

HERSEL INVESTMENTS PRIVATE LIMITED
versus
THE REGISTRAR OF DEEDS N.O.
and
THE SHERIFF OF THE HIGH COURT
and
TREDCOR ZIMBABWE PRIVATE LIMITED
and
ESTRELAC INVESTMENTS PRIVATE LIMITED
and
ROSELYN MANDEBVU

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 22 JANUARY 2015, 5 AND 25 FEBRUARY 2015

Urgent Chamber Application

F Piki, for the applicant
No appearance, for 1st respondent
No appearance, for 2nd respondent
F Rudoph, for 3rd respondent
J Mafulela, for 4th respondent
Mrs R Mandebvu, in person

TAGU J: This is an urgent chamber application for an interim relief order interdicting the first respondent from transferring a certain piece of land situate in the District of Salisbury called an undivided 5% share No. 19 in the Remainder of Stand 1652 Salisbury Township held under Deed of Transfer number 11009/2005 to the fifth respondent pending the hearing and determination of an application to set aside the sale of property described herein sold by public auction.

During the hearing of the matter the first respondent was not represented. The fourth and the fifth respondents' representatives who were present elected not to say anything. The second respondent filed his report couched in the following words-

“ SHERIFF’S REPORT

I have gone through the applicant’s founding affidavit and have been sighted as the 2nd Respondent in my official capacity although on the applicants (sic) founding affidavit the Sheriff has been sighted as the 4th Respondent in his official capacity.

The Sheriff will abide by the decision of this Honourable Court.

.....(signed).....

M Madega

Sheriff

/rg”

Mr F Rudoph, for the third respondent raised a number of points in *limine*. The pertinent ones being-

- a) that the matter is not urgent,
- b) that the relief claimed by the applicant is for stay of execution that has already been completed,
- c) that the interim relief and final relief sought are the same, and
- d) that the urgent application was not served on us personally but on Scanlen and Holderness who were acting on behalf of us in the action proceedings, therefore, the service was defective.

After hearing submissions by parties on the points in *limine*, I indicated that, in my view, the matter was urgent and I was going to dismiss the points in *limine*. I invited the parties to address me on the merits. I indicated that my reason for dismissing the points in *limine* will be apparent in my judgement. These are they.

The applicant purchased the property in question from the fourth respondent by way of private treaty on the 11th of November 2013 and paid full purchase price. The applicant and the fourth respondent signed a memorandum of agreement of sale to that effect which is attached as annexure F. The applicant took vacant possession of the said property soon after the sale and leased out the property to a tenant. The applicant then sought the transfer of the property to itself sometime in April 2014. There was a delay in processing the transfer because of the office of the Zimbabwe Revenue Authority (ZIMRA)‘s queries concerning the payment of capital gains tax.

Meanwhile, and unbeknown to the applicant, the fourth respondent owed the third respondent money. The third respondent sued the fourth respondent and obtained judgment in its favour. The third respondent then obtained a writ of execution against movables and

immovable property on the 10th of July 2014. The applicant's piece of property which was still in the names of the fourth respondent was attached and subsequently sold to the fifth respondent at a public auction. The applicant only became aware of the proceedings involving the third and the fourth respondents by way of a written communication from the chairperson of the block of apartments that house the property in question on the morning of the 16th January 2015.

Upon learning that the property in question had been auctioned, the applicant immediately approached its legal practitioners who then filed this urgent chamber application on the 19th of January 2015.

Let me hasten to mention that the applicant was not cited as a party in the court processes. Had it not been for the chairperson of the block of apartments who knew the owner of the property in question, the applicant might not have known of the sale of its property until ownership was passed onto the fifth respondent.

Mr Rudoph's contention was that this matter is not urgent because the relief sought by the applicant cannot be granted as the applicant has not shown that they have a clear right against the third respondent, but the fourth respondent which right can be adequately remedied by an award for damages in the matter that will have been filed against the fourth respondent. He further submitted that the urgency in this matter is self- created. I will deal with this issue in detail later. What this court has to decide, taking into account all the issues raised as points in *limine*, is whether or not this matter is urgent.

What constitutes urgency has been clearly stated by Chatikobo J in the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 at page 193 where the learned judge said-

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arrives, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been a delay.”

In *casu*, the applicant became aware of the proceedings on the 16th January 2015. The applicant did not sit on its laurels. It quickly filed this application to protect its rights on the

19th of January 2015. A delay of 3 days cannot be said by any imagination to be inordinate. In my view, the applicant acted when the need to act arose. The need to act only arose on the 16th January 2015 when they became aware of the sale of their property. It has not been shown that the urgency in this case was self-created since the applicant was not a party to the proceedings involving the third and the fourth respondents.

In any case, I do not believe that the applicant does not have real rights worthy protecting. The applicant's rights over the property in question are enforceable against all the respondents cited in these proceedings. The rights are derived from the contract of sale that exists between the applicant and the fourth respondent. Moreover, this is an application for a temporary interdict. What the applicant need to prove is a *prima facie* right, that is, a right which though *prima facie* established, is open to some doubt. *Setlogelo v Setlogelo* 1914 AD 221 at 227.

For the above reasons I am satisfied that this matter qualifies to be heard on an urgent basis, despite the other factors raised on behalf of the third respondent. The points in *limine* are therefore dismissed.

I will now deal with the merits.

Mr *F. Piki*, for the applicant outlined the requirements for an application for any interdict as stated in the case of *Setlogelo v Setlogelo supra*. The position of the law is that an applicant for a temporary interdict will succeed if he/she is able to satisfy four requirements. The requirements are-

- a) a *prima facie* right, though open to doubt;
- b) that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right;
- c) the balance of convenience favours the granting of interim relief, and
- d) that the applicant has no other satisfactory remedy. See also *Cool v Minister of Justice* 1955 (2) SA 682 (C) at 688.

Mr *Rudoph* in his argument submitted that all the above four requirements have to be satisfied. He thus opted to dwell on the issue of irreparable harm. According to him the applicant has a remedy in terms of the contract hence there is no irreparable harm. He relied

for his arguments on clauses 9 and 10 of the contract between the applicant and the fourth respondent. The clauses in question read as follows-

"9. CANCELLATION

Notwithstanding any extension of time or other concession given by the Seller to the Purchaser, if the Purchaser fails to observe or perform any of the Purchaser's obligations under this agreement and fails to rectify any such breach within Seven (7) days of dispatch of written notice by the Seller, the Seller shall be entitled without prejudice to the Seller's rights to:

- (a) Seek specific performance; or
- (b) Cancel the agreement and claim ejection of the Purchaser from the property and/or
- (c) Claim damages

10.1 In the event of the Seller breaching any of its obligations in terms of this contract and fails to rectify any such breach within 7 days of dispatch of a written notice by the Purchaser, the Purchaser shall be entitled to:

- (a) Seek Specific performance; or
- (b) Cancel the contract and claim the full purchase price together with interest from the date of payment and/or
- (c) Claim damages"

In response to Mr *Rudoph's* submission, Mr *Piki* argued that the applicant cannot invoke the provisions in clause 9 and or 10 of the contract because the fourth respondent has not breached any of the provisions of the contract of sale. Besides, the fourth respondent is now bankrupt and has ceased to operate, that is the reason why the fourth respondent's property was attached. Further, he argued that there is going to be irreparable harm because the fourth respondent's other two pieces of property are now under judicial attachment. In his view the balance of convenience favours the applicant because the applicant paid for the property in question, whereas the fifth respondent has so far paid nothing.

In resolving this dispute the court took into account the remarks of Holmes J (as he then was), who summed up the position in relation to granting of interim interdicts in the case of *Olympic Passenger Service (Pvt) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 C- G as follows-

"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie' established though open to some

doubt seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion, to be exercised judiciously upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.”

In *casu*, the applicant’s right is clear and all the other requisites are present. The applicant purchased the property in question and paid the purchase price in full. The applicant took vacant possession of the property. What was only left was the transfer of Title Deeds to the applicant. The property was therefore no longer the property of the fourth respondent at the time it was attached in execution. Had the applicant known of the attachment the applicant could have issued interpleader Summons or contest the sale and or the subsequent confirmation of the sale. Had the correct status of the property been disclosed to the Sherriff of the High Court, the property could have been excluded from the property that was attached.

At the moment the fifth respondent was confirmed the highest bidder at the public auction. The fifth respondent has not paid a cent towards purchase price. The balance of convenience favours the applicant. The Registrar of Deeds cannot therefore, proceed to transfer any Title Deeds of the property to the fifth respondent. The application for an interdict will therefore succeed.

The applicant had included in its relief a request to be allowed to file within ten working days the application for the setting aside of the sale of the property in question. This relief, from the submissions of Mr *Piki*, has since been overtaken by events. An application for the setting aside of the sale has since been filed under case number HC 697/15.

In the result, the following interim relief is granted-

“ INTERIM RELIEF GRANTED

Pending the outcome of the application to set aside the sale by auction, the Applicant is granted the following relief:

1. The First Respondent be and is hereby interdicted from transferring certain piece of land situate in the District of Salisbury called an undivided 5% share No. 19 in the Remainder of

Stand 1652 Salisbury Township held under Deed of transfer number 11009/2005 by the Second Respondent from the Fourth Respondent to the Fifth Respondent;

2. The Second Respondent be and is hereby interdicted from signing all such documents of transfer as may be necessary to transfer certain piece of land situate in the District of Salisbury called an undivided 5% share No. 19 in the Remainder of Stand 1652 Salisbury Township held under Deed of Transfer number 11009/2005 by the Second Respondent to any other party in pursuance to the writ of execution issued in favour of the Third Respondent under case number HC 10443/13.

SERVICE OF THE PROVISIONAL ORDER

That the Applicant’s legal Practitioners are hereby given leave to serve the Provisional order on the Respondents.”

TAGU J.....

IEG Musimbe and Partners, applicant’s legal practitioners
Messrs. Scanlen and Holderness, 3rd respondent’s legal practitioners.