

STANFORD NYONI

APPLICANT

AND

380 OTHERS

VERSUS

**BOPSE LAND DEVELOPERS (PVT) LTD
In Liquidation**

1ST RESPONDENT

AND

**WATERBUCK TRUST (PVT) LTD
As represented by Thabani Lihle Siziba- Liquidator**

2ND RESPONDENT

AND

ASSISTANT MASTER OF THE HIGH COURT

3RD RESPONDENT

AND

CITY OF BULAWAYO

4TH RESPONDENT

INT HE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 12 JUNE 2012 AND 12 JULY 2012

Ms Mudenda for applicants

N. Dube for respondents

Opposed Application

MAKONESE J: The Applicant and 380 others filed an Application seeking an order in the following terms:

- “(1) Second Respondent, acting as Liquidator of 1st Respondent, be and is hereby debarred from holding a Creditors’ meeting on 20th April 2011, which meeting was expected to include the Applicant and 380 stand holders of Pumula South Housing Scheme, Bulawayo, and that any future Creditors’ meeting to be called

- by 2nd Respondent must exclude the Applicant and the 380 stand-holders at Pumula South Housing Scheme, Bulawayo.
- (2) The Assistant Master be and is hereby compelled not to entertain any future creditors' meeting which involves and includes Applicant and the said 380 Stand-holders of Pumula South Housing Scheme, Bulawayo.
 - (3) The 4th Respondent be and is hereby ordered to transfer immediately, the interests rights and title of the Applicant and those of the 380 others of Pumula South Housing Scheme, Bulawayo, into their names.
 - (4) Respondents to pay costs of suit should they oppose this application."

A Provisional order was granted on 17th November 2011 and the 1st and 2nd Respondents oppose the confirmation of such order. The events forming the background to this case are as follows:

First Respondent acquired some land for development from 4th Respondent on the 2nd December 2002. The land was duly surveyed by first Respondent in liason with fourth Respondent resulting in 381 residential stands, 2 local authority areas, two places of assemble, and an open space land being demarcated. First respondent was contracted by fourth Respondent to develop the area for the said residential stands. First Respondent ran into financial difficulties and subsequently failed to develop the 381 surveyed vacant stands. The Applicant and 380 others interested individuals indicated an interest to purchase the said stands in order to build houses. First Respondent agreed to sell the 381 vacant stands and agreements of sale were accordingly prepared in favour of the Applicant and the other 380 persons. First respondent charged each purchaser of the vacant surveyed stands a fee for the preparation of the Agreements of Sale, inclusive of legal fees for the transfer of rights, title and interest to the purchasers. Applicant and the 380 others received written confirmation that they had satisfied all the requirements for the fourth Respondent to effect transfer into the names of the Applicants. Applicants were issued development permits authorising them to commence construction work on the surveyed land. By April 2012, Applicant and the 380 other stand-holders were at different stages of construction of their houses. Fourth Respondent had also begun processing transfer documents in favour of the Applicants. It would seem clear that at that stage the first Respondent had effectively relinquished its rights,

title and interest, to and in the said stands. Sometime in or around May 2012 first Respondent went into liquidation. First Respondent then sought to include the 380 stands allocated to the Applicants as part of the assets under liquidation. This resulted in the Applicant and the other 380 stand-holders filing an Urgent Application with this court, seeking an order, *inter alia* barring the first Respondent from including the said stands in the liquidation process. The first Respondent opposed the Application arguing that each stand-holder should prove their entitlement to the stands individually. A Provisional Order was issued in favour of the Applicant and 380 others. The first and second Respondents are opposed to the confirmation of the Provisional order and have advanced a *point in limine* in the following terms:

Locus standi

The deponent to the Founding Affidavit, STANFORD NYONI has no *locus standi* as he is not part of the liquidation process. Further, it is argued that there is no proof that Stanford Nyoni represents the other 380 stand-holders and that he should have furnished proof to indicate that he was authorised to represent them in the proceedings before the court. The Respondent referred the court to the case of *Gutaramwari vs Joseph Tayali and others* HB 132/04. In this particular decision it was held that office bearers of a voluntary association such as a church are not automatically entitled to sue in terms of the constitution of the association. The office bearer it was held, should establish that they were mandated and authorised to bring the proceedings on behalf of the church. It is clear that the facts in the *Gutaramwari* case, *supra* are entirely different from the present case.

In this matter what has to be noted is that Stanford Nyoni is not purporting to bring legal action on behalf of a legal entity. The position is that Stanford Nyoni is one of the 380 stand-holders who have an interest against the Respondents arising out of the sale to them of stands for housing developments. Stanford Nyoni avers in his Founding Affidavit that he was authorised to depose to an affidavit by his fellow 380 stand-holders of Pumula South Housing Scheme, Pumula South Township, Bulawayo, such authority having been granted to him by his fellow stand-holders of the said housing scheme by acclamation at a general meeting held on the 13th April 2011. Further, Applicant annexed to his Founding Affidavit supporting Affidavits

from at least five other members of the Housing Scheme. In all their supporting affidavits, the other members confirm that Stanford Nyoni was authorised to bring legal proceedings on behalf of the other members. I am satisfied on the facts of this matter that Stanford Nyoni does have *locus standi* to act on behalf of his colleagues in bringing this legal suit. Apart from the fact that he was publicly appointed by members of the housing scheme, there are supporting affidavits which put the issue of legal authority to sue beyond dispute.

See the case of, *John Strong (Pvt) Ltd and another v Wachenuka* 2010(1) ZLR151.

In the above case it was held that in deciding whether or not to determine whether a person has *locus standi*, each case must be decided on its own merits.

In *casu*, Stanford Nyoni avers that he was mandated to act on behalf of the other 380 stand-holders at a public meeting by acclamation. This fact has not been disputed and it has to be accepted that authority to institute legal action does not always have to be in writing. The principle has to be that for a person to have authority to act on behalf of another there has to be clear proof that the person purporting to act possesses such authority. I am satisfied that on the facts of this matter the allegation that Stanford Nyoni has no *locus standi* has no merit. Accordingly, I would dismiss the point raised *in limine* and proceed to deal with the merits of the matter.

The central issue for determination is whether or not the first and second Respondents are entitled to proceed with a liquidation process that includes the 380 residential stands allocated to the Applicant and 380 others. Both parties to this action agree that BOPSE LAND DEVELOPERS (PVT) LTD entered into a contract with the City of Bulawayo where it purchased land for private development. First Respondent was in accordance with the agreement with fourth Respondent expected to service the land in question, develop houses, and or sell stands to individuals requiring them. First Respondent was also mandated by fourth Respondent to enter into purchase agreements with prospective buyers. It is in pursuance of the said arrangement that Applicant and 380 others purchased land for housing development. However, first Respondent ran into financial problems and failed to service and develop the land. Applicant and 380 others stand-holders who had been allocated the stands had already

commenced construction of their houses when first Respondent went into voluntary liquidation. First Respondent placed an advertisement in the Chronicle Newspaper of the 13th January 2011 with the following headline:

“PUBLIC NOTICE ON RESIDENTIAL STANDS: PUMULA SOUTH PHASE II, BULAWAYO”

The First Respondent listed various stand numbers and calling upon all persons, claiming right, title and interest in and to the aforementioned stands to contact them not later than six weeks from the date of publication for verification and processing of such claim of right, title and interest failing which the stands would be repossessed and dealt without further notice.

Second Respondent as liquidator of first Respondent caused the Assistant Master of the High Court to set a date for a meeting of creditors to be held. What caused Applicant and other 380 stand-holders to panic was the inclusion of the residential stands that had been sold to them under various agreements of sale as part of the assets to be liquidated. Sensing that they may be prejudiced if the stands were included in the liquidation process, the Applicant and 380 others filed an Urgent Chamber Application preventing the inclusion of the allocated and sold stands in the liquidation process. A Provisional Order was granted by this court and consequently first Respondent persisted in seeking to proceed with the liquidation process which included the disputed stands inspite of the Provisional Order.

In their Heads of Argument first and second Respondents have argued that the order sought by Applicants is incompetent at law. They further argued that the Applicants seek to interdict the Assistant Master of the High Court from performing his duties as laid down in the Companies Act [Chapter 24:03]. The Respondents contend that such an order is illegal and goes against statute. Furthermore the Respondents argue that this court is being asked to take away powers vested in the Assistant Master of the High Court by statute. There is clearly no merit in the argument that the order sought seeks to strip the Assistant Master of his powers. The basis of the order sought by Applicants is aimed at preventing the liquidator from including property which has been sold to the stand-holders, as part of the assets that fall under liquidation. In other words, what prompted this application is the attempt by the liquidator to include property which had been sold to the Applicants in the liquidation process. At the time the

stands were sold to the stand-holders and the process of the transfer of rights, title and interest thereto commenced, the first Respondent divested itself of any ownership in regards to the stands. It stands to reason, therefore, that the liquidator is entitled to list all other assets belonging to the first Respondent but there is no legal basis for seeking to include in the list of assets, property that had been sold to third parties prior to the liquidation process.

It is my view that the order sought by Applicants in this matter is sound and competent at law. It is especially aimed at preventing the liquidator from including property or assets which the first Respondent is not entitled to, at law, in the company's liquidation process. In proceedings under case number HC 842/11, the only surviving co-director of first Respondent stated that the company was insolvent and had no money and no property except a few pieces of furniture. She expressly stated in her affidavit as follows:

"The only assets left now in the company register and offices are an office desk and 4 chairs --- the company had no other immovable assets, it has no cars or any current contracts which are some of the issues that precipitated the fall of the company."

The assertions referred to above can only lead to the conclusion that the first Respondent can not on one hand claim that the only other assets in their books are a few pieces of furniture and then at the same time seek to include hundreds of residential stands in the liquidation process. In the case of *Bluston And Bramley v Leigh* (1950) ZKB 548

It was held that the assets which the liquidator takes over are primarily those to which the company is entitled to at the commencement of the liquidation. The basic proposition in insolvency proceedings is that all of the property of the debtor must be made available to the debtors and as such the liquidator must get into his possession or control all the property and assets to which the company is entitled. At the time first Respondent went into liquidation, the Applicant and 380 others had purchased the housing stands and duly completed agreements of sale and commenced construction of their houses on the said stands. First and second Respondents should not be allowed to realize and liquidate property that is no longer theirs and it was wrong for them to stop fourth Respondent from concluding the process of the transfer of stands to the Applicants, which process the fourth Respondent had already started.

The first and second Respondents have also submitted that the requirements of a final interdict have not been satisfied. I am, however satisfied that all the requirements for the granting of a final interdict have been established. The case of *Setlogelo v Setlogelo* 1914 AD 221 set out the principles for the grant of a final interdict as follows:

- (a) a clear or definite right
- (b) an injury actually committed or reasonably apprehended and
- (c) the absence of similar protection by any other remedy

It should be noted here that the reference to a clear right in regard to a final interdict, as opposed to a *prima facie* right in regard to a temporary interdict, means no more than a clear right must be established on a balance of probabilities.

See the case of *UBM Zimbabwe Ltd v The Zimbabwe Independent and Another* 2000(1) ZLR 234 and also the case of *Sage Holdings Ltd and another v Financial Mail Pty Ltd* 1991 (2)SA 117.

Firstly, it can be safely concluded on the facts of the present matter that it has been shown on the papers that the stand-holders bought and paid for the stands from first Respondent and that Applicants not only signed agreements of sale but first Respondent also relinquished all its rights, title and interest in the stands. The Applicants, have therefore clearly established a clear right to seek the interdict in the manner they have done. Secondly, the Applicants have a reasonable apprehension of injury or harm especially in view of the fact that first and second Respondents' actions are suggestive of a motive to re-sale the stands already sold to the Applicants. The desire to include the stands as part of the property under liquidation has no other explanation other than a desire to cause real prejudice to the Applicants. It is clear that the Applicants risk losing their investments in the form of dwelling houses if the first and second Respondents are not interdicted from including the stands in the liquidation proceedings and dealing with such stands as if they still belong to first Respondent. Thirdly, there is no other remedy satisfactory enough to protect the Applicants. This court is enjoined to afford protection to innocent purchases of land such as Applicants.

I am accordingly satisfied that this matter is properly before the court and the order sought by the Applicants is competent at law. This is so especially, regard being had to the provisions of section 222(3) of the Companies Act [Chapter 24:03] which provides as follows:

“Any person aggrieved by any act or decision of the liquidator may apply to the court after notice of motion to the liquidator and therein the court may make such order as it thinks fit.”

In the result, the Provisional Order granted on 17th November 2011 is hereby confirmed. First and Second Respondents are ordered to pay the costs of this Application on an attorney and client scale.

Messrs Mudenda attorneys, applicants’ legal practitioners
Messrs Cheda and partners, 1st & 2nd respondent’s legal practitioners