EASTVIEW GARDENS RESIDENTS ASSOCIATION
vs
ZIMBABWE REINSURANCE CORPORATION LIMITED
and
NATIONAL REAL ESTATE (PVT) LIMITED
and
GAINSBOROUGH ESTATE AGENTS (PVT) LIMITED

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 10 January and 29 May, 2002 and 5 February 2003

Mr *Mambosasa* for plaintiff
Mr *F Girach* for respondents

Opposed Application

PARADZA J: This matter came before me as an opposed application, firstly on 10 January, 2002 on which date the matter was postponed *sine die* with no order as to costs by consent. The reason was that applicants were unable to secure the services of another legal practitioner after their counsel, Mr *Kututwa* had left the partnership where he was employed. It is not clear why he could not represent the applicants, although it was made known to me that he was still available elsewhere. The matter came before me again on 29 May, 2002, but the matter did not take off for unclear reasons. At this stage the applicants were now being represented by a Mr *Chaoma* and the respondents by Mr *Girach*. The matter finally came before me on 5 February, 2003, this time with applicants being represented by a Mr *Mambosasa* and the respondents still being represented by Mr *Girach*. Argument was heard from both counsel and at the conclusion of the hearing I dismissed the application with costs on an attorney and client scale. In delivering my judgment in open court I gave my reasons for arriving at that decision. I believe my reasons were recorded in open court for the benefit of any of the parties who

wanted to take the matter up on appeal. As far as I was concerned that was the end of the matter as it was out of my hands.

A perusal of the court record does not show me that any of the parties who were present on the day requested the Registrar to have a transcript of the record so that they could proceed to note their appeal. The record does not have any letter or correspondence from any of the parties notifying me of their intention to lodge an appeal and at the same time requesting my full reasons for my judgment. The first letter on record came from Messrs Hussein, Ranchod and Company. That letter is dated 23 June, 2003 which was addressed to the Registrar of the High Court. The letter simply requested a transcript of the record of the proceedings, at the same time undertaking to pay the Registrar's charges for transcribing the record. In that letter no indication was made that it was the intention of the applicants to lodge an appeal.

The second letter written by Messrs Hussein, Ranchod and Company is dated 22nd August, 2003 addressed to my clerk. That letter refers to the applicants' Notice of Appeal which Messrs Hussein, Ranchod and Company say they had filed without my reasons for judgment. Upon having sight of those two letters I took the liberty of contacting Mr Hussein of Messrs Hussein, Ranchod and Company to find out whether a Notice of Appeal had been filed as there was nothing on record to indicate anything to that effect. He advised me on the telephone that indeed a Notice of Appeal was filed but it was not stating the grounds of appeal. He undertook to provide me with a copy of that Notice of Appeal. At the time of preparing this judgment a copy of the Notice of Appeal has not been furnished to me.

The other copies of correspondences on record were delivered by Messrs Costa and Madzonga to the Registrar on the 12 August, 2003. They are what appears to be their own file copies of the correspondence between my clerk and Messrs Costa and Madzonga. The originals of those copies are not on record. The first letter is dated lst February, 2003 advising my clerk that Messrs Costa and Madzonga had been served with a Notice of Appeal a copy of which they purport to attach to that letter to my clerk and at the same time requesting my reasons for the judgment as a matter of urgency to ensure that the appeal is heard expeditiously.

The second letter from Messrs Costa and Madzonga is dated 11 March, 2003 again addressed to my clerk. That letter purports to attach a certain Supreme Court judgment which I believed I requested during the hearing of the matter but which judgment had not been furnished to me. The letter was a follow up to find out whether the reasons for judgment were available so that the matter could proceed.

The last letter from Messrs Costa and Madzonga is dated 30 April 2003. It was a mere follow up on the letters of 7 February, 2003 and 11 March, 2003. The letter seems to indicate that assurance had been given to them that the judgment would be available and ready for them in March this year. It is not clear who made those assurances. All I can say is that at that stage the matter was out of my hands as I had delivered my judgment in open court and no formal request had been made to me, at least looking at the court record, requesting me to provide my full reasons for judgment.

I have, today, received a letter from the Honourable Judge President attaching a letter written by the Secretary for Justice, Legal and Parliamentary Affairs which letter reads as follows -

> "I refer to our telephone conversation of the morning of the first instant in the above connection.
>
> Honourable Mr Justice Paradza presided over the above matter which is being appealed against. Messrs Hussein, Ranchod and Company's letter of 22 February, Justice Paradza's clerk attached hereto refers.
>
> Applicant is very anxious to prosecute its appeal with a minimum of delay. I should, in the circumstances, be grateful if Honourable Justice Paradza could kindly give his reasons for judgment in the matter at his earliest convenient time".

It is with this background that I find it necessary that I provide again my reasons for the judgment for the simple reason that the proceedings that were recorded at the time would by now have lapsed in the sense that if no notification was made timeously to the Registrar with regard to the intention to appeal against my judgment, the tape recording would have been used for other purposes. The judgment which I now provide cannot obviously be the same wording as the one I provided in court. All that can be said now is that the applicants have not followed the proper procedures as expected of them in approaching me to enable me to provide the full reasons for judgment. Instead, they have chosen to involve arms of the Executive when in fact their lawyers know the correct procedure which should have been followed in an effort to execute their appeal. All that I can say at the moment is that litigants through their legal practitioners should do all they can in terms of the laid down rules of court when they want to bring a matter to court. They should be discouraged from invoking the assistance of members of the Executive or of any other arm of Government as that would set a bad precedent and create a wrong impression that the Executive can tell the judiciary and, or other arms of Government what to do.

I now deal with the application itself proper. This application has a long history behind it. The applicant is an association of residents of a place called Eastview Gardens in Harare. It is not disputed that the association is a legal entity capable of bringing this

application on behalf of the residents. Its Secretary filed an affidavit to the following effect.

The residents represented by the applicant amount in total to 384 members. They are tenants of the first respondent and reside in a complex of flats known as Eastview Gardens.

On 9 February, 2001 the 384 members received letters from the second and third respondents notifying them of an intention to sell the flats to the residents by virtue of them being sitting tenants in the complex. The letter reads as follows -

> "Dear Sir/Madam,
>
> Re: Proposed Sale of Eastview Gardens
>
> Reference is made to the above matter.
>
> The owners of Eastview Gardens, the Zimbabwe Reassurance Company Limited, have advised that they shall be selling the premises you are leasing from them. The sale shall be on a 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 to purchase if you are interested in doing so. The purchase price for the flat is ---
>
> May you please advise us in writing whether or not you will be taking up the offer as soon as possible or 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".

Applicant argued in the founding affidavit and elsewhere that that letter created a right of pre-emption to buy or not to buy the flat. Alternatively, through the adoption of the doctrine of estoppel, respondents were estopped from revoking the offer. Paragraph 5 of the applicant's founding affidavit reads in part as follows -

> "It is contended further by applicant on behalf of its members that an offer is a unilateral contract which becomes bilateral only when the offer is accepted".

I shall deal with this aspect later. For now it is suffices to say that before 28 February, 2001 first respondent withdrew its offer and sought to amend the offer in such a way that the members would still have the right to purchase their flats but this time with the added provision that the seller would sell the flats "block by block". The letter from the first respondent reads in part as follows -

> "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 in Eastview Gardens, now, you may chose from the block that shall be selling at any one point in time. In any event you will still need to confirm your interest in purchasing your unit by close of business on 28 February, 2001".** (My emphasis).

That letter from the second respondent was dated 15 February, 2001. Nothing seems to have happened from that date to 27 February, when one N Chauma representing the applicant sought for a meeting with the respondents in order to clarify some areas with which they were not clear about. We are not told whether the meeting went ahead but a letter was written on 28 February, 2001, the date of the deadline by the same Mr N Chauma, Chairman of the applicant registering an objection in the manner in which the sale of the flats was being handled. In particular applicant was not happy that its members were not being given the opportunity to buy the flats they were residing in directly. Also applicant was unhappy that the sale was being conducted through a third party, presumably the third respondent. Applicant in that letter was also not happy with the pricing of the flats which he described as not being uniform. Thirdly, applicant was objecting to tenants buying flats which were occupied by other tenants and thus creating a potential conflict between its members. Lastly, in that letter applicant was suggesting that the whole idea of selling the flats be shelved until various issues with the tenants were clarified.

On the 8th March, 2001 third respondent wrote another letter to the tenants, members of the applicant offering to sell the flat which the tenants occupied. Part of that letter dated 8 March, 2001 reads as follows -

> "Dear Sir/Madam,
>
> RE: FLAT NO:……EASTVIEW GARDENS
>
> Our letter refers to introduce ourselves as the selling agents for the flat you occupy. As the sitting tenant we would like to offer you the first refusal to purchase the flat.
>
> We are giving you seven days notice to make your offer to buy the same failing which the flat will be offered to the public. Your offer should be made to the writer within the stipulated period and your failure to respond will be assumed as a rejection of our proposal. Therefore we would like you to allow our prospective buyers to view your flat at a reasonable time. ".

From the Opposing Affidavit filed by the respondents it would appear that some of the members of the applicant indeed responded and accepted the offer and proceeded to purchase the flats they were occupying. One of those was Mr Chauma the applicant's Chairman who wrote a letter to first respondent on 15 February, 2001. His letter reads as follows -

> "Dear Sir/Madam,
>
> RE: OFFER TO BUY FLAT NO: D 216 ZAMBEZI COURT
>
> I do hereby register my intent to buy the flat no D216, Zambezi Court, Eastview Gardens. I propose to make payment as follows:
>
> 25% cash deposit and a balance payable by Mortgage Loan. Awaiting your reply.
>
> Yours faithfully,
>
> Y N Chauma
> Tenant".

All in all, a total of 128 tenants expressed their desire to purchase their flats. Those who had the means to purchase the flats went to second respondent's offices and signed Agreements of Sale and paid what they undertook to pay. Today those tenants are the happy owners of the flats they were living in.

The issues that need consideration are firstly, whether the deponent to the founding affidavit has in terms of the Constitution he relies on the authority to bring this matter on behalf of the members of the Association, and secondly whether the respondents were correct in deciding to ignore the applicant's members who had not taken up the offer made by the respondents.

I have already stated above that the deponent purports to act for 384 members of the applicant Association. This issue is seriously challenged by the respondents on the basis that the deponent cannot purport to act for 384 members when in fact there are over 128 members of the Association who took up the offer of the respondents including the Chairman of the Association. That, to me, puts in issue the averment, if any, by the deponent that he had authority to act for the entire membership of the Association.

In his Founding Affidavit, the deponent avers that he is the Secretary of the applicant Association, which Association is vested with the mandate to represent all the residents of Eastview Gardens on all issues pertaining to the rights of tenants of Eastview Gardens. Paragraph 6.1 of the Applicant's Constitution authorizes the Executive Committee, of which the deponent is a member, to -

> "institute and defend legal proceedings on behalf of the Residents' Association, and for that purpose sign and execute any necessary Powers of Attorney".

It is important to note the deponent does not purport to act for every member of the Resident's Association. Deponent stated that whatever he was doing was as laid

down in the applicant's Constitution, namely to represent residents in any legal proceedings they may choose to institute or defend.

In the case of *Direct Response (Private) Limited* v *Shepherd* 1993(2) ZLR 218(H) ADAM J considered the circumstances under which a litigant may successfully challenge the authority of the person who purports to act for another person, in that case a company. He concluded that where a deponent does not state that he or she is duly authorised to depose to that affidavit on behalf of others the Court will not readily conclude that such person had no authority to so depose to an affidavit. The Court should consider each case on its own merits in arriving at a conclusion. WATERMEYER J in the case of *Mall (Cape)(Pty) Ltd* v *Merino Ko-operasie Bpk* 1957(2) SA 347(C), stated that in the case of an artificial person coming before the Courts like a company or co-operative company, *albeit* an association as in the case of the applicant, -

> "there is judicial precedent for holding that that objection may be taken **if there is nothing before the Court** to show that the applicant has duly authorised institution of motion proceedings. Unlike an individual an artificial person can only function through its agent and it only takes decisions in the passing of resolutions **in the manner provided by its Constitution** …….The best evidence that the proceedings have been properly authorised would be to provide by an affidavit made by an official by the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf". (My emphasis)

I am satisfied that the Constitution which has been annexed to the deponent's affidavit clearly authorises the Executive Committee to institute and defend any legal proceedings on behalf of the residents. Under the circumstances it may not be necessary that each of the residents files a supporting or verifying affidavit to show that indeed the deponent had authority to depose to the affidavit on behalf of everybody. To me enough

evidence has been placed before me to convince me that indeed the deponent acting for the applicant Association was duly authorised to act as he did. It is not material whether some of the people opted to purchase the flats or not. Some people may take a cautious approach in life but that does not mean they have not authorised their Secretary to institute proceedings on their behalf. As stated by ADAM J in the *Direct Response (Pvt) Ltd* case *supra,* it is very wise for a deponent to state in his affidavit that he has been duly authorised to swear to an affidavit on behalf of a particular person in the absence of that argument in the affidavit. As long as the deponent places before the Court enough evidence, as in this case, in the form of the Constitution of the Association, that should satisfy the Court that indeed the deponent has authority to act for and on behalf of the applicant Association and its members.

That leaves me to deal with the second issue on whether the respondents were correct in deciding not to sell the flats to the members of the applicant's Association, assuming that such a decision was indeed made.

In his Founding Affidavit, applicant is of the view that the letter of offer which was written by the first respondent to each member of the applicant Association creates in each member of the Association a right of pre-emption to buy or not to buy the flats they were living in. The question to decide therefore is, could it be said that the letter referred to above, indeed created that right either of pre-emption or first refusal which applicant in its Founding Affidavit seems to liberally interchange. What applicant is saying is that the offer contained in that letter was drafted in such a way that the offerer could not withdraw the offer as he had bound himself **by contract** with the offeree not to withdraw it. (My emphasis).

The contract I am referring to is what has been termed an option. The question therefore is whether the applicant's members and the respondents had created an option once a letter had been written to the applicant's members offering to sell the flats at whatever price.

Applicant in his Heads of Argument does not seem to argue at all in a convincing manner as to how that option is created in the circumstances. In the legendary case of *Hersch and Nel* 1948(3) SA 686 (A) 695 an authority known to all students of the Law of Contract, the true nature of an option is clearly analyzed in two different parts, namely, an offer to enter into the main contract together with a concluded subsidiary contract (the Contract of Option), binding the offeror to keep that offer open for a certain period. (See also the case of *Boyd and Nel* 1922 AD 414).

A letter written by the first respondent to members of the applicant Association disclosing a desire to sell the flats to the sitting tenants at a particular price and inviting them to respond by a particular date does not to me amount to an option. To me therefore, no right of pre-emption was created at all and applicant misdirected itself in thinking that such a right had been created under the circumstances. What applicant should have simply read into that letter was that this letter was a simple offer inviting the members of the applicant Association to come and negotiate with a view to enter into an Agreement of Sale. It amounts to nothing but an invitation to treat, or to an offer to negotiate, or what has been known in English law as an offer to chaffer (See the case of *Carlill* v *Carbolic Smoke Bowl Co (Pvt) Ltd* 1893 1 QB 256.) In the case of *Fergueson* v *Merensky* INNES CJ was quick to conclude that statements contained in a so-called letter of offer which advises the offeree to take any further steps **if he wishes to take up the**

matter have the effect of not making such an offer a genuine offer in the legal sense (my emphasis). In that case the words-

> "You may write to him if you like to follow up the matter"

were held not to be an offer because it was accompanied by a mention of the seller's agent and those words. In the present case the letter reads in part -

> "As a sitting tenant we are hereby giving you notice of the owner's intention to sell that flat and advise that we are offering to purchase **if you are interested in doing so** ". (My emphasis).

That would not create an option as it means there is no contract between the parties whatsoever. Anything which would happen would arise as a result of any interest on the part of the offeree, that is if he was interested to take up the offer. I am therefore satisfied that applicant in its Founding Affidavit proceeded on a complete wrong premise. It envisaged and saw the existence of the right of pre-emption or an option which was not there. To me the letter to the members of the Association was a simple offer giving the offeree a certain time period in which to respond. The response by the offeree through its Association, the applicant, was not positive. On 28 February, 2001 a letter was written by the Chairman of the applicant suggesting that the issue of the sale of the flats be "shelved". What it points towards is a clear rejection of the offer.

As if that was not enough correspondence continued to be exchanged between the parties and on the 8 March, 2001, the third respondent acting on the instructions of the second respondent made another offer to the members of the applicant giving them a week to decide otherwise they were going to proceed to sell the flats to the public. Nothing seems to have been concluded out of the subsequent offer. What this means is therefore that the argument by the applicant that the respondent withdraw the offer before

the expiry of the initial period of offer is neither here nor there. It became irrelevant when subsequently other offers were made to the same applicant's members which again they refused to take up. One must ask the question, what would the owner of the block of flats who is eager to sell do in the face of attempts to shelve the whole idea of a sale and clear rejection from the people who were offered to purchase the flats. The obvious answer would be that the seller would proceed to sell as mentioned in the letter from the third respondent to third parties. Nothing in the Contract of Lease or anywhere was provided to the Court to show that the seller was not entitled to proceed as he did. No contract existed whatsoever binding the seller not to sell the blocks of flats. In the light of the above it is quite clear that the respondents were correct in deciding not to proceed with the sale of the flats to people who had clearly failed to utilize an opportunity which had been created for them without any undue pressure being made to bear upon the respondents. It was for the above reasons that I made the order dismissing the application with costs on the higher scale.

On the issue of costs I was of the view that the applicants had unnecessarily frustrated the seller by delaying the court process for such a long time unreasonably and for their own benefit. Repeatedly they had come to court unprepared when the matter was set down for hearing. They had come to court without a legal practitioner and the matter was postponed several times. As I indicated earlier this matter could have been heard in January 2002. A year lapsed before the matter was heard finally in February 2003. All the postponements were at the instance of the applicant. The longer it took the more convenient it was for the applicant as they would be assured of a longer stay in the flats. For the applicants to come to court now and purport to accept an offer which was

made and which they should have accepted at the relevant time to me is unacceptable. If they were interested in purchasing the flats, why did they not accept the offer at that early stage and this matter would not have come to court. Time has obviously moved to their advantage and that explains why they purport to accept the offer at this late hour.

The Court cannot create a contract for them. An opportunity was created for them which they allowed to let go and by-pass them. The application they filed in court was completely baseless and frivolous. They should, under the circumstances be slapped with a punitive order as to costs. They have wasted their time and everybody's time, including the court's time in bringing such a matter to court. Costs should be paid on an attorney and client scale.

Ziume and Company, legal practitioners for applicants
Zamchiya & Costa, legal practitioners for respondents