REPORTABLE ZLR (78)

Judgment No. S.C. 137/99
Civil Appeal No. 69/99

CHARUMA BLASTING & EARTHMOVING SERVICES (PRIVATE) LIMITED

vs (1) ISAAC NJAINJAI (2) TIMOTHY JOHN WALTER PRESTON

(3) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, SEPTEMBER 16, 1999 & JANUARY 7, 2000

C Hungwe, for the appellant

E Mugugu, for the first respondent

No appearance for the second and third respondents

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed the appellant's application for a provisional order.

The facts are as follows. On 16 July 1998 the appellant ("Charuma") and the second respondent ("Preston") concluded an agreement of sale in terms of which Charuma purchased from Preston a piece of land at Ruwa ("the property"). The agreed purchase price was $2 500 000.00, which was to be paid to an estate agent. Payment of the purchase price was to be by way of a deposit of $500 000.00 on or before 22 July 1998, and four monthly instalments of $500 000.00, the first

instalment being payable on or before 5 August 1998. Subsequent instalments were to be paid on or before the 5th day of each month.

In addition, it was agreed that the property would only be transferred to Charuma after the purchase price had been paid in full. It was also agreed that if Charuma failed to pay any instalment by the date when it was due, Preston was entitled to call upon Charuma to remedy the breach within fourteen days, and that if Charuma failed to pay the instalment within that period, Preston was entitled to cancel the sale and repossess the property.

After the sale agreement had been signed by the parties, Charuma paid the deposit as well as the first instalment, although both were paid late. The payments were made on different dates.

When the second instalment was not paid by 5 September 1998, the estate agent, acting for Preston, wrote to Charuma giving it fourteen days within which to pay the balance of the purchase price in full, and when that payment was not made he cancelled the sale.

Charuma then filed an urgent application in the High Court on 14 October 1998 seeking an order setting aside the cancellation of the sale. The order was subsequently granted on 2 March 1999, on the ground that in terms of s 8(1) of the Contractual Penalties Act [*Chapter 8:04*] ("the Act"), Charuma should have been given thirty days within which to remedy the breach.

However, before the cancellation of the sale was set aside, Preston sold the property to the first respondent in this case ("Njainjai") for $1 500 000.00 on 1 November 1998. Thereafter, Njainjai paid the required deposit of $500 000.00 on 27 November 1998.

At the time of the conclusion of the second sale agreement Preston did not disclose to Njainjai that Charuma had an interest in the property and that on 14 October 1998 it had filed an application in the High Court challenging the termination of the first sale agreement.

However, when Charuma became aware of the second sale, it wrote a letter to Njainjai on 7 December 1998 informing him of the first sale and advising him that the property should not be transferred to him. Thereafter, Njainjai telephoned Charuma and was fully briefed about the first sale.

Subsequently, on 15 December 1998, Charuma's legal practitioner ("Warara") had a lengthy telephone conversation with Njainjai's legal practitioner ("Mugugu"). In that conversation Warara fully briefed Mugugu about the first sale agreement and the purported cancellation of that agreement. He also informed him about Charuma's application for an order setting aside the purported cancellation on the ground that in terms of the Act Preston should have given Charuma thirty days within which to remedy the breach before terminating the agreement. Before the conversation ended, Warara undertook to send to Mugugu a copy of Charuma's application for an order setting aside the purported cancellation of the first sale, and

Mugugu undertook to send to Warara a copy of the second sale agreement. That was subsequently done.

Nevertheless, in February 1999 Preston transferred the property to Njainjai. When Charuma became aware of the transfer, it filed an urgent application in the High Court against Njainjai, Preston and the Registrar of Deeds. In that application, it sought a provisional order calling upon the respondents to show cause why a final order should not be made: (a) setting aside the transfer of the property to Njainjai; (b) directing Preston to transfer the property to Charuma; (c) directing Njainjai to vacate the property; and (d) directing that the costs of the application be paid by Njainjai and Preston on the legal practitioner and client scale.

In addition, Charuma sought a temporary interdict restraining Njainjai from selling, transferring or mortgaging the property, and also restraining the Registrar of Deeds from registering any transfer, mortgage or encumbrance relating to the property in favour of any other person.

The application was dismissed on 19 March 1999. Aggrieved by that result, Charuma appealed to this Court.

The main reason for dismissing the application was the belief by the learned judge in the court *a quo* that there was no need for an interdict because the property had already been transferred to Njainjai. In his judgment he said the following:

> "I also come to the conclusion that there is no basis on which a court should be asked to grant an interdict at this stage. The act and event which the applicant claims violated his right to own the disputed property, namely the sale and transfer to the first respondent, already occurred in October and December 1998. The applicant could have interdicted the transfer of December 1998 but clearly failed to do so. … Having failed to stop the transfer which was imminent, to seek an interdict at this stage is trying to lock the stable door when the horse has bolted."

With respect, the learned judge clearly misconstrued the reason why Charuma sought the temporary interdict. The reason was that, pending the determination of the application for an order setting aside the cancellation of the first sale, Charuma intended restraining Njainjai from selling or otherwise disposing of the property. The temporary interdict was intended to prevent further complications by preserving the *status quo*. It was meant to protect Charuma's interest in the property. This was made clear in its founding affidavit, filed by its financial director, paras 14 and 15 of which read as follows:

> "14. I verily believe that at the time (the) first respondent (Njainjai) obtained transfer he was fully aware that there was an agreement between (the) applicant (Charuma) and (the) second respondent (Preston) and that (that) agreement had not been cancelled or at the very least cancellation of that agreement by (the) second respondent (Preston) was contested in a court of law and the matter was still pending. (The) first respondent (Njainjai) acted with a clear intention of defeating (the) applicant's (Charuma's) claim to the property as both him (sic) and his legal practitioner were fully appraised (sic) of the legal basis on which cancellation of the first agreement between the applicant (Charuma) and (the) second respondent (Preston) was being challenged. It must have been evident to Mr Mugugu that our claim was not in bad faith.
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> 15. I verily believe too that if (the) first respondent (Njainjai) is not restrained from proceeding to sell the property he will proceed behind everyone's back and sell this property to defeat (the) applicant's (Charuma's) claim, as he knows the risk he faces, which risk he was avoiding in the first place when he pressed on with transfer with full knowledge of (the) applicant's (Charuma's) rights over the property. I also believe that no prejudice will be caused by such a restraint as (the) first respondent (Njainjai) has occupation and only recently (about two weeks ago) got transfer of the property."

In the circumstances, the learned judge clearly misdirected himself and dismissed Charuma's application for wrong reasons.

What an applicant for an interdict should establish in order to succeed has been set out in many previous cases.

In *Setlogelo v Setlogelo* 1914 AD 221, INNES JA (as he then was) said the following at 227:

> "The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

Subsequently, in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Anor* 1973 (3) SA 685 (A) HOLMES JA, dealing with the issue of temporary interdicts, said the following at 691 C-G:

> "The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo v Setlogelo* 1914 AD 221 at p 227. In general the requisites are -
>
> (a) a right which, 'though *prima facie* established, is open to some doubt';
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> (b) a well grounded apprehension of irreparable injury;
>
> (c) the absence of ordinary remedy.
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> 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 foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour

> him. … Viewed in that light, the reference to a right which, 'though *prima facie* established, is open to some doubt', is apt, flexible and practical, and needs no further elaboration."

I respectfully associate myself with those comments. A preliminary assessment of the merits of the applicant's case is, therefore, essential in each case.

I now turn to the facts of the present case. As already stated, in the main application Charuma sought an order setting aside the termination of the first sale agreement by Preston on the ground that Preston had not given it thirty days within which to remedy the breach as required by subss (1) and (2) of s 8 of the Act. Preston did not dispute that allegation but averred that he acted in terms of the first sale agreement. That, in my view, is not a good argument. It is quite clear from the papers that Preston called upon Charuma to pay the balance of the purchase price in full within fourteen days contrary to the provisions of the Act. Charuma's prospects of success in the main application were, therefore, excellent, and the learned judge in the court *a quo* should have found that Charuma had established a clear right not open to any doubt whatsoever.

As a matter of fact, when the main application was heard in March 1999, Charuma was successful and the purported termination of the first sale agreement was set aside. A subsequent appeal to this Court by Preston was dismissed with costs. See *Timothy John Walter Preston v Charuma Blasting & Earthmoving Services (Pvt) Ltd & Anor* S-135-99 (not yet reported).

Since Charuma proved a clear right, it was not necessary for it to establish that it would suffer irreparable harm if the interim interdict was not granted.

Support for this conclusion is found in what INNES JA (as he then was) said in *Setlogelo v Setlogelo supra* at 227. There the learned JUDGE OF APPEAL said:

> "The argument as to irreparable injury being a condition precedent to the grant of an interdict is derived probably from a loose reading in the well-known passage in Van der Linden's *Institutes* where he enumerates the essentials for such an application. The first, he says, is a clear right; the second is injury. But he does not say that where the right is clear the injury feared must be irreparable. That element is only introduced by him in cases where the right asserted by the applicant, though *prima facie* established, is open to some doubt. In such cases he says the test must be applied whether the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. If so, the better course is to grant the relief if the discontinuance of the act complained of would not involve irreparable injury to the other party: Van der Linden *Inst.* (3, 1, 4, 7). But he certainly does not lay down the doctrine that where there is a clear right the injury complained of must be irreparable in order to justify an application for an interdict."

Thus where, as in the present case, the right is clear, the damage need not be irreparable.

I now wish to deal with the requirement that there be no other adequate remedy. In seeking the interim interdict, Charuma intended protecting its right to the property by preserving the *status quo* and preventing any further complications in the equation, pending the hearing of the main application in which its prospects of success on the merits were excellent because it had a clear-cut case. In my view, no other remedy would have achieved that objective. In any event, the balance of convenience was overwhelmingly in favour of Charuma. The prejudice to Charuma if the interdict was refused was very much greater than the prejudice to Njainjai if the interdict was granted. In fact, the granting of the interim interdict would not have prejudiced Njainjai in any way because he indicated that he did not intend selling or otherwise disposing of the property.

In the circumstances, I am satisfied that on the facts of this case the learned judge should have exercised his discretion in favour of Charuma and granted it the interim interdict.

I now wish to consider whether this Court can, in the circumstances, interfere with the decision of the learned judge since his refusal to grant the interim interdict clearly involved the exercise of a judicial discretion.

The circumstances in which this Court can interfere with the exercise of a judicial discretion were clearly set out by GUBBAY CJ in *Betty Felicity Barros and Prompt Builders Company (Pvt) Ltd v Gideon Justas Chimphonda* S-1-99 (not yet reported). At pp 7-8 of the cyclostyled judgment the learned CHIEF JUSTICE said:

> "The determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion, see *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350 - may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing."

In the present case, as stated earlier in this judgment, the learned judge quite clearly misconstrued the reason why Charuma sought the interim interdict. He, therefore, mistook the facts and this Court is justified in interfering with his decision.

Finally, I wish to deal with the provisional order application by Charuma. The learned judge, having decided against granting the interim interdict, dismissed the provisional order application. As stated earlier, in that application Charuma sought a provisional order which, *inter alia*, called upon Njainjai to show cause why a final order should not be made setting aside the sale of the property to him. Preston had sold the property to Njainjai after he purportedly cancelled the sale of the property to Charuma.

I now turn to consider whether Charuma made out a *prima facie* case for the issue of the provisional order against Njainjai.

The principles which apply where a person sells a property to two or more persons separately were set out by this Court in *Crundall Brothers (Pvt) Ltd v Lazarus N.O. & Anor* 1991 (2) ZLR 125 (S) at 132G-133C, 1992 (2) SA 423 (S) at 429H-430A as follows:

> "This approach was set out as follows by Professor McKerron in (1935) 4 *SA Law Times* 178 and repeated with approval by Professor Burchell in (1974) 91 *SALJ* 40:
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> > 'It is submitted that where A sells a piece of land first to B and then to C - and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court would decree specific performance - the rights of the parties are as follows:
> >
> > (1) …
> >
> > (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A. If, however, C had knowledge at either of these dates, B, *in the absence of special circumstances affecting the balance of equities,* can recover the land

> from him, and in that event C's only remedy is an action for damages against A.'
>
> It is relevant at this stage, since the question of *mala fides* has been canvassed extensively in argument, to point out that the doctrine of notice, as it is called, requires nothing more than notice or knowledge of the prior claim. It is not necessary to prove *mala fides* or fraud."

Applying these principles to the facts of the present case, I am satisfied that Charuma made out a *prima facie* case for the issue of the provisional order. Although it appears to have been common cause that at the time Preston and Njainjai concluded the second sale agreement Njainjai was unaware of the earlier sale of the property to Charuma, he was certainly aware of it at the time he took transfer. He and his legal practitioner, Mugugu, were informed about the sale by Charuma. They were also informed that an application had been filed in the High Court seeking an order setting aside the purported cancellation of the first sale by Preston. In addition, Mugugu was given a copy of the application by Charuma. The provisional order should, therefore, have been granted.

In the circumstances, the appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted:

"The application is granted in terms of the draft order."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

V S Nyangulu & Associates, appellant's legal practitioners

Mugugu & Associates, first respondent's legal practitioners