HALOPACT ENTERPRISES (PVT) LTD
versus
CHINHOYI MUNICIPALITY

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 17 and 20 January 2020 & 12 February 2020

Urgent Chamber Application

N Mashizha, for the applicant
C Warara, for the respondent

CHITAPI J: The applicant prays for the following relief as set out in the amended draft order.

WHEREUPON after reading documents filed of record and hearing counsel, IT IS ORDERED THAT:

1. The respondent and all those claiming occupation and ownership through it be and are hereby interdicted from developing, disposing of or otherwise dealing with the land known as Stand number 16051 and 16057 Chinhoyi or any allocated stands developed from the layout plan, pending the determination of the arbitration proceedings and the registration of the arbitral award.
2. The respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.
3. Leave is granted to the applicant's legal practitioners to serve this order on the respondents.

In the cause of the hearing it emerged that as far as the process of arbitration as referred to in para 1 of the draft order concerned, it could not be said that there were arbitration proceedings awaiting determination since the parties had not even commenced the proceedings save that the applicant had written to the Commercial Arbitration referring the dispute between

the parties for arbitration. No arbitrator had been agreed between the parties nor appointed so that it would be a misnomer for the applicant to ask for the grant of an order "pending the determination of the arbitration proceedings and the registration of the arbitral award." A court does not grant a prospective order or one based on conjecture. Both counsel however correctly agreed that in the event that the application succeeded, judge could grant the order as varied as considered fit.

The applicant is a registered company operating in Zimbabwe. The respondent is a municipality constituted in terms of the Urban Councils Act [*Chapter 29:15*]. By two separate written agreements of sale dated 5 November 2008, the respondent sold to the applicant two immovable unserviced properties described respectively as stand 16051 measuring 40 hectares and 16057 measuring 13 hectares. It is common cause that the purchase price was fully discharged on both sales. The applicant has not taken transfer. The dispute regarding the failed or delayed transfer culminated *inter-alia* in the applicant instituting court proceedings in case No. HC 2218/10 which the respondent did not defend. The respondent was ordered by order of this court dated 7 July 2010 to furnish the applicant's legal practitioners with the original title deeds for the two properties. The applicant averred that the court order has not been complied. The respondent in response to the allegation that transfer is outstanding on account of its failure or refusal to effect the transfer raised a curious argument that the immovable properties in question were a public asset in terms of which it was necessary for certain processes to be followed. For example, the respondent averred that the applicant was supposed to make development on the properties before transfer could be conveyed to it. I am not called upon to determine the issue. My interest in that regard arose from the need to know whether the court order in case No. HC 2218/10 was complied with. It was not. The respondent did not explain why it did not comply with a court order. What became clear however was that the dispute between the parties in regard to the properties is real and not fanciful.

Despite it being clear as evidenced by exchange of correspondence threatening cancellations on the part of the respondent and opposition to the mooted cancellations by the respondent, the respondent raised a point *in limine* that the matter was not urgent. After hearing submissions from counsel, I dismissed the point *in limine* and directed that there be arguments on the merits. The grounds raised in the point *in limine* that there was no urgency and that the applicant did not act for two weeks after it became aware of the violation of its rights is

unmerited. The applicant averred that it is in occupation of the properties in question. The parties were in the middle of arguments as evidenced by correspondence on the threatened cancellation of the agreements by the respondents through its legal practitioners. The applicant advised that it would resist the cancellation and declared a dispute which in terms of the sale agreements must be determined through arbitration. On 18 November, 2019 the applicant's legal practitioners escalated the dispute to the Commercial Arbitration Centre in Harare. On 2 January, 2020 the applicant served a letter dated 26 November, 2019 from the Commercial Arbitration Centre upon the respondent. In the letter the Commercial Arbitration Centre suggested 5 arbitrators available for the parties to choose from. It is therefore undisputed that the applicant escalated the dispute as aforesaid.

Mr *Warara* for the respondent argued that the applicant acted behind the respondent's back in escalating the dispute to the Commercial Arbitration Centre. He also argued that the applicant was in the habit of circumventing the respondent's legal practitioners in that it would direct its correspondence to the respondent instead of to his firm which would be seized with the matters. As such Mr *Warara* argued that the applicant's conduct was not only unprofessional but that it created a situation where a matter which would otherwise not have found its way to court was not subjected to parties own attempt at resolution before commencing litigation. Mr Mashizha whilst admitting that the applicant had indeed directed its correspondence to the respondent on matters raised by letter written by the respondent's legal practitioners argued that the applicant was not a firm of legal practitioners and its officers were laymen who did not appreciate that it was improper to address the respondent directly. I am persuaded to accept Mr Mashizha's submission that there was no prejudice suffered by the respondent because it would still have referred the replies to its legal practitioners.

The applicant's contention was that despite the existence of the dispute over the property its legal officer visited the properties on 2 January, 2020 for an inspection of the sites. The officer and her team noted some pegging which had not been done by the applicant. On enquiry of occupants of an adjourning property, the legal officer gathered that the respondent was distributing pieces of land on the properties to its employees and the employees were selling the land to willing purchasers. The legal officer was referred to as Mrs Machaya who works for the respondent. Mrs Machaya was said to be selling 3 stands.

On the same date, 2 January 2020, the legal officer wrote a letter to the respondent protesting the respondent's alleged sale and pegging of the land in dispute. In the letter the applicant indicated that it had confirmed on enquiry at the offices of the respondent that the respondent was selling parcels of the land on a willing buyer and willing seller basis purporting that it, the respondent, was the owner of the land. The respondent did not in its opposing affidavit deny the averments made by the applicant's legal officer. On the contrary the tone of the respondent's affidavit was that it had terminated the agreement and now owned the land which it was entitled to resale. The respondent further averred in paragraph 6 of the opposing affidavit that:

> "… the land belongs to the respondent and has every right to deal with the land in any way they deem necessary and the applicant has no right to interdict the respondent since the applicant lost rights to the land when they failed to develop the land as per agreement."

The respondent also averred that it had repossessed the land upon termination of the agreement because the applicant had not prepared sub divisional diagrams and sold stands to the public as expected of it. It further averred that arbitration was not necessary because the termination of the agreement meant that the respondent could deal with the land as it wished. In paragraph 8.1 of the opposing affidavit the respondent made a clear admission that it was selling the land when it stated:

> "It is worth mentioning that the transaction was not a sale but an allocation of land for the applicant to develop for public benefit. However, from the time the applicant acquired the land up to now they had done absolutely nothing to develop the land except for the layout plan. Now that the respondent has terminated the agreement and is now selling the land to the public that is when the applicant wants to assert rights over land which it has no authority over...." (own underlining)

Mr *Warara* found himself in an invidious position of having to advance a lost cause when he contradicted the clear admission that the respondent was selling the land by submitting to the contrary and stating that only a surveyor had been assigned by the respondent to carry out survey work as the land in issue fell within a farm. Even then, the applicant was not advised of survey work to be carried out on the farm nor the surveyors' deployment or the surveys terms of reference. The clear impression I got from a reading of the papers and arguments advanced by the respondent's counsel on urgency was that the respondent prided itself with having elbowed out the applicant and was dealing and intended to continue to deal with the land under dispute in a manner that it wished.

The applicant having protested the respondent's purported cancellation of the agreement and sale of stands by letter dated 2 January, 2020 in which it had given the respondent until 6 January, 2020 to make an undertaking of the cessation of the land sales, followed up the protection of its rights by filing this application on 13 January, 2020. The respondent submitted that the applicant did not act with urgency from in that it waited for two weeks from 2 January, 2020 until 13 January, 2020 before filing this application. It was also contended that the applicant did not come to court in May, 2019 following the letter of cancellation dated 8 May, 2019 already referred. It is of course untrue to say that the applicant sat on its rights after receiving the letter dated 8 May, 2019 because it addressed the letter albeit through the respondent directly as already alluded to hereinabove. It is also untrue to say that the applicant did nothing from 2 January 2020 to 13 January 2020 because applicant protested the invasion of its rights by letter of 2 January, 2020 and called for a commitment of cessation of the violation of its rights failing which it would petition the court. Such conduct is wholly inconsistent with conduct of an unconcerned person. The fact that an injured person first approached the wrong doer in an attempt to amicably resolve a dispute before rushing to court should be encouraged and not be construed as a compromise on one's right to seek urgent relief. The circumstances of each case are a determinant on whether the court can hold that in any given situation the fact that the applicant has not immediately come to court should defeat the urgency of the matter.

It was noted by MATHONSI J (as he then was) in *Telecel Zimbabwe (Pvt) Ltd* v *Potraz & Ors 2015* (1) ZLR 651 (H) that it has become fashionable for legal practitioners to raise points in *limine* on urgency in applications even where it was clear that the objection was not meritorious. It was stated by the learned judge that courts spend a lot of time determining points in *limine* which do not have the remotest chance of success whilst avoiding to deal with the substance of the application. The learned judge emphasized that a preliminary point should not be taken as an exercise of ingenuity by counsel to circumvent arguing a purely defenceless position of the respondent. A point in *limine* should be taken where it has merit and secondly where its determination in the respondent's favour will likely dispose of the disputes, I would say, wholly or in part. The learned judge further warned that since points *in limine* are invariably raised on points of law and procedure, they are the product of creativity, (I would say, misdirected inventiveness at times), where there have been raised *mala fide*, this would

amount to abuse of court processes and a legal practitioner who raises the preliminary point out of mischief may be visited with a costs order *debonis propriis*.

The point *in limine* on urgency raised in this matter was raised as a perfunctory hunch or intuition where clearly the point had no merit. Mr *Warara* glossed over it I sensed that there was no confidence in his submission on the urgency of the application. There could be no doubt that the respondent adopted an overbearing and domineering stance that it had cancelled the sale agreement and was at liberty to do as it wished with the land in question and tacitly admitted selling parts of it. The respondent in the whole saga assumed to itself the powers of judge, jury and executioner unilaterally. It purported to terminate the agreement unilaterally without taking steps to have the termination confirmed, took over the land in dispute and commenced to resale it and did not even comply with the previous court order to avail title deeds in order to facilitate transfer. I exercised restraint in that this could have been a fitting matter to call the respondent's legal practitioner to account for the glaringly ill-conceived point *in limine* taken on urgency in line with the warning given by MATHONSI J in the *Telecel Zimbabwe* case (*supra).*

In the main, the respondent again submitted a flimsy argument that it employed a surveyor to carry out survey work on the farm on which the property in dispute is situate. The fallacy of the argument was demonstrated by the fact that the applicant's papers had attached to them the surveyor General's surveyed diagrams done in July, 2009. The respondent strenuously argued that the applicant was under obligation in terms of the agreements of sale to develop and subdivide and sell the stands to the public hence, the applicant's failure to do so had caused the respondent to terminate the agreement and repossess the land. The applicant however, still awaits title deeds. Without title, it would be foolhardy of any land developer to commence subdivisions and sales of land whose title cannot be conveyed to the would be purchasers. It offends the property laws of the county to just parcel out land through sales where the purchaser cannot get registered title. The respondent was coy on the issue of title deeds. The failure to address the issue did not escape my scrutiny in that I had to take notice that the respondent did not comply with a standing court order as already alluded to. In fact, the respondent stated as follows in para 4 of the opposing affidavit-

> "…claiming title before doing any developments shows that the applicant never intended to abide by the agreements in the first place. The applicant cannot use a court order to obtain title when the applicant itself has not met the terms and condition specified in the agreement……"

The sale agreements in clause 9 set out developmental stages and the time spans for doing them by the applicant as purchase. However, clause 5 in both agreements provided as follows:

> "5. Registration of transfer of the property may be obtained by the Purchaser immediately as full purchase price has been paid in full. Accordingly, council tenders transfer of the same."

The respondent whilst arguing that the applicant did not develop the property for 10 years did not itself account for its failure to transfer the property. Mr *Warara* argued that rates were due before transfer could be effected. The submission made was again a feeble attempt to clutch at straw because in terms of clauses 4 and 7 of the agreements, rates would become the responsibility of the applicant after transfer and there was a waiver of the same to facilitate early transfer which would in turn facilitate the ease of servicing the properties.

Mr *Mashizha* submitted that the applicants' case was simply that it needed the court to grant an interdict against the respondent from alienating the land or interfering with the applicant's rights therein. It is however necessary to consider the background I have alluded to because where the applicant applies for a final interdict, it should establish a clear right. The requirements for a final interdict are agreed to be as stated by ZIYAMBI JA in *Zesa Staff Pension Fund* v *Mushambadzi* SC 57/02 being

(a) A clear right

(b) Irreparable harm actually committed or reasonably apprehended; and

(c) The absence of an alternative remedy.

In the case *Fred Marere* v *T Mukwazi* HH 462/19 Zhou J after considering authorities on final interdicts requirements states on p 2 of the cyclostyled judgment as follows:

> "the authorities show that the word "clear" in the context of the interdict does not really qualify the right itself but speaks to the extent to which the right has been proved by evidence. Whether there is a right is a question of substantive law whether that right is clearly established is a matter of evidence. What is required where a final interdict is sought is that the right must be established clearly (as opposed to it being prima facie established on a balance of probabilities."

In *casu*, the applicant indisputably purchased the two pieces of land in dispute from the respondent and paid the full purchase price. The right to the land is therefore clearly established. The respondent purported to have cancelled the agreement. Since the purported cancellation is disputed by the applicant, until its legality is determined by a competent lawful order, the termination cannot be said to be effective. The respondent admitted to have engaged in what is clearly a hostile takeover of the properties and commenced to sell parts thereof on

the basis that it can do as it wishes since it has repossessed the land. There was no allegation that the proceeds of the sales were safeguarded and this justifies the applicant to allege irreparable harm actually committed or apprehended. The respondent did not suggest any other remedy which would safeguard the right of the applicant. It is the duty of the court to safeguard the sanctity of contracts. The integrity of commercial transactions should be jealously guarded by the courts lest the country loses investments on fears that commercially acquired rights are not protected by the law and the courts.

The applicants case was clearly urgent as the respondent took the law into its own hands to the prejudice not just of the applicant but of desperate home seeking who stand to lose out in purchasing disputed land now being offered for sale by the respondent. It is hoped that the respondent and the applicant resolve this matter amicably so that the much needed development envisaged by the agreements is not scuttled by selfish and/or partisan interest.

Mr *Mashizha* abandoned the applicant's prayer for costs on the legal practitioner and client scale and insisted on costs on the ordinary scale. I am satisfied that the applicant is entitled to its costs of suit. The respondent by its admissions and conduct has purported to cancel the sale agreements and to repossess the land. It has made it clear that nothing stops it from dealing with the land in the manner it chooses. The applicant in such circumstances can only look to the court for relief whose entitlement to which it has adequately established. A final interdict will therefore issue on the following terms:

IT IS ORDERED THAT A FINAL INTERDICT ISSUE AS FOLLOWS:

1. The respondent and any other person natural or juristic claiming occupation, ownership or rights to occupation or ownership through the respondent is interdicted from occupying, developing, disposing or otherwise dealing in any manner that infringes the applicant's rights under the agreements of sale of stands 16051 and 16057 between the applicant and the respondent dated 5 November, 2008 without a valid court order.
2. The respondent shall pay the costs of this application.

Mashizha & Associates, applicants' legal practitioners
Warara & Associates, respondent's legal practitioners