

RICHARD WILSON

AND

GETRUDE WILSON

Versus

WINFRED MANEMO

AND

THREE OTHERS

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 24 SEPTEMBER 2012 AND 1 NOVEMBER 2012

Advocate H. Moyo for the applicants
Mr M. Ncube for the respondents

Opposed application

MAKONESE J: The Applicants have brought this application for the confirmation of a Provisional Order granted on the 20th April 2012 by the Honourable CHEDA AJA. The order is in the following terms:

“TERMS OF FINAL ORDER SOUGHT

THAT you should show cause to this Honourable Court why a final order should not be made in the following terms:

1. The 1st and 2nd Respondents are hereby permanently interdicted from dispossessing the Applicants of possession of the premises known as 80 Cecil Avenue, Hillside, Bulawayo pending the application for rescission of judgment in case number 1889/11.
2. That the 1st and 2nd Respondents is hereby interdicted from interfering in any manner whatsoever with Applicants’ peaceful and undisturbed possession of number 80 Cecil Avenue, Hillside, Bulawayo.
3. That the Respondent is hereby ordered to pay the costs of this application.

INTERIM RELIEF

Pending argument and finalisation of this application the Applicants are granted the following relief:

1. The 1st and 2nd Respondents forthwith restore joint and peaceful possession of the premises known as Number 80 Cecil Avenue, Hillside, Bulawayo to the Applicants.
2. The 4th Respondent registers a caveat over the immovable property described as certain piece of land being the remaining extent of lot 4 Hillside of Napiers lease situate in the District of Bulawayo measuring 5950 square metres.”

The 1st and 2nd Respondents have opposed the confirmation of the provisional order and have urged the court to discharge the provisional order with costs on a punitive scale.

It is necessary to set out the background details of this matter which has seen many applications and counter applications being brought to court on the same subject matter. For the purposes of bringing finality to litigation I shall seek to canvass all the contentions matters which have been raised by both parties in their sworn affidavits filed of record and in their Heads of Argument.

Background

The 1st and 2nd Respondents are husband and wife and the 1st and 2nd Applicants are also husband and wife.

First and second Respondents aver that sometime in early February 2011, third Respondent approached them and advised them that Applicants were selling their house, being No. 80 Cecil Avenue, Hillside, Bulawayo. The third Respondent has in his possession the original title deed to the property to prove that the whole transaction was genuine. The third Respondent who had acted as a representative of the Applicants in previous transactions assured them that everything was above board. A verbal agreement was concluded in March 2011, the full purchase price was paid through the third Respondent and the Respondents were handed the title deed. The Respondents received title to the property under Deed of Transfer number 1347/11 on the 16th September 2011. The Respondents asked the Applicants to vacate the property but Applicants did not oblige arguing that third Respondent had no authority to sell their house. The Applicants did not, however deny that third Respondent had previously acted on their behalf in previous transactions with the same parties. Applicants, further, did

not dispute that they had handed the original title deeds to third Respondent but they said they had asked Respondent to raise a loan using the title deeds as security. The explanation proffered by the Applicants is difficult to believe considering that Applicants are not illiterate persons. It seems that on balance the probability is that they did ask third Respondent to sell the property on their behalf, but for some reason he must have cheated them and not handed them the purchase price. That alone does not make the sale of the house to the Respondents illegal. In other words, the Applicants should have their recourse against the third Respondent who should account to them for the proceeds of the sale. Applicants admit that in June 2011 the Respondents confronted them and advised them that they had purchased their property and demanded that they vacate the property. The Applicants did not vacate the property which compelled the Respondents to institute proceedings under case number 1889/11 for Applicants' eviction from the property. A writ of Eviction was duly issued by this Honourable Court on the 26th August 2011. Subsequently, and on the 20th April 2012 the Applicants filed an Urgent chamber application seeking a stay of execution pending an application for rescission of the judgment under case No. HC 1889/11. The Applicants were granted a Provisional Order on the 24th April 2012, which is now the subject of the application before the court.

POINTS IN LIMINE

1. No Urgency

The Respondents have strongly argued that this matter is not urgent at all, in that as far back as August 2011 the Applicants were evicted by the Deputy Sheriff from the premises and became aware at that stage that the Respondents were claiming not only legal title to the property but that they take vacant occupation of the property. No cogent explanation has been given to this stage why the Applicants did not take action way back in August/September of 2011. No logical explanation has not been advanced as to what has happened to the application for rescission of the default judgment under case No. HC 1889/11.

I tend to agree with Respondents that the urgency proclaimed by the Applicants is to a large extent self created. On this basis alone this application would not succeed.

In the case of *Destiny of Africa Network (Pvt) Ltd v Obadiah Msindo* HB 76/07 the learned Judge said:

“---cases brought on a certificate of urgency must satisfy the basic requirements of urgency as provided for in our court rules and expanded through precedent. There are numerous cases queuing for attention at our courts and these cases have been dealt with in the normal court process ---. The common denominator in all the decided cases is that a matter is urgent “if at the time the litigant decides to act, it is so clear or apparent that the matter cannot wait to follow the normal court channel ---“self created urgency will not suffice.”

I have in the instant case decided to deal with the merits of this case to bring finality to litigation. The Provisional order has been in place since April 2012. There is no indication that the Applicants have taken steps to resolve their application for rescission of judgment, if at all.

On the merits

The Law

The Applicants contend that they have satisfied the requirements of an interdict *pendete lite* and that this court should therefore confirm the Provisional order. The Respondents argue that the requirements for temporary interdict as laid down in decided cases have not been met and that accordingly, the Provisional order must be discharged. Our law is now well established on the requirements of an interdict. The principles were restated by CHATIKOBO J, in the case of *Bozimo Trade and Development Co (Pvt) Ltd vs First Merchant Bank of Zimbabwe Ltd and Others* 2001 (1) ZLR 1, as follows:

- (a) *A prima facie* right
- (b) which has been infringed by Respondent
- (c) irreparable harm or a reasonable apprehension of such harm.
- (d) the absence of a satisfactory remedy
- (e) the balance of convenience favours the granting of an interdict

I will deal with these requirements in turn:-

(1) **Prima facie right**

I have examined the facts and I am not satisfied that the Applicants have established that they have a *prima facie* right to the property in question. The sworn statements reveal that the Applicant via the agency of the third Respondent sold the property to the Respondents in terms of a verbal agreement. It is not disputed that the Respondents obtained legal title in the form of title deeds to the property. The Respondents sued out process to evict the Applicants from the property but the Applicants claimed they had not sold the property. The eviction papers were served upon the Applicants who did nothing for seven months when they filed an Urgent Application for a stay of execution pending an application for rescission of judgment. I have not been shown any evidence to show that there is indeed an application for rescission of judgment. It would seem that if such a process is underway, Applicants are not taking active steps to resolve the matter. The records placed before me do not show that there has been an outcome on such an application for rescission of judgment. In terms of clause 1 of the "Terms of the final order" to the Provisional order the Applicants purport to have filed an application for rescission of judgment under case No. HC 1889/11 but an examination of the documents filed of record reflect that no such application is pending. The Provisional order can therefore not be sustained even on this clause alone. I must observe here, that it has now become customary for some legal practitioners to seek and obtain under a certificate of urgency provisional orders providing for a "stay of proceedings" pending certain other applications being made. When the orders are granted no follow up is made to prepare and file the purported applications. Such practices are deplorable and the courts frown upon such conduct. The Applicants have denied that they entered into an agreement of sale with the Respondents. They deny that they authorised the third Respondent to sell the house to any third party. The Applicants must explain, satisfactorily, why they entrusted the third respondents with the title deeds. The onus, in my view rests largely with the Applicants to prove and establish that the Respondents obtained legal title without permission to do so. In any event if it turns out that the third Respondent was not properly authorised to negotiate and enter into a sale in respect of the property, then the Applicant should look for their remedy from the third Respondent. The Respondents are mere innocent purchasers.

I, accordingly, come to the conclusion that the Applicants have not established a prima facie right.

(2) **A WELL GROUNDED APPREHENSION OF IRREPARABLE HARM**

The Applicants were evicted some seven months before they filed the Urgent Application for a Provisional order to stay execution. If any harm arose it would have arise immediately after the eviction. The Applicants chose to wait for reasons best known to themselves. In *casu* the harm perceived by the Applicants is self created and not the harm envisaged by the law. The Respondents obtained transfer in September 2011. The Applicants have been aware that they had lost title in the property and if they felt cheated by third Respondent, they should have taken positive steps to have the judgment rescinded. The Applicants have not even seriously denied that respondents have done extensive renovations on the property because they were still resident at the property. Their passive conduct leads credence to the view that they were aware that the house had been sold to the Respondents. In the circumstances, the balance of convenience does not favour the confirmation of the provisional Order.

(3) **ABSENCE OF ANY OTHER REMEDY**

I do not agree that the Applicants do not have another satisfactory remedy. A perusal of the several sworn statements that have been filed in this matter show that the main grievance of the Applicants is that if their agent/third Respondent received the purchase price he did not account to them for the purchase price. There is, therefore, an alternative remedy. The Applicants can sue their chosen agent for the purchase price or have him prosecuted on a criminal charge.

See the case of *Knox D' archy Ltd and Others v Jameson and others* 1996 (4) SA 348.

I am satisfied that if the Applicants had been properly advised from the onset in August 2011, they would have mounted proceedings as well against the third Respondent for an action for the recovery of their losses. I am satisfied that the Applicants have not made out a proper case for a confirmation of the Provisional order and I accordingly make the following order:

1. The Provisional order granted on the 20th April 2012 under case No. 1245/12 is hereby discharged and set aside.
2. The caveat registered by the 4th Respondent over the immovable property described as Lot 4 of Hillside of Napiers Lease situate in the District of Bulawayo be and is hereby uplifted.
3. The Applicants are ordered to pay the costs of suit.

Lazarus and Sarif, applicants' legal practitioners
Cheda and partners, 1st a& 2nd respondents' legal practitioners