REPORTABLE (4)

Judgment No. SC 13/09
Civil Appeal No. 336/05

CALISTO CHIRENJE v
(1) VENDFIN INVESTMENTS (PRIVATE) LIMITED
(2) H S M USHEWOKUNZE (3) DIVINE HOMES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & MALABA JA
HARARE, NOVEMBER 12, 2007 & MARCH 19, 2009

P Machaya, for the appellant

C F Dube, for the respondents

CHIDYAUSIKU CJ: This is an appeal against the judgment of BHUNU J, in which he dismissed an application for a provisional order by the appellant and twenty-three other applicants. I shall refer to the appellant and his co-applicants as "the applicants" hereinafter. The facts of this case are very ably summarised by the learned Judge in the court *a quo*. The applicants' counsel, in his heads of argument, recapitulates and accepts those facts. The following are the relevant facts, as summarised by the learned Judge.

The applicants bought serviced individual residential stands, being subdivisions of Stand 399 Highlands Estate of Welmoed Township, Harare, ("the property") from the third respondent, Divine Homes (Pvt) Ltd (hereinafter referred to as

"Divine Homes") some time in or around 2001. Before title could pass to the applicants, the same property was sold in execution by the Deputy Sheriff and title was transferred to the first respondent, Vendfin Investments (Pvt) Ltd (hereinafter referred to as "Vendfin"). Vendfin is a nominee of H S M Ushewokunze (hereinafter referred as "Ushewokunze"). The transfer triggered fierce legal battles between Divine Homes as the applicant and the Sheriff of Zimbabwe and Ushewokunze as the first and second respondents respectively under case no. HC 1721/03.

The protracted legal battles culminated in the following consent court order dated 4 May 2005:

> "IT IS ORDERED BY CONSENT THAT:
>
> 1. The applicant hereby withdraws its application against the respondents.
>
> 2. The first respondent be and is hereby authorised/ ordered to effect transfer (of) Lot 399 Highlands Estate of Welmoed, Harare, to the second respondent, H S M Ushewokunze, upon compliance with the terms of the agreement between (the) first and second respondent(s) in respect of 399 Highlands Estate of Welmoed.
>
> 3. This order incorporates an agreement signed by the parties regulating their interest, rights and obligations.
>
> 4. Each party bears its own costs."

The parties' agreement, referred to under para 3 of the court order, was filed of record. The applicants were not a party either to the court order or the agreement mentioned therein. The agreement was between Divine Homes and Ushewokunze.

The applicants became aware that Vendfin was selling the property and was inviting the applicants to purchase the property at a price to be advised. The applicants, who had somehow become aware of the court order and the attached agreement, were invited by Vendfin to purchase the property at $200 000 per square metre and not the $60 000 per square metre stipulated in the original agreement. This was not acceptable to the applicants and they launched an application with the High Court for a provisional order in which they sought the following relief:

"**1. TERMS OF FINAL ORDER SOUGHT**

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

a) That the first respondent shall address and cause to (be) delivered to the applicants or their legal practitioners formal offers in terms of Clause 4 of the Agreement annexed to the Order in case number 1721/03 Ref HC 523/03 within 10 days of service of this order upon them.

b) That the first respondent pay the costs of this application at a higher scale.

2. INTERM RELIEF GRANTED

a) Pending the return date the first respondent be and is hereby interdicted from disposing (of) or in any way alienating or encumbering its (interest) in the various stands that the applicants had previously bought from the third respondent which are subdivisions of stand 399 Highlands of Welmoed, Salisbury."

The applicants sought an interim interdict prohibiting Vendfin from disposing of or in any way alienating the disputed properties pending the outcome of the main action in which they sought an order compelling Vendfin to make them an offer to purchase the property at $60 000 per square metre as provided for in the original

agreement. The applicants claimed that they had acquired the right to be offered the property at that price under the contract between Divine Homes and Ushewokunze. In the main action they sought an order compelling Ushewokunze to offer the property to them at the stipulated price of $60 000 per square metre. As I have already stated, the applicants were not a party to the agreement between Divine Homes and Ushewokunze. The applicants however argued that clause 4 of the agreement conferred on them the right to be offered to purchase the property at $60 000 per square metre.

Clause 4 of the agreement between Divine Homes and Ushewokunze provides as follows:

> "4. H S M Ushewokunze has, on behalf of the parties, agreed to offer the 62 purchasers [the applicants then, now the appellants] whose names appear on annexure 'A' to this agreement the stands which relate to their agreements of sale with Divine Homes (Pvt) Ltd in an amount of $60 000 per square metre, which offer shall be subject to the following terms:
>
> a) the offer shall be open for a period of seven (7) working days, whereupon if the offeree has not accepted the offer it shall lapse and the stand shall be offered to the public on the terms and conditions in clause 5 hereunder;
>
> b) upon acceptance of the offer, an agreement of sale shall be entered into which shall stipulate that the maximum period of payment of the full purchase price shall be ninety (90) days from the date of acceptance.
>
> 5. If the offers or such part of the offers as in clause 4 hereof have not been accepted by the stipulated date, i.e. after seven (7) working days of the offer being made in terms of clause 4, such stands shall be offered for sale to the public at the same price as the price in clause 4 or such other price as the parties to this agreement shall from time to time fix. However, at all times the parties shall act and agree so as to sell the stands to best advantage guided always by the market prices prevailing at the time."

Clause 9 of the same agreement provided that the parties to the agreement had an unfettered right to amend or vary the terms of the agreement. On a proper reading, clause 9 provides that the agreement can be altered without any reference to third parties. The only requirement for the validity of any amendment was that it be reduced to writing and signed by the parties to the agreement. Clause 9 provides as follows:

> "9. This agreement forms the whole agreement between the parties. Any variation, change, alteration or anything that affects the implementation of its contents shall not be valid unless (the) same is reduced into writing and signed by the parties whose signatures have been affixed to this agreement."

On 21 and 28 June 2005 Divine Homes and Ushewokunze signed an addendum to the agreement in terms of clause 9, amending the offer price. The amendment was reduced to writing and duly signed by both parties in compliance with clause 9 of the agreement. The addendum reads in part as follows:

> "ADDENDUM TO AGREEMENT AS PER PARAGRAPH 9
>
> Made and entered into by and between
>
> DIVINE HOMES (PVT) LTD (of the first part)
>
> AND
>
> H S M USHEWOKUNZE (of the other part)
>
> WHEREAS
>
> 4. HERBERT SYLVESTER MASIYIWA USHEWOKUNZE has on behalf of the parties agreed to offer the 62 purchasers whose names appear on annexure 'A' to this agreement the stands which relate to their agreements of sale with Divine Homes (Pvt) Ltd at $60 000 per square metre or the prevailing market price, whichever is higher at the time of acceptance of the offer, which offer shall be subject to the following terms:

a) The offer shall be open for a period of seven (7) working days, whereupon if the offeree has not accepted the offer it shall lapse and the stand shall be offered to the public on the terms and conditions in clause 5 hereunder;

b) Upon acceptance of the offer, an agreement of sale shall be entered into which shall stipulate that the maximum period of payment of the full purchase price be ninety (90) days from the date of acceptance;

c) The parties have agreed to amend the principal agreement."

It is common cause that Ushewokunze, acting in terms of the amended agreement, offered to sell the property to the applicants for $200 000 per square metre. The applicants do not dispute that $200 000 per square metre was the prevailing market value of the property at the time of the offer. The offer to the applicants was through an advertisement in the press and an explanation at the offices of the respondents' legal practitioners.

The applicants objected to the revised purchase price of $200 000 per square metre. The applicants contended that Ushewokunze was legally obliged to offer them the property at $60 000 per square metre as per the original agreement. The applicants argued that the amendment to the agreement was illegal as it amounted to an illegal variation of a court order. The learned Judge in the court *a quo* rejected this argument and concluded as follows:

> "I find that there is absolutely no merit in that argument because the court order incorporates the agreement, which agreement envisages valid amendments or alterations to the original agreement. What that means is that once a valid amendment is made in terms of clause 9 before acceptance by the applicants it becomes part of the valid court order.

> The applicants could not validly accept the original tentative offer price because it was not a firm offer to them. Even if we were to assume for one moment that it constituted a firm offer, an offer can be amended, varied or altered (at) any time before acceptance.
>
> Having come to that conclusion, I find that there is no merit in this application. The applicants have failed to establish a *prima facie* right."

I respectfully agree with the conclusion of the learned Judge.

It is common cause that the agreement entered into between Divine Homes and Ushewokunze is what is generally known as a contract for the benefit of a third party. In terms of clause 4 of the agreement (before the amendment) Ushewokunze agreed to offer to sell to the applicants the property at the purchasing price of $60 000 per square metre. It is now settled law that in a contract for the benefit of the third party, the beneficiary third party's right to sue and the obligation to be sued under such contract accrue upon the offer being communicated to and accepted by the third party in terms of the contract. It is the communicating of the offer and the acceptance of the offer that creates the *vinculum juris*, which in turn creates the entitlement to sue and the obligation to be sued. See *McCullogh v Fernwood Estate Ltd* 1920 AD 204 at 206.

The applicants are no doubt the beneficiary third party in the contract between Divine Homes and Ushewokunze. In terms of clause 4 of the agreement between the two contracting parties Ushewokunze was to offer the applicants the property for sale at the purchasing price of $60 000 per square metre. He undertook to make the offer to the applicants within seven days of the agreement. On the applicants' version of the facts, no offer was ever communicated to the applicants within the seven

days stipulated in the contract. Indeed no offer was ever made to the applicants before the amendment of the agreement in June 2005. As no offer was ever made to the applicants, on the authority of *McCullogh's* case *supra* no *vinculum juris* was ever created entitling the applicants to sue the promissor (Ushewokunze) on the undertaking to sell the property for $60 000 per square metre in terms of the agreement before it was amended. Divine Homes, as a party to the agreement, could have sued Ushewokunze to make good that offer before it expired. Had Ushewokunze communicated the offer to the applicants and sought to withdraw the offer prior to the expiry date of the offer, the applicants might have had a cause of action. On the facts of this case, as set out by the applicants themselves, no offer was ever communicated to the applicants for the purchase of the property at $60 000 per square metre. Consequently no such offer was ever accepted by them. Without the offer being communicated to the applicants and the applicants accepting such offer, the applicants cannot sue or be sued upon the contract between Divine Homes and Ushewokunze. See *Salisbury Bottling Co (Pvt) Ltd v Lomagundi Distributors (Pvt) Ltd* 1965 (3) SA 503 (SR) at 510. Ushewokunze, after the June 2005 amendment to the agreement, offered to sell the property to the applicants at $200 000 per square metre. That offer was never accepted by the applicants. Consequently no cause of action can arise from that offer.

The applicants in this case sought an interim interdict pending the finalisation of the main action between the parties. Before a court can grant an interim interdict, it is necessary for the applicant to establish a *prima facie* case, that is to say, the applicants must aver facts which if proved in the main action will constitute a cause of

action. The facts that the applicants intend to prove in the main action are incapable of constituting a cause of action even if they were proved. On this basis, I agree with the learned Judge in the court *a quo* that the applicants failed to establish a *prima facie* case entitling them to an interim interdict pending the finalisation of the main action.

The other argument of the applicants, that the original agreement between Divine Homes and Ushewokunze was part of an order of the court and therefore cannot be altered, does not merit any detailed consideration. That argument is simply untenable. The express language of the agreement itself confers on the contracting parties the unfettered power to amend the agreement in the manner prescribed or provided for in the agreement. This unfettered power to amend the agreement is incorporated into the court order itself. The amendments to the agreement can only be impugned on the basis of lack of compliance with the terms of the agreement. The amendment was in accordance with the agreement itself and is therefore valid.

In the result, the appeal is dismissed with costs.

SANDURA JA: I agree

MALABA JA: I agree

Makoni Legal Practice, appellant's legal practitioners

Dube, Manikai & Hwacha, respondents' legal practitioners