBO SIBANDA
versus
GYWNNE ANN STEVENSON
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 4 February 2014, 12 June 2014

Opposed Matter

K. Musimwa, for the applicant
Adv.*Morris*, for the respondent

DUBE J: This is an application for an interdict to stop the first respondent from selling and transferring stand No 47 Addington Lane, Ballantyne Park, Harare.

The background facts to this matter are common cause. The applicant entered into a lease agreement with Brian Stevenson, the first respondent's husband from 1 April 2005 to 31 October 2006 and the lease was renewable on the same terms. The applicant claims that he made certain repairs and improvements to the property for which he is entitled to be reimbursed. The applicant seeks to interdict the respondent from selling and transferring the house pending the determination of the claim for improvements. The applicant claims that if the first respondent who resides in Jamaica, sells the property and takes the funds out of the jurisdiction of the court, it will be difficult for him to recover the money he expended in effecting the improvements. The applicant has instituted an application under HC 10286/12 for unjust enrichment where he is claiming damages for improvements he made to the property.

The first respondent is opposed to the application and submitted that she cancelled the agreement of sale for non-payment of rentals and the applicant had previously purported to pay the purchase price in a manner that was legally unacceptable. The respondent contends that the applicant is unlikely to be successful in the claim for improvements. The first respondent denies that the applicant performed any repair or replacement work other than that

which he was obliged to perform free of charge in return for being granted each lease, with the rentals pitched lower than would have been the case. The respondent denies that the applicant performed any work on the property after the cancellation of the lease. That the applicant lost his right to transfer of the property into his name, is a *mala fide possessor* and has not set out a basis for a claim for improvements.

The following are the requirements for a temporary interdict and were laid out in *Neptune* (*Pvt*) *Ltd* v *Neptune Enterprises* HH 127/88 as follows;

(a) the applicant must show a *prima facie* right though open to some doubt,
(b) that he has suffered actual injury or has a reasonable apprehension of injury
(c) that there is no other ordinary remedy by which he can be protected in the same way as an interdict.
(d) The injury must be irreparable.
(e) The balance of convenience must favour the applicant.

The applicant claims that the first repairs were carried out around October 2006 to make the property habitable. He later carried out several repairs to maintain the condition of the property. These in summation include painting the premises, constructing a septic tank, drilling a borehole, house repairs and plumbing. In February 2007 the parties entered into a deed of sale with the rights and obligations of the lease continuing until the purchase price was paid in full. The first respondent cancelled the agreement in April 2007. Following the cancellation, the applicant filed a claim for transfer of the property into his name and absolution from the instance was granted by the High Court which decision was later confirmed by the Supreme Court on 14 February 2011. Summons for eviction of the applicant from the premises were issued in June 2008 and the respondent obtained an order from the High Court evicting the applicant. The applicant appealed and remains on the property.

The applicant has lost his claim to ownership of the property and is a *mala fide possessor.* The law with respect to this class of possessors was outlined in *De Beers Consolidated Mines* v *The London & South African Exploration Co (supra*) G at 372 as follows;:

> "A *mala fide possessor* who has affixed materials to the land and, before demand made by the owner, has disannexed and removed them, is not deemed to have parted with his ownership in the materials. After demand, he no longer has the right to retain the land or remove the materials from the land, nor is he entitled to compensation

> except for such expenditure as he may have necessarily incurred for the protection or preservation of the land. If, however, the rightful owner has stood by and allowed the erection to proceed without any notice of his own claim he will not be permitted to avail himself of his fraud, and the possessor, although he may not have believed himself to be the owner, will have the same rights to retention and compensation as the *bona fide possessor."*

Once the applicant lost his claim for ownership he became a *mala fide possessor* and he lost the right to compensation other than improvements necessary to protect the property or preserve it compensation.

The respondent claims that part of the applicant's claim for improvements prescribed in November 2012. The cause of action regarding some of the improvements and those effected before 2008 arose when absolution from the instance was granted in 2008. In fact the applicant was well aware after the cancellation of the contract of sale that he was losing the property and he did not take any action then until September 2012 when he filed a claim for improvements. The applicant had three years within which to bring his claim for improvements made. By the time he filed the claim for improvements that part of the claim had prescribed.

After the respondent had obtained judgment on absolution from the instance and issued summons and obtained an order for eviction in 2008 under HC 3212/08 it became evident that applicant was no longer going to buy the house and that the respondents no longer wanted him on the premises. He continued to carry out works on the property. These relate to provision of top soil, plants and pots, tobacco manure, trampoline mat, replacement and repairs to geyser and kitchen, plumping supplies and repairs, drilling and installing and supplying accessories for a bore hall, repairs to roof leaks and ceiling, repainting the premises,paint constructing a septic tank and soakaway and repairs to the alarm system among other things. The applicant avers that these repairs were necessary to maintain the condition of the property and keep the property in a good state of repair and to make it more habitable. The applicant was required in terms of the lease agreement to maintain the property in a habitable condition and he did that. Clause 9 of the lease agreement provides that the lessee shall make no internal or external alterations or additions to the property whether structural or otherwise or interfere with the electrical installation in the premises. He has done things he was not entitled to do. Any alterations or additions were supposed to be carried out with the lessors' permission and such permission was never given. A tenant is

entitled to only necessary and useful improvements. No such permission was given and hence the improvements if any, were unauthorised and cannot be claimed. Any repairs and maintenance, would be made at his own expense .The repairs cannot be said to have been incurred for the protection and preservation of the property. There is nothing to suggest that the premises were in a state of degradation or derelict and therefore it is unlikely that the applicant will be able to show the existence of necessary improvements that would entitle a*mala fide possessor* to compensation for works carried out. See *Business Aviation Corporation* v *Rand Airport Holdings* 2006 [6] SA 605 for that principle.

The papers attached consist mainly of quotations and delivery notes. Most of the invoices attached do not indicate what the materials would be used for. For example the invoice for tobacco and topsoil. It is not clear how these invoices arise. This is not proof of what work was quoted or what work was done. The improvements claimed have not been quantified. Most of these improvements were carried out in the Zimbabwe dollar era and were not expressed in US dollars.No basis for unjust enrichment has been laid. It does not appear that the applicant has shown that bit has effected improvements for which he is entitled to compensation. I am not satisfied that applicant has shown the existence of a *prima facie right*.

Having found that there has not been shown the existence of a *prima facie* right, the issue of irreparable harm does not arise. However, even assuming I am wrong in this view, the applicant's fears are without foundation. The applicant fears that if the respondent sells the property and takes the funds out of the jurisdiction of the court, it will be difficult for him to recover the money he expended in effecting the improvements. He has not shown that the applicant intends to dispose of the property for purposes defeating satisfaction of his claim for improvements. The applicant has an order for holding over damages of $55000-00. These have been calculated up to November 2012 and currently stand at $101 000-00. The applicant has been in the premises since then and continues to accrue further holding over damages. What also ought to be considered is that part of the applicant's claim has prescribed and it is unlikely that applicant's remaining claim for improvements will exceed that of holding over damages. The respondent is prepared to set off this amount against what he may be owing the applicant. In the event that the applicant wins the application for improvements, he can still enforce the judgement wherever the respondent may be. He is unlikely to suffer any irreparable harm or prejudice.

The applicant seeks a temporary interdict which he equates to a caveat. The two remedies are different. This property is not *res litigosa* after the applicant failed in his claim for transfer of the property. The applicant could have opted for an ordinary caveat because the applicant no longer has any right over the property. An order that the money be held in trust until the finalisation of the application would have the same effects as an interdict. The remedy sought is too drastic in the circumstances of this case. There exists other remedies which can adequately protect him in the same way as an interdict.

The balance of convenience favours both parties. The respondent stands to be prejudiced if the relief sought is granted and the application for unjust enrichment is dismissed. The respondent will not be able to sell the property should she choose to do so. The applicant on the other hand will be inconvenienced if the relief sought is refused and he ultimately wins the claim for improvements. He will be required to pursue the respondent who is based outside Zimbabwe. This will be costly for him.

Having considered these factors together, I am not satisfied that the applicant has shown a good basis for an interdict.

In the result it is ordered as follows:-

1. The application is dismissed.
2. The applicant shall pay the costs of this application.

Musimwa & Associates, applicant's legal practitioners
Wintertons, respondents' legal practitioners