

REPORTABLE ZLR (43)

Judgment No. SC 47/06
Civil Appeal No. 140/05

NERGER PROPERTIES (PRIVATE) LIMITED

v

R CHITRIN & COMPANY (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
BULAWAYO, JULY 31 & NOVEMBER 13, 2006

E.T. Matinenga, for the appellant

R Fitches, for the respondent

CHEDA JA: The respondent was a tenant of a commercial property owned by a company known as Potential Investments (Private) Limited, the sixth respondent in the original High Court case (hereinafter referred to as “Potential”). The company had five shareholders, one of whom was Mrs Humpage.

The company was generally administered by one of its directors a Mr Reymond Paul Louw, through a company under his control named F & CS Accounting (Private) Limited (“F & CS”). F & CS also administered certain immovable property owned by Potential known as Jemeson Buildings, situated at the corner of Jason Moyo Street and Sixth Avenue, collecting rentals from the tenants and dealing with the tenants and their leases in general.

F & CS employed a bookkeeper named Sheena Zurnamer who dealt directly with Potential's immovable property.

The appellant, Nerger Properties (Private) Limited, entered into an agreement of sale with the directors of Potential in respect of the shareholdings and loan accounts of Potential.

The respondent contested this sale at the High Court and got a judgment in its favour on the basis that it had a right of first refusal to acquire the property from Potential. The High Court ordered that transfer of the property and its shares to the appellant be stopped. It is against this decision that the appellant appeals.

At the High Court the respondent's case, according to the founding affidavit of Raphael Howard Chitrin (hereinafter referred to as "Chitrin") was as follows -

He is the director of R. Chitrin & Company Zimbabwe (Private) Limited, a company registered according to the laws of Zimbabwe, which has registered offices at No. 68, Jason Moyo Street in Bulawayo.

On 28 January 1997 the respondent and Potential entered into a lease agreement in terms of which the respondent hired a portion of Stand 188 of Bulawayo Township Lands at the corner of Jason Moyo Street and Sixth Avenue. Potential was represented by Louw who was authorised by a resolution of Potential's directors.

On 23 April the respondent received a notice addressed by F & CS Accounting Services to all its tenants, inviting offers for the purchase of the whole of Stand 188 Bulawayo Township (hereinafter referred to as “the property”). Chitrin immediately telephoned Louw and reminded him of the fact that previously he had verbally agreed to grant to the respondent the right of first refusal should the property come up for sale.

Mr Louw had agreed to this a year before. Since he used to deal with Mr Louw on matters pertaining to the property, Mr Louw had agreed that the respondent would have the right of first refusal if the premises ever came up for sale and it was implied that the right could be exercised whether the sale was by way of a sale of the property or the shares and any loan account in the company.

Mr Louw acknowledged that he had indeed given that right but thought it fair to make an offer to all the tenants. At that time there was no specific time limit within which the offer was to be accepted and at that stage the offer was for the purchase of the property and not the shares in the company. He later telephoned Louw and asked for a copy of the Deed of Transfer. Louw telephoned a few days later asking about Chitrin’s offer and was once again reminded of the right of first refusal. Chitrin also asked for the list of tenants of the property and the rentals they were paying.

On 7 May 2003 Chitrin received from Louw the information that he had requested. Chitrin was also asked to make a proposal, if the respondent was interested in purchasing the shareholding in Potential, within fourteen days.

Chitrin advised Louw that he was going to South Africa and requested Louw to await Chitrin's return.

On his return he telephoned Louw and was advised that another tenant was also interested in the property and was pressing Louw on the matter. Louw asked Chitrin to revert to him by Wednesday 25 June 2003.

On Friday 20 June 2003 Chitrin received a letter from Zurnamer advising that the sellers were looking for at least \$100 000 000,00 net and would require at least \$130 000 000,00. In that letter Chitrin was asked to make an offer before 1 pm that day as the other party was sending a cheque with its offer.

Although Chitrin says this other party turned out to be the sixth respondent, this is obviously an error as it appears this is a reference to the appellant who was at the time the seventh respondent.

Louw had also advised Chitrin that the appellant's representatives were members of the Affirmative Action Group who were exercising undue pressure on Louw to sell the property to them.

Upon Chitrin's instructions, the respondent's legal practitioners made a written offer on 20 June 2003 to purchase both the property and the entire shareholding of the company which owned the property for \$151 000 (*sic*).

The letter was delivered by Chitrin personally at about 1 pm on 20 June 2003 to the offices of F & CS Accounting. Chitrin was told by Zurnamer that Louw was in his office with some people at the time. Louw later telephoned Chitrin about 4.30 pm and confirmed that he had been with members of the AAG (Affirmative Action Group) who had been harassing and intimidating him and his staff and had offered to purchase the property for \$130 000 000.

On Monday 23 June 2003 Louw advised Chitrin that the appellant was only interested in acquiring a small portion of the property and enquired whether Chitrin would consider subdividing the property and selling that portion to the appellant. This proposal was not acceptable to Chitrin.

On Tuesday 24 June 2003 Louw telephoned Chitrin to advise that Mrs Humpage had decided to accept the appellant's offer because of the intimidation. Chitrin advised Louw that the respondent would go to litigation on the matter.

A meeting was arranged between Chitrin and Humpage, at which she did not deny the respondent's right of first refusal and said she had always contemplated that the property would be offered to the respondent because it was a tenant. She was advised by Chitrin to consult legal practitioners on the matter but on

25 June 2003 she telephoned to say that F & CS were going to remove the property from the market.

On Wednesday 25 June, 2003 at 10 a.m., she telephoned to say she would really have liked the respondent to have the property, but that they had succumbed and decided to accept the lower offer of the appellant which was \$21 000 lower than that of the respondent.

Despite their being reminded of the respondent's right of first refusal, Potential and the appellant proceeded to sign an agreement of sale on 24 and 25 June 2003.

This is the background that led to the litigation which followed. Most of the facts are common cause.

It is not denied that Chitrin asked for and was granted the right of first refusal. Mr Louw does not dispute having done so. Instead he tried to put on it his own interpretation suggesting that it only meant that when the property came up for sale Chitrin was to be informed. Mrs Zurnamer does not deny it. Instead she sought to argue that Louw had no authority to grant it. Mr. Louw's mistaken interpretation of the right of first refusal does not change the position.

Mrs Zurnamer's contention that Louw did not have authority to grant it does not assist. Potential had long authorised Louw to deal with the property on its behalf. Indeed when Louw granted this right to the respondent he genuinely believed

he was entitled to do so, and, similarly, Chitrin was entitled to believe that a right granted by Louw was proper as he always dealt with Louw in matters regarding the property. It does not assist Potential to attempt to place any limitations on Louw's mandate at this stage. Louw was at all material times an agent of Potential concerning the property.

Mrs Humpage averred that out of the tenants she expected Chitrin to be the most likely to make an offer on behalf of the respondent as she had learnt that the respondent had expressed to Louw an interest in purchasing the property if it ever came up for sale.

Although she used different words, her averments in this regard confirm Chitrin's claim about having asked Louw for a right of first refusal. She, however, goes on to say she was disappointed that although the respondent through Chitrin had expressed an interest, the latter had not made an offer though he had more than enough time to do so. She does not say at what stage it was decided that the respondent had failed to make an offer.

The respondent's offer was made, not to her but to Louw. If there was a delay in transmitting the respondent's offer to her, such delay should be attributed to Louw.

Although she admitted that Louw advised her that he had on an earlier occasion granted to the respondent the right of first refusal, she denied any knowledge as to what the term meant, and yet it is so simple and self explanatory. Further, the

complaint that the respondent delayed in making an offer is not valid because of the different time limits that were granted to it. Mr Louw had in fact given Chitrin up to Wednesday 25 June 2003 to make an offer on behalf of the respondent.

Having established that the respondent had the right of first refusal, it remains to examine the legal position regarding the right of the appellant:-

“An option is an offer to sell, which remains open during the stipulated period, and if the offer is accepted at any time before the time has lapsed, a binding contract of sale is concluded between the parties.

When an option is given by a seller, he is bound and cannot withdraw his offer ...”

See *Boyd v Nel*, 1922 AD 414.

I should point out here that the right of first refusal is the same as the right of an option.

See also *Mackeurtan's Sale of Goods in South Africa*, 5th Edition at p 277 – 17G.1.6.

where it is stated as follows:

“The rights of the holder of an option, or of a pre-emptive right, to interdict the delivery of the thing in question to a subsequent purchaser and to obtain specific performance are the same in law as those of a prior purchaser. The right of the holder of an option or of a pre-emptive right to exercise it remains prior in time to the personal right of a subsequent purchaser, even where the latter was ignorant of the option or right of pre-emption.”

See *Sher v Allan*, 1929 OFS 137, *Archibald & Company Limited v Strachan & Company Limited* 1944 NPD 40 and *Le Roux v Odendaal & Ors* 1954 (4) SA 432.

These authorities establish very decisively the respondent's right to interdict the sale of the property to the appellant and to seek transfer to itself on tendering payment of the purchase price that it offered.

I find that there is therefore no merit in the appeal and it is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree

James Moyo-Majwabu & Nyoni, appellant's legal practitioners

Joel Pincus Konson & Wolhuter, respondent's legal practitioners