REPORTABLE (78)

Judgment No. SC 90/02
Civil Appeal No. 210/01

EASTVIEW GARDENS RESIDENTS ASSOCIATION v

(1) ZIMBABWE REINSURANCE CORPORATION LIMITED (2) CB RICHARD ELLIS (3) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, JULY 1 & OCTOBER 30, 2002

*H Zhou*, for the appellant

*F Girach*, for the first respondent

No appearance for the second and third respondents

MALABA JA: This is an appeal from a judgment of the High Court delivered on 18 July 2001 discharging a provisional order and dismissing with costs the application made by the appellant for an interim interdict against the respondents in case HC 6127/01.

The first respondent is the owner of three hundred and eighty-four two-bedroom flats in Harare, collectively known as "Eastview Gardens". The appellant's members rented the flats from the first respondent. It is common cause that the first respondent took a decision to sell the flats and instructed the second respondent and other estate agents to do so on its behalf.

On 9 February 2001 a letter was written on behalf of the first respondent to the sitting tenants of Eastview Gardens by National Real Estate (Private) Limited in the following terms:

> "RE: PROPOSED SALE OF EASTVIEW GARDENS
>
> Reference is made to the above matter. The owners of Eastview Gardens, the Zimbabwe Reinsurance Company Limited, have advised that they shall be selling the premises you are leasing from them. The sale shall be on sectional title basis and each flat shall have title deeds on transfer.
>
> As a sitting tenant, we are hereby giving you notice of the owner's intention to sell the flat and advise that we are offering you (an option) to purchase if you are interested in doing so. The purchase price for the flat is $950 000.00. The terms of payment are as follows:
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> * 25% cash deposit and the balance payable by mortgage loan; or
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> * 30% cash deposit and the balance payable over six equal monthly instalments; or
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> * cash deposit and/or full mortgage bond/loan from employer.
>
> May you please advise us in writing whether or not you shall be taking up the offer as soon as possible and in any event by 28 February 2001. In addition, if you are taking up the offer, may you please call at our offices in person to complete the necessary formalities by the same date."

The first respondent later decided to offer the flats for sale block by block. On 15 February 2001 a letter was written to the tenants advising them of the new decision and withdrawing the offer made on 9 February 2001 to sell the flats to them as sitting tenants. It read as follows:

> "RE: PROPOSED SALE OF EASTVIEW GARDENS
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> Reference is made to our letter of 9 February 2001 in respect of the above matter.
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> Please be advised that the offer made to purchase the unit you occupy has been withdrawn. This follows the decision by the seller to sell the flats block by block. However, should you wish to purchase a unit into Eastview Gardens

> now, you may choose from the block that shall be selling at any one point in time.
>
> In any event, you still need to confirm your interest in purchasing a unit by close of business on 28 February 2001."

By close of business on 28 February 2001 some of the tenants had taken up the offer. They had indicated the units they wanted to purchase. Others had not done so. The flats were then offered to members of the public at the same price they were offered to the tenants.

Some of the tenants who had not, by close of business on 28 February 2001, accepted the offer to purchase units in Eastview Gardens, turned to court in a bid to force the first respondent to sell them the flats they occupied. They made an urgent application to the High Court on 13 March 2001 for an interim interdict restraining National Real Estate (Private) Limited from selling and transferring "all the flats constituting Eastview Gardens to any other party pending the outcome of proceedings to be instituted at the High Court, Harare, for a determination of (the) applicant's rights of pre-emption in terms of the lease agreements". The applicant was, however, the appellant, which claimed rights as if it was a tenant.

The averments made in the founding affidavit deposed to by the appellant's chairman in case HC 2665/01 were that the first respondent had, in the letter of 9 February 2001, given the appellant a right of first refusal to buy the flats. It was alleged that the first respondent had wrongfully revoked the right of pre-emption in the letter of 15 February 2001.

In opposing the application, National Real Estate (Private) Limited made three observations. It indicated that it was the wrong party to be sued. As an estate agent, it was carrying out instructions from the owner of the flats. As such it could not decide whether or not they should be sold. The second observation made was that the letter of 9 February 2001 did not grant a right of pre-emption to the sitting tenants. It was said the letter contained a simple offer to sell the flats to the tenants. They, in turn, had to accept the offer by the close of business on 28 February 2001. The last contention was that the appellant, as an association, could not claim a right of pre-emption over the flats. The letter of 9 February 2001, on which the alleged cause of action was based, had not been addressed to it. The appellant had no lease agreement with the first respondent.

The application was dismissed on 26 March 2001.

On the same day that the urgent chamber application in case HC 2665/01 was dismissed, a court application was made in the name of the appellant in case HC 3277/01. This time the respondents were the Zimbabwe Reinsurance Corporation Limited, National Real Estate (Private) Limited and Gainsborough Estate Agents. The relief sought was an order that:

> "1. The applicant's members, totalling three hundred and nine, be and are hereby granted the right to purchase their respective flats, which right they should exercise within twelve months from the date of this order.
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> 2. Any sales of the respective flats which the respondents had approved prior to the date of this order be and are hereby cancelled."

The founding affidavit, deposed to by the secretary of the appellant, contained the same allegations of fact as had been made in the founding affidavit in case HC 2665/01. The respondents filed opposing affidavits.

Before the matter was heard, the appellant made yet another urgent chamber application on 23 June 2001, in case HC 6127/01. In that case the appellant sued the three respondents now before this Court. The application seems to have been prompted by an advertisement placed in a daily newspaper by the second respondent on 21 June 2001, to the effect that the flats in Eastview Gardens were on sale. The first and second respondents were called upon to show cause why a final order should not be made against them, prohibiting the disposal of the flats occupied by the three hundred and nine tenants pending the finalisation of the proceedings in case HC 3277/01. The third respondent was called upon to show cause why he should not be prohibited from registering the transfer of any of the flats specified therein pending the finalisation of the proceedings in case HC 3277/01. The appellant sought and was granted as interim relief an interdict restraining the respondents from committing any of the prohibited acts pending the discharge or confirmation of the provisional order.

The allegations made in the founding affidavit in support of the application were again that the letter of 9 February 2001 granted to the appellant a right of pre-emption. In opposing the application, the first respondent contended that the letter did not contain the right claimed by the appellant. It said the letter was a simple offer to sell to the sitting tenants the flats at the specified price. The submissions made on behalf of the appellant did not find favour with the learned

judge who heard the application. He discharged the provisional order and dismissed the application with costs. He said:

> "… an interdict prohibiting the first respondent from selling the vast majority of the flats in the complex cannot, in my mind, be justified. There is no evidence that all of the tenants in those flats are interested (in) and able to buy the flat each occupies. The applicant itself has no right of first refusal as claimed in the founding affidavit. Such a right was offered to the tenant of each flat. It is only those tenants who have accepted the offer that can seek to enforce them."

The grounds of appeal were that the learned judge in the court *a quo* erred in discharging the temporary interdict and paved the way for the first respondent to dispose of the flats to the detriment of the rights of the appellant's members in case HC 3277/01.

The question to be answered is whether or not the appellant placed before the court *a quo* facts from which the learned judge ought to have found that the requirements for the granting of a temporary interdict had been met.

In *Eriksen Motors (Welkom) Ltd v Proten Motors, Warrenton & Anor* 1973 (3) SA 685 (A) HOLMES JA, dealing with the requirements of temporary interdicts, said the following at 691 C-G:

> "The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. Where the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by INNES JA in *Setlogelo v Setlogelo* 1914 AD 221 at p 227. In general, the requisites are:
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> (a) a right which, 'though *prima facie* established, is open to some doubt';
>
> (b) a well grounded apprehension of irreparable injury;

(c) the absence of ordinary remedy.

In exercising its discretion the Court weighs, *inter alia*, the prejudice to the applicant if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.

The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. … Viewed in that light, the reference to a right which, 'though *prima facie* established, is open to some doubt', is apt, flexible and practical, and needs no further elaboration."

There was, in my view, no question of the right of pre-emption having been *prima facie* established on the facts of this case. The right was just not available to the appellant or the tenants themselves because the letter of 9 February 2001 did not create it.

A right of first refusal or pre-emption is created when in an agreement one party (the grantor) undertakes that when he decides to sell his property he will first give the other party (the grantee) the opportunity of refusing or buying the property at a price equal to that offered by another person. The grantor is then said to be under an obligation to do, at the time he sells the property, what he voluntarily bound himself to do, that is, offer the property to the grantee first at a price equal to that offered by a third party or which he is prepared to accept from any other would-be buyer. The grantee is said to have acquired the correlative right to have the property offered to him first so that he can match the price offered by the third party or refuse the offer. The grant does not entail an existing offer because it conditions it. See *Manchester Ship Canal Company v Manchester Racecourse Company* [1901] 2 Ch 37 at 46-47; *Sher v Allan* 1929 OPD 137 at 140-142; *Cohen v Behr* 1946 CPD

942 at 946-947; *Bellairs v Hodnett & Anor* 1978 (1) SA 1109 at 1138F-1139H; *Hirschowitz v Moolman & Ors* 1983 (4) SA 1 at 6 A-H; *Sotoriou v Retco Poyntons (Pty) Ltd* 1985 (2)SA 922 at 932 B-G; *Madan v Macedo Heirs & Anor* 1991 (1) ZLR 295 (S) at 302A-303D.

It is clear from all these decided cases that a right of pre-emption can only be created by contract or agreement between the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the *onus* is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer to him the property at a price equal to that offered by another.

To establish a *prima facie* existence of the right of pre-emption in its favour or in favour of the tenants, the appellant had to show that the letter of 9 February 2001 contained an offer, the terms of which constituted a right of pre-emption and that there was acceptance of the offer.

Leaving for a moment the question whether the letter contained an offer of a right of first refusal as defined above, the appellant admitted that the tenants interested in the relief sought in case HC 3277/01 did not accept the offer contained in the letter. The reason given for the non-acceptance of the offer was that it was withdrawn by the first respondent on 15 February 2001. On its own admission, it is clear that there was no contract reached by the parties in terms of which the right of pre-emption was created. Without a contract there cannot be a right of pre-emption.

Further, there is no question of the letter of 9 February 2001 being an offer of a right of first refusal. It does not mention the right at all. I agree with Mr *Girach* that the letter contains a simple offer by the first respondent to sell the flats to the sitting tenants at the specified price. There is an invitation to them to indicate in writing acceptance of the offer by close of business on 28 February 2001. It is an ordinary offer unaccompanied by an undertaking by the first respondent to keep it open until close of business on 28 February 2001. There was no promise not to revoke the offer during the period fixed for the notification of its acceptance.

The general rule is that an ordinary offer may be withdrawn on notice to the offeree at any time before it is accepted. See *Yates v Dalton* 1938 EDL 177; *Bird v Sumerville* 1960 (4) SA 395 (N) at 400F; *Stewart v Zagreb Properties (Pvt) Ltd* 1971 (2) SA 346 (R, AD) at 352.

At the time the offer contained in the letter of 9 February 2001 was withdrawn none of the three hundred and nine tenants involved in case HC 3277/01 had indicated in writing acceptance of the offer. In fact, none of them accepted the offer before the close of business on 28 February 2001.

The offer lapsed on the expiry of the period within which its acceptance had to be communicated to the first respondent. Mr *Zhou*, who appeared on behalf of the appellant, could not argue that the withdrawal of the offer contained in the letter of 9 February 2001 had the effect of extending the time within which the parties ought to have entered into contracts of sale on the terms of the offer of 9 or 15 February 2001.

By not communicating to the first respondent their mental states on the offer before the close of business on 28 February 2001 the tenants were presumed to have rejected the offer made on 9 February 2001. They did not accept the new offer made on 15 February 2001 either.

The appellant sought the interim interdict to protect a right it knew had not accrued to it or its members at the time it made the application. The relief sought in case HC 3277/01 was a court order granting the tenants a right to purchase the flats they occupied. To successfully interdict the first respondent from selling its property to whomsoever it chose to contract with, the appellant or the tenants had to found the cause of action on a breach of contract with it.

The appellant and its members knew they could not found a cause of action against the first respondent on the lease agreements. The appellant was not a party to the lease agreements and the agreements did not contain any term, the breach of which could entitle the tenants to an interdict restraining the first respondent from exercising the right of alienation of the flats. Realising the futility of an attempt to found a cause of action against the first respondent on an alleged breach of a right of pre-emption as they clearly could not prove the existence of a contract in which the right was given, the appellant and its members sought to found a cause of action in a court order.

Courts have no power to create legal rights. Their duty is to interpret the law and declare existing rights which they enforce. If, as was the case here, there

was no agreement between the first respondent and the tenants in terms of which the right to purchase the flats they occupied was given to the tenants, the Court had no basis on which to grant them a right to purchase the same. Courts cannot make contracts for parties.

The appeal is without merit. It is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

*Kantor & Immerman*, appellant's legal practitioners

*Zamchiya Costa*, first respondent's legal practitioners