GULMIT INVESTMENTS (PRIVATE) LIMITED
versus
RANCHVILLE ENTERPRISES (PRIVATE) LIMITED
and
C.R.G. QUARRIES (PRIVATE) LIMITED
and
KEELY GRANITE (PRIVATE) LIMITED
and
MINERALS MARKETING CORPORATION OF ZIMBABWE
and
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 14 April, 2004

Urgent Chamber Application

Mr *E Morris,* for applicant
Mr *N Madya,* for 2nd respondent
Mr *P Masamba,* for 4th respondent
Mr *G Chikumbirike,* for 6th 7th and 8th respondents.
The 1st 3rd and 5th respondents in default.

MAKARAU J: After hearing the parties in the above matter, I dismissed the application on the turn with costs in favour of the second respondent and indicated that my reasons would follow. I now set them out.

The facts of this matter are common cause. The first respondent had an agreement with the applicant in terms of which the applicant had the right of first refusal over the first respondent's black granite. The agreement also provided for the financing of the operations of the first respondent by the applicant and the future shareholding of the first respondent in which applicant had a 70% stake. The agreement was concluded in May 2003.

On 1 March 2004, the applicant received information that the first respondent was moving 41 blocks of black granite from its mine in Mutoko to Harare. This was without the knowledge of the applicant or of the first respondent's Finance Director with whom the applicant worked closely. It soon emerged that the blocks were being moved on behalf of the second respondent, which had purchased the blocks from one Crymble, the

Managing Director of the first respondent. The third respondent had been engaged by the second respondent to move the stones from Mutoko to Makon siding where they would be loaded onto the fifth respondent's wagons enroute to the port at Beira.

Armed with this information, the applicant filed this urgent application seeking an order setting aside the sale of the blocks to the second respondent and compelling the first respondent to offer the blocks to the applicant in terms of their agreement. As interim relief, the applicant prayed for an order that the blocks be kept at the third respondent's leased premises at Makon siding at the expense of the applicant.

The respondents' legal practitioners all took turns to attack the procedure adopted by the applicant in bringing this application on an urgent basis. It was argued that the applicant became aware of the movement of the granite blocks from the first respondent's mine in Mutoko on 1 March and only filed the urgent application on 30 March 2004, some 30 days later. By this delay, the argument proceeded, the applicant created the urgency in the matter and is thus abusing court process by approaching the court on an urgent basis.

This court has held that an application is urgent when if at the time the cause of action arises, determination of the matter cannot wait. (See *Kuvarega v Registrar-General* & *Another* 1998 (1) ZLR 188 (HC)). In such a case, the filing of an application with the court immediately the cause of action arises acts to underscore the urgency of the matter and the vigilance of the applicant. A delay may however occur between the cause of action arising and the filing of the application with the court. Where the urgency of the matter is born out of that delay, then unless the delay is satisfactorily explained, the non- action on the part of the applicant until his or her legal position is altered by some other vigilant person cannot constitute urgency for the purposes of the rules of this court. Where however the delay in bringing the matter to court does not create the urgency nor further complicates the matter, in my view, this should not be held to detract from the urgency of the matter, especially where the delay in approaching the court for relief is not inordinate.

In *casu*, the urgency of the application has not been created by the delay of the applicant in filing this application. The situation that prevailed on 1 March was pretty much the same as on 30 March 2004 when the application was filed. This is so because the second respondent purchased the granite from the first respondent on 6 February 2004. That the need to act manifested itself on 1 March when the applicant became aware of the movement of the granite cannot be denied. In my view, the delay between 1 and 30 March did not create the urgency nor did it complicate matters any further. The matter remained urgent after 1 March and the delay in bringing the application to court does not appear to me to be inordinate in the circumstances of this matter. At the time of the hearing of the application, the granite had not been removed from Zimbabwe and if the applicant is entitled to protection of its rights, in my view, it is the duty of this court to ensure that the matter is determined urgently.

The applicant as the holder of a right of first refusal to the granite blocks, is in law placed in the same position as a prior purchaser. It has been argued and accepted as the correct position in law that the holder of a pre-emptive right who has not yet exercised the right is in the same legal position as one who has exercised the right or has actually purchased the property to which the right relates. (See *Le Roux v Odendaal and Others* 1954 (4) SA 432 (NPD) and *Sawyer v Chioza and Others* 1999 (1) ZLR 203 (HC)).

The legal situation presented by the facts of this matter thus gives rise to the typical double sale scene. The first respondent, bound in contract to offer its granite to the applicant, sold and delivered the stone to the second respondent.

The principles that apply where a person has sells a property to two or more persons have been set out clearly in *Crundall Brothers (Private) Limited v Lazarus NO & Another* 1991 (2) ZLR 125. These principles have been followed in a line of decisions in this jurisdiction. (See *Charuma Blasting and Earthmoving Services (Private) Limited v Njainjai & Others* 2000 (1) ZLR 85 (SC) *Barros and Another v Chimponda* 1999 (1) ZLR 58 (SC).

In my view, the position is so well settled that it can now be taken as trite that where A sells to B and to C and C takes transfer without knowledge of B's right or claim to the property, then C acquires an indefeasible right and B is left to claim damages

against A. The same position obtains in respect of movable property that has been delivered to C. It is a common position at law that transfer of ownership in respect of movable property is effected by delivery of the property.

The applicant can only advantageously rely on its status as the "prior purchaser" of the granite if it can show that the second respondent was aware or ought to have been aware of its prior right or claim to the stone. In this event, the applicant will be relying on the maxim *qui prior est tempore potior est jure*, giving priority to the first purchaser. Mindful of this requirement, Mr Morris for the applicant sought to impute knowledge on the part of the second respondent. This he did by arguing that the second respondent must have been put on guard when the first respondent sold it the stone instead of exporting the stone for its own benefit. I must confess that the argument loses me. It is not disputed that the first respondent was in the business of selling the stone. It had an agreement to offer the stone to the applicant for sale first. Presumably, where the applicant did not for any reason exercise its right, the first respondent was at liberty to sell the stone to any other party. In these circumstances, I do not see how the fact that the first respondent was selling the stone and not exporting it for itself should have put the second respondent on guard and cause it to inquire into the internal arrangements that the first respondent might have had with its shareholders.

The second respondent has specifically denied that it had knowledge of the agreement between the applicant and the first respondent. When confronted by the applicant's representative over its possession of the stone, it did not seek to hide anything from the applicant, but even made available to the applicant the invoice that it had received from Crymble, issued in the name of the first respondent but with different telephone and fax numbers. These were not the actions or responses of someone acting *mala* fide and in concert with the first respondent to defeat the just claims of the applicant.

It is therefore my finding that the second respondent took delivery of the stone in the absence of any knowledge of the prior rights of the applicant.

In the absence of any prior knowledge on the part of the second respondent, I see no basis upon which the title received by the second respondent from the first respondent can be impugned. It is indefeasible.

Mr *Madya* argued that the second respondent became the owner of the stones upon delivery of the stone to it. Its right in the stones is real as opposed to the personal right that the applicant may have against the first respondent in terms of the agreement between the parties.

It would appear self evident that a personal right as the applicant has must yield to the real right that the second respondent has in the stone. This is however not the basis upon which such issues are resolved. It is not a question of a greater right yielding to a lesser right or a personal right yielding to a real right. The emphasis in the authorities is clearly on the manner in which the second purchaser acquires rights in the property in dispute rather than on the content of that right. The authorities are clear that if the second purchaser acquires tittle to the property innocently and without prior knowledge of the rights of the first purchaser, then his title in the property is good and cannot be defeated by rights stemming from the first purchaser's status as the prior purchaser.

Thus, while it is correct that the second respondent did acquire ownership in the stones when it received delivery of the stones, the basis of its protection at law is not the right of ownership but the manner in which it acquired that right in competition to the applicant. That this is the correct position in law is in my view confirmed by the fact that one may have a prima facie right against an owner. It is therefore not the content of the rights one has in relation to the property that matters but the manner in which that right is acquired in competition with the competing party.

Further and in any event, the issue between the parties cannot be resolved on the basis of determining which of the parties has an indefeasible right against the other. This matter came to me by way of an urgent application for an interim interdict. I had to determine whether the applicant is entitled to the interdict that it seeks.

It is a settled position in our law that for a temporary interdict to issue, the applicant must show that he has a clear right or a prima facie right to the relief sought and

that there is imminent harm to that right. That is the approach Mr Morris took in arguing this matter. He conceded that the applicant does not have a clear right but has a *prima facie* that is open to doubt. He then proceeded to address the issue of irreparable harm that will ensue if the applicant's *prima facie* right is not protected by highlighting how an award of damages will be inequitable in the hyperinflation characteristic of the environment.

The issue that exercised my mind to some extent is whether in the circumstances of this matter, it can be said that the applicant has a prima facie right to the stone for the purposes of the issuance of a temporary interdict in its favour.

It appears to me that the applicant's right to the stone cannot be determined in isolation and without considering the competing rights of the second respondent. It further appears to me that because the second respondent has acquired an indefeasible right to the stone in competition to the applicant, the applicant cannot have a prima facie right to the same stone. The two appear mutually exclusive to me and on that basis alone, the dismissal of the application would be justified.

Although convinced that the applicant has no right capable of protection as against the second respondent because of the indefeasible right that the second respondent has acquired in the stone, and consequently that the balance of equities should not come into play as between the applicant an the second respondent, I took the approach of GILLESPIE J In *Watson v Gilson Enterprises & Others* 1997 (2) ZLR 318 (H), and considered all the circumstances of the matter to decide whether, on a balance, I could still exercise my discretion in favour of granting the interdict sought.

The circumstances that I took into the balance are:

1. That the applicant's loss can be made good by an award of damages for the alleged breach of contract. In this respect, the applicant does have a suitable alternative remedy. The fact that the damages will be claimed and collected in a hyperinflationary environment does not in my view satisfy the requirements of the law that the applicant must show an absence of an alternative remedy.

2. The second respondent has already sold the stone to its customers in Italy and has received payment for the stone. The balance of convenience is heavily in its favour. Were I to grant the interdict, the business reputation and integrity of the second respondent would have been severely compromised.

Considering these two factors, I used my discretion to withhold the granting of the temporary interdict in favour of the applicant. The balance of convenience is clearly in favour of the second respondent in this matter.

In view of the conclusion I reached in this matter, it became unnecessary in my view to deal with the other issues arising from this application.

Regarding costs, I made an order of costs in favour of the second respondent, as it has been successful in its opposition of the application.

The applicant did not seek an order against the 4th respondent and its filing of opposing papers and appearance at the hearing was thus unwarranted. It is not entitled to any costs.

The sixth to eighth respondents applied to be joined to the application only when the mandate of Mr *Chikumbirike* to appear on behalf of the first respondent was challenged. Although the application for joinder was allowed by consent, the sixth to eighth respondents, being the Managing Director, Operations Director and minority shareholder in the first respondent had no independent interest to protect in the matter. No specific order was prayed against them and their opposition and appearance at the hearing wee also unwarranted. They are not entitled to costs for the application for joinder or for the opposition to the application.

It was for the above reasons that I dismissed the application on the turn and made the order of costs that I did.

Coghlan Welsh & Guest, applicant's legal practitioners
Wintertons, second respondent's legal practitioners
Dube Manikai & Hwacha, 4th respondent's legal practitioners
Chikumbirike & Associates, 6th, 7th and 8th respondent's legal practitioners.