

ANDREW M. SIBANDA

Versus

NYENGETERAI HAMA

And

HILDA ZULU

And

REGISTRAR OF DEEDS BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 16 FEBRUARY 2004

C P Moyo for the applicant
R Nyathi for the 2nd respondent

Opposed Court Application

CHIWESHE J: The applicant was granted a provisional order couched as follows:

“Terms of final order sought

- (a) That the 1st respondent be and is hereby ordered to sign all documents and take all actions necessary for the transfer of stand 3051 Cowdray Park, Bulawayo to applicant within 10 days of this order and that if she fails to do so 3rd respondent be and is hereby authorized to do all and sign every document necessary for the transfer on behalf of 1st respondent.
- (b) The costs of this application be borne by 1st and 2nd respondents the one paying the other to be absolved on an attorney – client scale.

Interim Relief Granted

That pending the determination of this matter applicant is granted the following relief:

- (i) The 1st and 3rd respondents be and are hereby interdicted from registering the transfer of stand 3051 Cowdray Park, Bulawayo pending the finalization of this matter.”

The applicant now seeks confirmation of this provisional order. The respondents argue that the provisional order should not be confirmed but should instead be discharged with costs.

The background facts to this matter are as follows. According to the applicant, he was instructed by his daughter around June 2003 to look for and purchase her an immovable property in Bulawayo. The daughter was at the time based overseas. He then approached a company called Gens Investments (Pvt) Ltd trading as Gens Housing Construction in Bulawayo. This company was in the business of selling houses. He was offered 3051 Cowdray Park (the property) for the price of \$4 million. He then entered into an agreement of sale with this company in terms of which the purchase price would be paid in two cash instalments after which transfer of the property would be effected. Notwithstanding that provision, he paid only \$705 000,00 in five instalments tendered between 27 June and 8 July 2003. Whilst attending to payment of the last of the five instalments at the company's premises, the applicant was introduced by an employee of the company to the 1st respondent. He was informed that the 1st respondent was the registered owner of the property he intended to buy. The 1st respondent was in the company of the 2nd respondent. The applicant then informed the 1st respondent that he was acting on behalf of his daughter the purchaser of the property. From the discussion that ensued the applicant was informed of the following facts:

- (a) That whilst 1st respondent was the registered owner of the property, she had earlier sold the property to the 2nd respondent.
- (b) That 2nd respondent had failed to pay for the property in full.
- (c) That an agreement had been entered into for the 1st and 2nd respondents to sell the property to a third party for a profit.
- (d) That 2nd respondent would recover the amounts paid to 1st respondent and the two respondents would then share the net proceeds.
- (e) That the company had not given them all the money that the applicant had paid.
- (f) That the company had told the 2nd respondent that the selling price of the property was \$3 million and not \$4 million.

After these disclosures, the applicant says the parties then concluded that the company was not an honest agent and that it would be best if the parties dealt with each other directly. In that regard the purchase price of \$4 million was confirmed. It was agreed that the applicant would pay to 1st and 2nd respondents the difference between what he had paid to the company and the purchase price of \$4 million. The applicant says during the course of July 2003 he paid the sum of \$790 000,00 directly to the 1st respondent. He was also informed by the 1st respondent that the 2nd respondent had sold the property to another person, one Lucky Moyo. The applicant then discovered that papers were being prepared at the behest of both respondents and another to transfer this property to the said Lucky Moyo. He confronted the

respondents who admitted to having approached their legal practitioners for that purpose. They demanded that the applicant offers a higher amount of money than that being offered by Moyo if he was to secure his contract with them. They informed him that Moyo's transfer was all but done save for the clearance certificate from ZIMRA which was yet to be made available.

It was for these reasons that the applicant had applied for and had been granted a provisional interdict restraining the respondents from transferring the property pending the outcome of this application.

The 2nd respondent denies literally every averment made by the applicant in its founding affidavit. In her opposing affidavit she challenges the veracity of the applicant's statement that he had come to view the property before concluding an agreement with Gens Housing Construction. She says she never saw the applicant nor was she informed of his visit to the property. She says the 1st respondent had sold the property to her. A copy of the agreement is filed of record. She says she has no knowledge of any agreement entered between Gens Housing Contractors and the applicant and challenges him to produce the agreement. She points out to the improbability of a reputable company or estate agent operating on the basis of verbal rather than written agreements of sale as the applicant would have the court believe. In any event, avers the 2nd respondent, the applicant would appear to have breached even the alleged verbal agreement as he has not paid the \$4 million purchase price within the stipulated two months. The 2nd respondent also casts doubt on the existence of this verbal agreement saying the applicant has not given sufficient details of the same such as the date of the agreement, the date of payment and who at Gens Housing Construction he negotiated with. 2nd respondent maintains she paid the full purchase price in terms of her agreement of sale with 1st respondent. She did so through Bulawayo Real Estate who in turn fully accounted to 1st respondent's legal practitioners. Correspondence filed of record indeed confirms this state of affairs. She was yet however to pay the transfer fees. For that reason alone the transfer had not been effected as shown by correspondence filed of record. She denies ever meeting the applicant and denies ever discussing and reaching a tripartite agreement involving herself, the applicant and the 1st respondent as averred by the applicant. She also denies ever receiving any money from the applicant. She says she had decided to sell the house to Lucky Moyo, as she was entitled to with the concurrence of the 1st respondent. Surprisingly the said Moyo has not been cited as a party to these proceedings, argues the 2nd respondent.

In his answering affidavit the applicant maintains his position as regards what transpired. It is clear that there are disputes of fact in this matter the nature of which is not capable of resolution on the papers as they stand. In my view the applicant should have proceeded by way of action. I am inclined to dismiss this application on that account alone.

However, I am surprised by the applicant's manner of conducting business. Firstly, he enters into an agreement with Gens Housing Construction for the sale of an asset as important as a house. He is content with a verbal agreement and makes payments in pursuance thereof. In this day and age does one fail to safeguard one's rights in this way? Then he enters into another arrangement with respondents with regards the sale of the same property and repeats the same mistake – the agreement is not reduced to writing as one would expect. Even then the applicant has not disclosed which agent he dealt with at Gens Housing Construction nor has he cited the said Gens Housing Construction in this application. How does he intend to prove his claim that they acted as agents of the 1st respondent and that they declined to enter into a written agreement because of his failure to pay on time, or, that they fraudulently failed to pass on payments to the 1st respondent? He also has not cited Luck Moyo, the person who is on the verge of receiving transfer of the property.

Assuming one could resolve the factual disputes and do so in favour of the applicant, where would that leave him? With regards both verbal agreements of sale, the applicant, by his own admission, has not paid the full purchase price and, further, he appears to have breached the agreed terms by not paying the instalments timeously. That alone could form the basis of cancellation of both agreements. On the other hand, we have the 2nd respondent who has paid the purchase price in full. All that remains is for her to pay the transfer fees. She intends to resell the property to an innocent purchaser, Lucky Moyo. Clearly the balance of convenience favours the 2nd respondent.

The applicant has demanded judgment at least against the 1st respondent who has not filed any opposing papers. In the normal course of events it would have been possible to visit the 1st respondent with some order of some sort. I am inclined not to do so in this case despite 1st respondent's default. It cannot be said that on these papers the applicant has made a clear case for the order that he seeks against either or both defendants. It would be unsafe to oblige his wishes in the circumstances of this case. I much prefer that he institutes separate proceedings against either or both respondents by way of action.

For these reasons it is ordered that the provisional order be and is hereby discharged with costs.

Messrs Majoko & Majoko applicant's legal practitioners
Messrs Sibusiso Ndlovu, 2nd respondent's legal practitioners