TASSMAK DESIGN AND CONSTRUCTION (PVT) LTD
versus
WELLINGTON MAKAMURE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 29 November 2024 & 27 January 2025

Court application

Ms. K. Munyewende for the applicant
Ms. B. Mudehwe for the 1st respondent

DUBE-BANDA J:

[1] This is an application for the placement of a caveat on a property known as Lot 115 of Lot 26 Lewisam of Lot E Colne Valley Reitfontein ('the property'). It is common cause that sometime in 2022 the applicant and the first respondent entered into an agreement for the construction of two cluster blocks at the property. A dispute has arisen about the payments allegedly due to the applicant. In consequence thereof, the applicant as plaintiff has in HCH 2797/24 sued out summons against the respondent claiming payments of USD$ 23 461.96 being the total fees for manual labour; USD$6 164.00 for the supply of electrical materials and installation and USD$ 25 604.96 for the procurement of building materials. Pending the finalization of HCH 2797/24 the applicant has filed this application seeking an order to place a caveat against the property. The first respondent opposes the application.

THE SUBMISSIONS BY THE PARTIES

[2] The applicant contends that it constructed the two cluster blocks at the property, and the first respondent failed to pay for costs of construction and the materials. It has caused a summons to be issued for the recovery of the debt. In the meantime, the first respondent has advertised the property for sale before paying it for the construction and materials. The applicant contends that it fears that the property it constructed would be sold to third parties pending the finalisation of the summons matter. It therefore, seeks an order for placement of a caveat over the property. It says the caveat would protect its interests since it has an interest in the property. The applicant submits further that it does not need to show that the

first respondent is about to dispose of the property, all it has to show is that a matter pending that concerns the property. Further, the applicant submits that it has met the requirements for a placement of a caveat against the property, in that it constructed the property but was not paid its dues hence an interest in the property. In addition, advertisements were placed to sell the property before the finalization of the summons matter pending or payment of the debt.

[3] Per *contra*, the first responded argued that the applicant has failed to prove the existence of a caveatable interest against the property. In that the application is meant to secure the applicant's interest in executing an order under HCHC2797/24. It was submitted that its interest will only arise if its summons under HCHC2797/24 is successful and the need to execute arises. It has a future interest that will depend on the outcome of the summons matter. Therefore, it has no present interest that warrants placement of a caveat.

[4] The first respondent submitted further that the relief sought in this application is incompetent. In that the draft order establishes the desire for both a caveat and an interdict. It was submitted that the applicant has to show that there is an unlawful act that warrants an interdict, and it has not satisfied the requirements of an interdict. In addition, it was argued that the relief sought is unsustainable in that the summons in HCH 2797/24 is defective and the applicant has filed a chamber application to amend its pleadings. Therefore, there is no summons pending upon which a caveat can be anchored. It was argued further that the applicant has failed to allege and prove that the first respondent owns the property.

THE LAW AND THE FACTS

[5] The issue for determination is whether the applicant has a caveatable interest against the property. In *Stenhop Investments (Pvt) Ltd v Mukoko & Another* HH 132/18 the court said:

> "The law does not permit a person to lodge a caveat over another's property without good cause. An applicant who applies to place a caveat over a property must show that he has an interest in the property concerned. The interest claimed must exist at the time the caveat is lodged and should not be an interest that arises in the future. The caveator must show that his claim arises from some dealing with the registered property. It is only those interests that are connected to the land that can be subject of a caveat. The interest must attach to the property, thus, a person seeking to place a caveat over a property is required to show that he has a caveatable interest to lodge the caveat. A caveator does not have to show that the other party is about to dispose of the property. The applicant has to show that he has a matter pending that concerns the property. The moment that the pending matter is determined, the caveat lapses by operation of law. The caveat cannot continue in perpetuity. The interest claimed by the caveator may be challenged by the owner of the property. It is the duty of the court to determine the validity and correctness of the application for a caveat." (My emphasis).

[6] The issue is whether the applicant has an interest in the property concerned, that the interest attaches to the property and that he has a matter pending that concerns the property. A closer scrutiny of case number HCH 2797/24 shows that it does not concern the property. Put simple, the applicant is not claiming the property i.e., it is not claiming that the property be transferred to it. It is claiming payment of a debt it alleges is owed to it by the first respondent. Even if it succeeds in HCH 2797/24 it will not get the property, but a judgment sounding in money. The fact that the alleged debt arises from work done on the property is of no consequence. It is of no moment. Simply put case number HCH 2797/24 does not concern the property, it concerns a debt. In the circumstances, the applicant has no caveatable interests on the property.

[7] In addition, and for the purposes of completeness, no evidence has been adduced, e.g. copy of the title deed to show that the property is registered in the name of the first respondent. In the opposing affidavit the first respondent placed the ownership of the property in issue, he averred that no evidence has been placed before court to show that he is the owner of the property. In his answering affidavit the applicant does not provide the evidence, he merely avers that he entered into the agreement with the first respondent.

[8] A caveat is noted by the Registrar of Deed against the title deeds of the property. It has far reaching consequences in that it interdicts or stops the registered owner of the property against any dealing with the property before such interdict has been removed. The court must be satisfied that indeed the respondent is the registered owner of the property. The best evidence in this regard is the deed of transfer of the property. The deed of transfer will show the correct names of the registered owner of the property, and whether it is jointly owned or not. It will show the deed of transfer number, and the correct description of the property so that, should the order be granted, the Registrar of Deed would know the identity of the property in issue. In addition, the court must be satisfied that it is dealing with the property registered in the name of the respondent and that there are no other interested parties in the property. The court must know whether there are any endorsements, servitudes, restrictions, and or other caveats on the property. If such exists whether the interests e.g., of the mortgage holders have had notice of the application. The *ipso dixit* of the applicant that the respondent is the owner of the property is hopelessly inadequate. The court does not even know the kind of ownership referred to by the applicant, whether it is held under leasehold or deed of transfer. It is for these reasons that this application cannot succeed.

COSTS

[9] The respondent sought costs on a punitive scale. It is trite that such costs are not for the mere asking. Something more underlies the practice of awarding costs as between attorney and client than the mere punishment of the losing party. The operative principle in determining whether to award punitive costs is whether the litigant's conduct is frivolous, vexatious or manifestly inappropriate. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). In *casu,* this is clearly one of those reckless and thoughtless applications flooding this court for no good measure. It must have been clear to the applicant that the litigation in HCH 2797/24 is not concerning the property, is about a debt allegedly owed to it by the respondent. In addition, no evidence was adduced to show that the property in issue is registered in the name of the respondent. This is a frivolous and vexatious application which amounts to an abuse of the process of this court. It is for these reasons that the applicant deserves to be mulct with costs on a punitive scale.

DISPOSITION

In the result, it is ordered as follows:

The application is dismissed with costs on a legal practitioner and client scale.

DUBE - BANDA J: ……

J. Mambara & Partners, applicant's legal practitioners
Mhishi and Nkomo Legal Practice, first respondent's legal practitioners