LIFESTYLE HOLDINGS PRIVATE LIMITED
and
RUFARO MARKETING PRIVATE LIMITED
versus
EMMANUEL MAHACHI

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 30 January 2020 & 26 February 2020

Opposed Application – Declaratur

W Musengwa, for the applicant
F G Gijima, for the respondent

CHAREWA J: This is an application for confirmation of a provisional order granted on 19 February 2019 for a *declaratur* and consequential relief pursuant to a lease agreement wherein the applicant seeks the following relief:

> "1. The lease agreement in respect of Vito Complex entered into by the 1st Applicant and 2nd Applicant is valid until 31 December 2022, or as extended to a later period by the parties in terms of the Memorandum of Agreement of Lease entered into between the parties in November 2011 is a valid and has not been set aside (sic).
> 2. Consequently, the Respondent does not have any authority to sublease Vito Complex to construct and build any tuck-shops, to modify or demolish the existing and approved buildings into tuck-shops in Vito Complex.
> 3. The Respondent and all those acting in terms of is (sic) instructions, be and are hereby ordered to demolish all structures that were erected on or after the 8th February 2019 within twenty-four (24) hours of service of this order, failure to (sic) which the Applicants, with the assistance of the City of Harare, be authorised to demolish such illegal structures erected on or after the 8th February 2019.
> 4. The Respondent shall pay costs of suit."

Facts

Second applicant is the owner of Vito Complex. The complex is immovable property comprising a community beer hall, several small buildings ancillary to the running of a beer hall, toilets and storerooms.

First applicant was previously known as TN Holdings Limited under that name. It entered into a lease agreement with second applicant with effect 6th November 2011 for the lease of Vito Complex until 31 December 2022, subject to twenty-four months' notice thereafter of intention to terminate the lease. During the notice period first applicant has the right to remain in occupation until 31 December 2024.

First applicant reserved for its own use the main building (the beer hall) and sublet to other persons, including respondent, the smaller units that it was not using. The sublease to respondent was terminated in June 2018. However, the respondent has remained in occupation.

As a result of disputes relating to the relationship between first applicant and respondent several applications have been filed wherein the first applicant variously obtained a peace order against the respondent, as well as a provisional order for an interdict against demolition and construction at the complex by the respondent.

Parties' submissions

Applicant submits that because of its lease agreement with second applicant, it has a clear right to bring this application to forestall the irremediable harm that will befall it if respondent is allowed to continue with demolitions of toilets and other structures and to construct and let out tuckshops. In particular, the demolition of toilets will create health hazards. Therefore, it is only prudent that it should protect its rights flowing from the lease agreement with an order such as it seeks. This is more so since, even if there was a valid sublease or joint venture, neither of the applicants have authorised respondent to carry out any demolitions or construction.

In any event, applicant submits, there is no lease agreement any more between it and respondent nor is there a joint venture, it having been entered into in 2013 and lapsed in 2014 (see p 74-88 of the record). Therefore, the structures being constructed by respondent are not part of any joint venture. Neither is the destruction of toilets and the building of tuckshop structures part of the sub-lease agreement since they have been done after the termination of both the joint venture and the lease agreement between first applicant and respondent. Further, in terms of its own lease agreement with second applicant, first applicant is liable for the risk to the destruction of toilets and ablution system, which destruction second applicant has not sanctioned. Consequently, first applicant's right of occupation of Vito Complex is threatened by respondent's conduct. Therefore, the only remedy for first applicant is a declaration of its

rights in terms of its lease agreement with second respondent congruent with an interdict to stop respondent from affecting those rights.

Finally, first applicant submits that its claim should be allowed with an order for costs on the higher scale as respondent has approached the court with dirty hands, having failed to comply with the provisional order of 19 February 2019. In particular, respondent's insistence on relying on a joint venture which clearly no longer exists and causing unnecessary litigation should be sanctioned with an order for higher costs.

On its part, the respondent argues that he is not responsible for the demolitions or construction, but first applicant itself is. To support this contention, he referred the court to sub-lease agreements between first applicant and other persons and receipts of these third parties rental payments to first applicant (see page 190-219 of the record).

He further submits that his joint venture with first applicant still subsists. However in the next breath he submits that the joint venture was indeed terminated but that first applicant did nothing about it and has now launched these proceedings to hound him out of the premises. In addition, he submits that the multiplicity of applications against him by first applicant are intended to harass him as he is the only sub-lessee being sued when there is no evidence of wrongdoing on his part. He admits that he did destroy some toilets but that these were decommissioned toilets: four functional ones remain.

And in so far as the *declaratur* is concerned, since he is not party to the lease agreement giving first applicant his rights, such a *declaratur* has nothing to do with him. In the result, he should not have to pay higher costs, but the first applicant, as it is the author of its own misfortune.

Analysis

I do not intend to unnecessarily obfuscate matters by taking on board respondent's submissions relating to previous litigation between the parties. First of all, Magistrate's Court Case number B1139/18 was a personal matter for a peace order between Miriam Chimutsa and defendant and is not relevant to this case. Secondly Magistrate's Court Case number 25504/18 was a claim for vacant possession and ejectment of respondent, payment of arrear rentals and holding over damages consequent upon the termination of the respondent's lease agreement. And HC 10159/18 was a claim for a return of first applicant's assets handed into respondent's safekeeping. This claim being for a declaration of first applicant's rights pursuant to its lease

agreement with second plaintiff and consequential interdict, the previous proceedings are in my view irrelevant.

Nor do I find it relevant that applicant had sub-lease agreements with the persons mentioned in respondent's opposing affidavit. This is not something denied by the applicant. Nor does applicant deny receiving rent from its sub-tenants. That is not its cause of action. However, what matters is that these sub-leases are not relevant to the disposal of this matter because it is clear from the facts that they were entered into before the infringements alleged to have been committed by the respondent occurred. The sub-leases are dated October and November 2018. The cause of action for this application are demolitions and constructions which first applicant found in progress on 8 February 2019. Even the rental receipts by the sub-lessees pre-date the infringements complained of.

What is important and relevant is that this court, *prima facie*, found respondent to be responsible for demolitions and constructions and issued a provisional order against him, on 19 February 2020. This provisional order, which has not been set aside, interdicts respondent, and all those acting through him from demolishing toilets and constructing tuck-shops without approved plans by the planning authority, pending the return date. Nothing in the record shows that respondent complied with this order. On the contrary, respondent argues that first applicant is enjoying the proceeds of those illegal structures and should therefore not be granted the relief it seeks. In addition he admits having demolished what he terms "decommissioned" toilets, thus supporting the contention that he is in fact carrying out the acts complained of, not the first applicant. I therefore find respondent's conduct untenable, and that in fact he has approached this court with dirty hands, having decided not to comply with its order.

Further, respondent cannot approbate and reprobate. In one breath, he claims that his joint venture with first applicant still subsists, and in the next, he submits it was indeed terminated. The joint venture agreement had a tenure of twelve months: from 2013 to 2014. No evidence of its renewal or extension has been produced. *Ego*, it has lapsed, and cannot be a basis for respondent's authority to demolish or construct anything. In any case, any demolition or construction must be in terms of the directions of the town planning authority. Respondent has not produced any such planning permission. In any event, respondent's rights, as a sub-lessee cannot be greater than those of the leaseholder. The lease agreement between the first applicant and second applicant does not allow for any demolition or construction without the lessor's approval in writing, which is not evident in the record.

Further, apart from the authority he might have had, from the lapsed joint venture agreement, respondent has not put before the court any evidence that, according to his own sub-lease with first applicant he is entitled, or has authority, to sublet the premises first applicant sublet to him, or to make any changes to the premises through demolitions and new constructions. In the premises, whatever constructions he has made must be demolished, and he must make good the demolitions he carried out without authority. I have already noted, in particular, that respondent admitted to demolishing four toilets.

Finally, no submissions have been made by the respondent regarding the validity of the lease agreement between first applicant and second applicant. Obviously, if respondent admits that there was no valid lease between the applicants, it means his own tenure is invalid, given that he is first applicant's sub-lessee. And if he agrees that the lease agreement is valid, then he has no leg to stand on, as he cannot have greater rights than first applicant. Therefore, since the lease agreement between the applicants has not been disputed and its tenure runs until 31 December 2022, and conceivably, even up to 31 December 2024, that lease agreement is valid as it has not been set aside. Consequently, first applicant is entitled to all the rights flowing from that lease agreement.

Costs

I cannot but agree with first applicant that this is a matter where a litigant should be visited with an order for higher costs to safeguard the integrity of judicial processes and orders, as well as to ensure that parties do not needlessly congest the courts with matters relying on ill-founded premises. Being a sub-lessee, respondent ought to have been aware that his rights are intrinsically tied to those of first applicant and cannot certainly be greater, and that basing his defence on a lapsed joint venture agreement, in which he approbates and reprobates, is an exercise in futility.

Disposition

In the premises, it be and is hereby ordered that the provisional order dated 19 February 2019 is confirmed and the following consequential relief is granted:

1. It is declared that the lease agreement in respect of Vito Complex entered into by the first and second applicant is valid until 31 December 2022, or as extended to 31 December 2024 by the parties in terms of the Memorandum of Agreement of Lease entered into between the applicants in November 2011.

2. It is declared that the respondent does not have any authority to sub-lease Vito Complex, construct and build tuck-shops, modify or demolish the existing and approved buildings comprising Vito Complex.
3. Consequently, the respondent and all those acting through him or under his instructions are ordered to demolish all structures that were erected on or after 8 February 2019 within twenty-four (24) hours of this order failing which, the applicants, with the assistance of the City of Harare are authorised to demolish such illegal structures.
4. The respondent shall pay costs of suit on the scale of legal practitioner and client.

Messrs Mtetwa & Nyambirai, applicant's legal practitioners
Messrs F G Gijima & Associates, respondent's legal practitioners