PILLARTON ENTERPRISES (PRIVATE) LIMITED
versus
CITY OF MUTARE

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 27 March 2023

Opposed Application: Interdict

A. Mutungura, for Applicant.
G.R.J Sithole with *C. Maunga*, for the Respondent.

MUZENDA J: On Thursday, 26 January 2023, I granted an interim relief in favour of the applicant to the following effect:

> *"Pending determination of this matter, Applicant is granted the following relief:*
>
> *(a) Respondents, its employees, agents and or assignees be and are hereby ordered to cease development on Stand Number 2189, Hobhouse 2 Mutare on the dame day this provisional order is served upon them pending the finalisation of this matter."*

The terms of final order sought are spelt out by applicant as follows:

"(a) That Respondent be and are hereby interdicted from building the structuring on Stand Number 2189 Hobhouse Mutare, destroy the present development and remove itself from the land.
(b) Failure to do so, the applicant will have it removed at the respondent's costs.
(c) Respondent be and is hereby ordered to pay costs of suit on a higher scale"

Applicant applied for a set down date for the grating of the final order sought.

Background Facts.

On 16 February 1998 at Mutare a Memorandum of Agreement was entered between the parties relating to the participation of applicant private company in the planning, designing and disposition of a specified portion of Umtali Township particularised on a provisional sketch plan agreed upon by the parties. The copy of the Memorandum of Agreement was attached as Annexure "C" to applicant's papers. Applicant also attached Annexure "E", the schedule of

stands and agreed purchase prices which applicant contends it paid in full to the respondent. The original number of stands was 500. Among these stands is stand 2189. On 16 February 1998 the Acting Town Clerk for respondent wrote a letter to applicant accepting applicant's application for the housing scheme subject to terms and conditions set by respondent, central of which was s.152 of the Urban Councils Act, which required respondent to advertise the proposed alienation of the chosen piece of land to the public. Applicant contends in its papers that that process was done and Mr Edward Mapara made the approval by date stamping documents in applicant's possession.

The subject land was subsequently surveyed by Eastern Land Surveyors and a General Plan was attached by the applicant and is filed of record. Applicant has since *instructed Bere Brothers* Legal Practitioners to register transfer of the property from respondent to applicant. Applicant attached correspondences from *Bere Brothers* to respondent to this effect. Applicant has also attached receipts showing payment of rates to respondent.

On 12 January 2023 applicant's agents noted that respondent's employees were putting up structures at stand 2189. Respondent in its papers does not dispute that indeed from the papers filed a "box" has been constructed by respondent to construct a municipal health centre for Hobhouse 2 residents. A cabin, a fence and a foundation had been put at the site by respondent. Applicant took action immediately by filing an urgent chamber application under UCHA 2/23 which led to the granting of provisional order.

In opposing the application and later in its heads respondent's raise preliminary points. The first preliminary point raised by respondent was for this court to recuse itself primarily because it is the one which dealt with the urgent chamber application under UCHA 2/23 and granted an interim relief. Respondent's council used the word "*perception*" in that this court knows the background facts of the urgent court application and should leave the matter to be handled by another judge. No other reasons of bias, or compromise or unfairness nor prejudice were advanced by the respondent.

The second preliminary point was that the application was replete with material dispute of facts incapable of resolution on paper. One of the alleged dispute of fact being whether parties or more aptly the respondent complied with s. 152 of the urban councils Act [Chapter 29:15] for the alleged sale to be valid. The other dispute was whether the memorandum of Agreement was one of sale or a scheme for residential development. Respondent also added a third dispute of fact on whether applicant paid the purchase price or not otherwise to the

respondent, applicant is deliberately misleading the court by clinging to a document applicant knows clearly does not amount to an agreement of sale. It was further argued that it is not clear as to how many stands were subject of the agreement, were they 455 stands or 500 stands, of which size, 300-800m2 or bigger was stand 2189 Hobhouse 2, Mutare part of the immovable bought by applicant?

It was also respondent's objection in applicant attaching documents to its answering affidavit which did not form part of the application. Respondent prayed for the documents to be expunged from the record of proceedings.

In opposing the preliminary points applicant submitted that respondent did not satisfactorily outline reasons for the court's recusal. To applicant there must be finality to litigation and respondent's ground for seeking recusal were flimsy scanty and baseless. Applicant also denied the existence of any meaningful material dispute of facts which can not adequately be resolved on paper without the need for calling *viva voce* evidence. Applicant submitted that most facts placed or pleaded before the court are not in dispute. Respondent candidly acknowledged and conceded the existence of an extant agreement where applicant derives a clear right. Applicant added that it has fully paid the purchase price and awaits transfer papers. It also reiterated that respondent after disposing of the property unlawfully repossessed it and put-up structures on it. On the number of stands purchased, applicant is adamant that Annexure E provides all the answers, they are 500 and a general Plan DG2964 prepared by the Surveyor General clearly includes Stand 2189 Hobhouse 2, Mutare as property bought by applicant and awaiting the processing of title deeds.

On allegations that applicant procedurally and improperly attached fresh evidence to an answering affidavit, applicant contends that there is no new evidence smuggled in. All the documents were requested by the respondent through its affidavit placing onus on the applicant to prove the existence of a valid agreement of sale. The documents originate from the respondent's office and others were written to respondent by legal practitioners. Applicant prayed for the dismissal of the preliminary points.

Disposition of Points in Limine

Recusal

In the matter of *Mary Mupungu* v *Minister of Justice Legal and Parliamentary Affairs and 6 Others*; [1] MAKARAU JCC had this to say:

> "*The law of recusal is entrenched in this jurisdiction. It is settled. It has found expression in many words some of which reflect approval of decisions of other jurisdictions. It is the law against bias and where after investigation it is established that the judicial officer or decision maker was biased, the ensuring decision is afflicted and must be vacated. Thus, the law of recusal is an expression at a very general level of the principle that justice must not only be done but must appear to have been done. This is so because justice is rooted in confidence and confidence is destroyed when right thinking people go away thinking that the court was biased or conflicted.*
>
> *It is in keeping with this general principle at all times, courts must conduct their affairs in such a way that the court's open mindedness, it is impartially and fairness are manifest to all those who follow the proceedings and view the outcome."*

On p 11 of the same judgment the Learned Judge of the Constitutional Court further observed that:

> "It therefore stands to reason that the law of recusal and the guaranties in s 69(2) require some degree of reciprocity of fairness and good faith from the apprehensive litigant. In other words a litigant alleging a violation of his or her right to a fair trial must not have created or contributed to the dire circumstances that he or she finds himself in. put differently, the application for recusal must be brought on genuine grounds and must not be contrived merely for the purposes of embarrassing the court. But above all, the apprehensive litigant must bring the application for recusal on triable positions at law. The application must be based on sound and sustainable positions at both the adjectival and substantive law."

I totally subscribe to the wisdom of the learned Judge of the Constitutional Court, this is what respondent failed to clarify seeking this court's recusal. Respondent did not allege bias, partiality or possibility of unfair hearing. Counsel for respondent repeatedly stated that it was not alleging any of these but only that the court previously heard an urgent chamber application and granted an interim relief. I am not satisfied that respondent met the thresh-hold for an application for recusal and the application is dismissed.

Material disputes of facts

A material dispute of fact arises where the court dealing with the matter finds no ready answer to the dispute between or among the litigants and requires adduction of further evidence, whether oral or sworn[2].

[1] CCZ 7/11 at p 9 of the cyclostyled Judgment
[2] Masukusa v national Foods Ltd and Anor 1983 (1) ZLR 232(H)

Facts before the court call for resolution on whether a final order sought by applicant can be granted or discharged. The court has to look at the requirements of a final interdict, not ownership or validity of a contract. Looking at the facts provided by the parties I discern no facts which can be classified or categorised as being in dispute more relevantly in relation to the aspect of the nature the relief being sought by the applicant. Most facts are common cause that respondent took occupation of land which applicant believes it purchased and applicant wants respondent to be stopped from putting structures on that stand. I will dismiss the point *in limine*.

The applicant does not dispute that there are annexures to its answering affidavit. Those documents cannot be introduced through an answering affidavit[3]. Respondent's point in limine has merit and its upheld.

Disposition on Merits

Mr *A Mutungura* for applicant and Mr *GRJ Sithole* for respondent extensively and capably submitted on the requirements of a final interdict and provided case laws on that[4] and these are:

a) *A clear right which must be established on a balance of probabilities.*
b) *Irreparable injury actually committed or reasonably apprehended; and*
c) *The absence of a similar protection by ant other remedy.*

On assessing applicant's case it is clear that applicant has established all the essential elements for a final interdict. Respondent sold the piece of land to applicant. Respondent's agents signed the memorandum of Agreement and the then Legal Officer Mr Edward Mapara certified and appended the signature to the contract in accordance to a mandate granted to him by the respondent and his signature signifies that the contract had met the requirements of s 152 of the Urban Councils Act. Respondent cannot be allowed to approbate and reprobate on a contract it signed and approved. It is bound by that agreement, and once the agreement is binding on respondent, a clear right is established on the part of the applicant. The memorandum of agreement to me is valid and enforceable at law and on a balance of probabilities applicant has managed to establish a clear right.

[3] Njanke Construction (Pvt) Ltd v Lafarge Cement Zimbabwe Ltd HH 24-22
[4] Zesa Stass pension Fund v Clifford Mushambadzi

After having sold the land, respondent retook occupation, it did so without cancelling the agreement, nor informing applicant. The reoccupation to me is unlawful and needs sanction by the courts. Respondent proceeded to put up structures, clearly that action constitutes an injury on the applicant. Applicant is not expected to stand by allowing respondent to put up structures on applicant's place. Applicant does not have any similar protection by another remedy. It needs to be protected by law against any impostor or intruder. I dismiss respondent's contention to offer an alternative piece of land. Applicant ought to succeed.

Applicant applied for an amendment of the final order sought by removing clauses to the effect of respondent removing its structures from stand 2189 at its costs. Respondent did not oppose the amendment.

Accordingly the following order is granted.

"1 *Respondent be and is hereby interdicted from building structures on stand No. 2189 Hobhouse 2 Mutare.*

2. Respondent be and is hereby ordered to pay applicant's costs on party and party basis."

Mutungura & Partners, applicant's legal practitioners
Maunga, Maanda & Associates, respondent's legal practitioners