THOMAS MUTAMBIRWA & 70 OTHERS

Versus

ARJUN INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 & 22 SEPTEMBER 2011

Ms C R Mudenda for the applicants
Advocate P. Dube for the respondent

Urgent Chamber Application

NDOU J: The applicants seek a provisional order for stay of execution in the following terms:

"Final Order sought

It is ordered that:

i) Execution of the final relief in HC 379/11 be stayed pending the finalization of the matters under HC 2066/11; HC 1276/11 SC 76/11 and other related matters thereto.
ii) No order as to costs.

Interim Relief granted

Pending the determination of this application, the applicants are hereby granted the following relief:

i) That the final relief granted to respondent under HC 379/11 and the writ of ejectment thereof be and is hereby stayed.
ii) The Deputy Sheriff or Messenger of Court are hereby interdicted and prohibited from executing the writ of ejectment."

This matter has a chequered history as evinced by the litany of cross-reference files. The brief facts relevant to this application are the following. The respondent is the registered owner of an immovable property known as stand number 1053 Bulawayo Township otherwise known as Victoria House/Victoria Flats 103, Herbert Chitepo Street, Bulawayo. ("Victoria House"). Applicant purchased this property through a written deed of sale from a company

known as Guelder-Rose Investments (Private) Limited. The deed of sale was signed on 25 November 2010. The purchase price was US$140 000. The respondent filed in the main application (HC 379/11) proof that the City of Bulawayo found Victoria House to be so run-down that it condemned it unfit for human habitation. The respondent had applied to the local authority to remodel and renovate the property. The applicants were given notice to vacate and they opposed resulting in the issuance of the court application under HC 379/11. The applicants' case is premised on the right of first refusal. The respondent obtained eviction order against the applicants on 14 March 2011.

This provisional order was confirmed on 7 July 2011. After the final order was confirmed on 7 July 2011 a writ of ejectment was issued. For the record, prior to the confirmation of the provisional order under HC 379/11 the applicants obtained, ex parte, provisional order in case number HC 1276/11. The provisional order suspended the effects of the provisional order granted by the court in HC 379/11. Strictly speaking, the applicants ought not to have proceeded in that manner, but, rather anticipated the return day of the provisional order in HC 379/11, so that the matter would be argued and finalized. Be that as it may, the provisional order in HC 1276/11 did not suspend or stay prosecution of case number HC 379/11, it simply suspended the effects of the provisional order pending the finalization of HC 379/11. The respondent caused HC 379/11 to be set down and finalized. As alluded to above, the matter was finalized on 7 July 2011. Therefore, the provisional order, which suspended eviction of the applicants only until the outcome of HC 379/11, became ineffective. The provisional order that applicants had obtained under HC 1276/11, notwithstanding that their wish was for it to protect them *ad infinitum*, did not provide unlimited protection. It protected them until such a time as a certain event, being finalization of HC 379/11, had passed. That event has passed, and there is no lasting protection. The applicants filed an appeal against the order granted under HC 379/11 and HC 64/11 pursuant to leave to appeal allegedly granted under HC 1276/11 on 28 July 2011. The respondent argues that the above leave was erroneously granted. I do not wish to determine that issue because the Supreme Court then became seized with the matter. This notice of appeal lapsed and the Registrar of the Supreme Court communicated this fact to both the applicants and the respondent. The notice of appeal lapsed, according to the above-mentioned notice from the Registrar of the Supreme Court, on account of the applicants' failure to comply with Rule 29(1) (b), Rule 31(1) and Rule 46(2) of the Supreme Court Rules, 1964.

In the circumstances there is no appeal pending at the time of the application. On this point alone the application should fail.

If I am wrong in this finding still the application should fail because the applicant has alternative remedy. The applicants have asserted that they were given a right of first refusal by the previous owner of the property who sold it to the respondent. They have remedies, in the nature of whatever damages they can prove against the previous owner. Even where a right of first refusal to be found in favour of the applicants, such right would not necessarily be enforceable against the respondent. From the facts the respondent had seemingly no prior knowledge or notice of such a right, and bought the property as a *bona fide* purchaser. There is protection afforded, at law, to a *bona fide* third party purchaser for value who had no prior notice of such right – *Central African Processed Exports (Pvt) Ltd and Ors* vs *MacDonald & Ors* SC-40-02; *Crossroads Properties (Pvt) Ltd* vs *A1 Taxi Services Co (Pvt) Ltd* 1954 (4) SA 514 (SR); *Sommer* v *Wilding* [1984] 4 ALL SA 356 (AD) and *Nerger Properties (Pvt) Ltd* vs *R. Chitrin & Co (Pvt) Ltd* SC-47-06.

In the circumstances the applicants' recourse would lie against the previous owners, Guelder-Rose Investments, for damages – *Boyd* v *Nel* 1922 AD 414. Whichever way one looks at this application, it is devoid of merit and it is accordingly dismissed with costs on the legal practitioner and client scale.

Mudenda Attorneys applicants' legal practitioners
Webb, Low & Barry respondent's legal practitioners