LOMABIL INVESTMENTS
versus
KUDZAISHE CRAIG MAWENI
and
FELIX MUNYARADZI
and
DELATFIN INVESTMENTS (PRIVATE)LIMITED
and
THE REGISTRAR OF DEEDS, HARARE

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 23 and 29 June, 2022

Urgent Chamber Application

M M Ushe, for the applicants
N A L Mupura, for the 1st respondent
C Warara, for the 2nd and 3rd respondents
No appearance for the 4th respondent

BACHI-MZAWAZI J**:** This is a contested urgent chamber application for an interdict brought by the applicant against the respondents. The provisional order sought is to the effect that the first respondent, his agents, employees, proxies or any persons acting on his instructions be ordered forthwith to stop making developments of any nature on property stand number 441 Haydon Township also known as number 441 Haydon farm, Standton, Harare situated in Salisbury district, measuring 5679 square metres under deed and transfer number 4728/14 pending the determination and finalization of case HC 3961/22. In addition, they want all of the respondents interdicted from selling, donating, alienating or transfer of title in the said property until the finalization of case HC 3961/22.

Brief Facts

The common cause facts are that the third respondent, a duly incorporated company acting through one of its directors, the second respondent on different dates, purchase prices and agreements of sale, sold an industrial stand 441 Haydon Township to the applicant and the first respondent. Applicant, also a duly registered company in terms of the laws of Zimbabwe, learnt of the sale of the same property sometime in March 2022. It investigated and traced the identity of the first respondent and informed him of their existing rights and interests in the said property. On the 10th of June 2022, applicant discovered that the second respondent had not taken heed of their warning and was

constructing a permanent structure on the same property, prompting them to launch this application simultaneously with that in HC 3691/22.

The applicant's case

Applicant submits that, it purchased and took vacant possession and occupation of the property in issue upon the payment of a deposit of US$25,000,3 June 2015 at the conclusion of the agreement of sale. The full purchase was price of $28,395.00 (twenty-eight thousand three hundred and ninety- five united states dollars was the agreed price) but the balance was eventually paid in terms of the said agreement. A copy of the agreement of sale and the title deed of the property was attached as evidence to that effect. In that regard the applicants urged the court to grant them the relief they sought as they claim that they had satisfied both the requirements of urgency and an interdict.

The respondents case

The first respondent does not deny the averments by the applicant but claims that they also purchased the same property on the 13th of January 2022, for a total sum of US159,012. They indicated that, they in turn got vacant possession upon paying the required deposit at the signing of the agreement of sale. There is discord however, between the applicant and the second and third respondents. The second and third respondents are not denying selling the applicant not only one but two stands and receiving the sum of US$50.000.00 . They are saying that it is absurd to sale an industrial stand for an amount as little as that paid for by the applicants. They state that the amount paid by the applicants was a deposit for one stand 481 but stand 441 Haydon farm, Harare, was never paid for. The second and third respondents posits that they had written a letter on July 2021 cancelling the sale of stand 441 Haydon which was received but not respondent to by the applicants. It is their submission that on the merits the applicant no longer has a *prima facie* right to the said stand and has no *prima facie* case. However, the respondent raised several *points in limine* and prayed for the dismissal of the applicant's case on the basis of any one of them.

Points *in limine*

The first respondent challenged the *locus standi* of the applicant alleging that the deponent of the founding affidavit was not authorized to act on behalf of the company as he did not attach a board resolution as is legally required. The applicants stated that because of the urgency of the matter they could not file one but it could be filed at a later stage if need be. They argued that, in any event the second and third respondents who are well acquainted to both the deponent and the applicant have not raised the issue of *locus standi* and in turn they also fall foul to the same omission as they did not file a board resolution. That being the case, relying in the dicta and sentiments in the B*each Consultancy (Private) Limited* v *Obert Makana and The Sheriff* v *ZWHHC 69/2021,* against the

bedrock of *Elkana Dube* v *Premier Service Aid & Anor SC 73/19,* as an exception to the general rule based on the circumstances of the case and interests of justice, I dismissed this *point on limine*.

The second preliminary point was that of citing the founder of and representative of the trust instead of the trust itself. I am swayed by the applicant's submissions that after a diligent search they only had knowledge of the purchase by the first respondent in his personal capacity. They learnt of the issue of a Trust, for the first time in these proceedings and accordingly ask for this court's indulgence. I again dismissed this objection in line with the *obiter dictum* in, *Musemwa* v *The Muvuri Investment Trust,* by DUBE J HH-1361/2016.

I find nothing turning on the rest of the preliminary points particularly the point that the applicant did not initially inform the court that they had purchased two stands. The applicants did mention the same in their oral submissions as well as their heads of argument. They even produced a receipt reflecting the payment of the US$50 000.00 deposit. I dismissed this point as well.

Issues

Given the above submissions the two issues for consideration are:

. Whether or not the application is urgent? and,

. Whether or not the applicant has made a case for an interdict?

Whether or not the matter is urgent?

Principles governing what constitutes urgency are well established. See the oft quoted cases of *Document Support Centre* v *Mapuvire,* 2006 (2)ZLR 240 at 244 C-D and *Kuvarega* v *Registrar General and Anor* 1998 (1) 2LR 188. The common thread resonating in the above two *locus classicus* cases above, in summation is that, what determines urgency is firstly, the action taken by the party when the need to act arose. Whether it is consistent with the urgency the situation demands. Secondly, if the court fails to act there and then it will be a futile exercise to act at any other time.

Applying the law to the facts, the applicant postulates that the cause of action arose upon its discovery of the permanent structures being erected by the first respondent on its property on the 10 June 2022. They state that they acted promptly by launching this application alongside that challenging ownership of the property in question, in case HC 3691/22 on the 15th of June 2022. On that basis they assert that they did not sit and wait for the day of reckoning. They countered that there was nothing prompting urgent action prior to the 10th of June 2022.

The respondents counterargued that there is no urgency as the cause of action arose, firstly, in March 2020, when the applicant first got wind of the sale and secondly, on the 6th of July 2021, when they wrote to the applicants notifying them that they had cancelled the sale in respect to property

stand number 441 Sandton Park, Haydon farm, Harare, as well as from other subsequent letters which they claim were all served to and received by the applicants.

I agree with the applicant's submissions that the cause of action arose upon discovery of the constructions that were being made by the respondents on the 10th of June 2022. There was no rebuttal to the applicants' averments on those events discovered on the 10th of June 22. That being so I find that the applicants acted with the urgency the situation demanded. Consequently, what is left for determination is the second issue.

Whether or not the applicants have made a case for the relief sought?

The fundamentals of an interdict have been spelt out time and again in several cases. The *locus classicus*, being *Setlegelo* v *Setlegelo* 1914AD. In the Supreme court decision, *Airfield Investment (Pvt) Ltd* v *Minister of Lands, Agriculture and Rural Settlement and other*s 2004(1) ZLR511(S) at 517, MALABA JA (as he then was) outlined the requirements of an interdict citing the case of *LF Boshoff Investments* (Pvt*) Ltd v Cape Town Municipality* 1969 (2) SA (C) at 267 A-F wherein CORBETT J (as he then was) stated that an applicant for such a relief must show:

a. that the right which is the subject matter of the main action and which he seeks to protect by means of an interim relief is clear, if not clear, is prima facie established though open to some doubt.
b. that, if the right is only prima facie there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right
c. and the balance of convenience favours the granting of interim relief and
d. that the applicant has no other satisfactory remedy.

Essentially, a provisional order or interim interdict is as the name implies an interim or temporary relief sought to arrest, suspend, stop, preserve, bar, intercept and or direct certain actions, conduct or situations before the resolution of the main dispute or pending the finalisation or determination of the main source of conflict. See *Gwarada* v *Johnson & Ors* HH 91/2009.

On the merits, applicants contend that by virtue of their attached agreement of sale which was not effectively challenged by the respondents and is extant, they have established the first essential element of the relief sought in that they do not have a clear right.

I do not agree with the argument by the second and third respondent's counsel that the agreement of sale pertaining to the stand in question had been cancelled by the letter of the 6 July, 2021, for several reasons. Firstly, they told this court that of the two stands purchased by the applicant,

only stand 481 had been paid a deposit for. They state that the deposit was US$50 000.00. However, what they failed to place before the court are the two or one of the agreements of sale of the said properties showing the actual purchase price of each.

Secondly, they failed to explain why they would then terminate an agreement of sale of a property that never came into being in the first place. One wonders why they would attach agreements of sale between the first respondent and themselves and another one bearing names of people not part to this suit but fail to file duplicate copies of those between themselves and the applicant.

Further, on analysis of the agreements of sale of the second and third respondents with the applicant and the first respondent, there is an identical clause which stipulates the payment of substantial amounts as deposit to be paid at the signing of the same and conclusion of the sale. Following that, how then would they have sold stand 441 Haydon farm to the applicants without receiving any deposit? That would have been outside the norm. In the absence of those agreements indicating that the US$50,000.00 was for one stand and not two, then I find that the second and third respondent's argument improbable.

In turn, I make a finding that there was no cancellation of a non- existent sale. What this means is that the applicant's challenge that the stamps on the letters inclusive of that of the 6th of July 2021, purporting to be of the applicant's was forged is sustainable. Legally, *Gwarada* v *Johnson, supr*a, is authority that an agreement of sale is not lawfully terminated without first giving notice of intention to terminate and communicating of the same. In contradistinction, the agreement of sale of May 2015, placed before the court by the applicants, filed of record, and not disputed by the respondents, reflects the stand that was sold as property stand number, 441, Haydon farm. In part, it reads as follows:

Clause 2: the property is being sold for USD$28 395-00 (Twenty-eight thousand three hundred and ninety-five, United States dollars), at the rate of USD$5.00 per square metre, paid as follows:

Clause 2.1: A deposit of US$25 000-00 (Twenty-five thousand United states dollars) to be paid in cash, directly to the seller, upon signing this agreement.

Clause 2.2: The balance of US3 395-00 to be paid to the seller in four instalments beginning the 29th of February 2015 and at the end of each successive month, with the last instalment being paid on or before the 31st of May 2015.

I have no reason not to find the applicant's version more probable in the face of clause two of their agreement of sale. Thus, the applicant has succeeded in the first hurdle of a *prima facie* right. They have rights and interest emanating from their agreement of sale of May 2015 until proven otherwise.

I am also swayed by their contention that the double sale itself and the move by the first respondent of the 10th of June 2022 to construct on a contentious piece of property they have rights and interests over, even after being strongly advised of the controversy surrounding the property, is direct and continuous injury.

I find no merit in the respondent's argument that, because they sold the same stand in 2022, for US28.00 per square metre, then it is absurd for them to have sold the same to the applicants for US$5.00.00 per square metre in 2015. This only serve to illustrate the *mala fides* and greed of the respondents as is common cause that the value of land appreciates over time and not depreciate. In that regard, the balance of convenience favours the applicant as the first purchaser with an extant agreement of sale.

I am also not persuaded by the respondents' argument that the applicant have an alternative satisfactory remedy of pursuing the damages route. Instead, I take up the applicant's averment that the logical or reasonable remedy at this juncture is the court's intervention as opposed to the long, costly and arduous damages avenue.

Accordingly, I am of the considered view that the applicants have satisfied the requirements of an interim interdict as pronounced in the jurisprudence of this jurisdiction as well as others. See, *Broadcasting Authority of Zimbabwe and Anor* v *Dr Dish (Pvt) Ltd* SC62-2018 and *Airfield Investment (Pvt) Ltd* v *Minister of Lands, Agriculture and Rural Settlement and Other*s 2004(1) ZLR511.

Disposition

In a nutshell, the respondents failed to challenge the applicant's agreement of sale of 2015. They did not deny that on the 10th of June 2022 the respondents' constructors were on the site constructing. They did not dispute that the applicant had made several attempts to warn the first respondent of the controversy surrounding the property in this issue and he did not take heed. Instead, after such interactions and warning they proceeded to put up a permanent structure. There is a permanent construction taking place on a property where there are competing rights and whose ownership is still to be determined. Therefore, there is need for the court to act. If the court fails to intervene now the applicant may well be within their right to suggest that it should not bother to act subsequently as the position would be irreversible. See *Document Support Center* above.

In the result, the applicant has made a case for provisional order which is accordingly granted.

Accordingly, **IT IS ORDERED THAT**:

"**TERMS OF FINAL ORDER SOUGHT**

That you should show cause to this Honourable court why final order should not be made in the following terms:

(i) The provided order be and is hereby confirmed, and the respondents, their agents, employees, proxies or any person(s) acting on their instructions be and are hereby barred from making any developments of whatsoever nature and from selling, ceding, donating or otherwise alienating and transferring title in the property on certain piece of land situate in the district of Salisbury, called Stand 441 Haydon Township of Haydon measuring 5 679 square metres and held under Deed of Tansfer Number 4 728/14, pending the finalization of case number HC 3961/22.

(ii) The 1st, 2nd and 3rd respondent to pay the costs of this application on the higher scale of attorney and client.

INTERIM RELIEF GRANTED

Pending the determination and finalization of this matter, the applicant is granted the following interim relief:

(i) The 1st respondent, his agents, employees, proxies or any person(s) acting on his instructions be and are hereby ordered to forthwith cease and desist from making any developments of whatsoever nature on certain piece of land situate in the district of Salisbury, called Stand 441 Haydon Township of Haydon measuring 5 679 square metres and held under Deed of Transfer Number 4 728/14, pending the finalization of case number HC 3961/22.

(ii) The 1st, 2nd, 3rd and 4th respondents be and are hereby interdicted from selling, ceding, donating or otherwise alienating and transferring title in the property known as Stand 44 Haydon Township of Haydon measuring 5 679 square metres and held under Deed of Transfer Number 4 728/14, pending the finalization of case number HC 3961/22.

SERVICE OF THE PROVISIONAL ORDER

A copy of this application together with the Provisional Order shall be served upon the respondents by the applicant's legal practitioners or an officer in their employment."

Sachikonye-Ushe, applicant's legal practitioners
Machiridza Commercial law Chambers, first respondent's legal practitioners
Warara & Associates, second and third respondents' legal practitioners