NYAGUI HOUSING TRUST
and
GLORIOUS PROPERTIES (PRIVATE) LIMITED
and
PETRONELLA KAGONYE
versus
RUWA ESTATES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 18 February 2016

URGENT CHAMBER APPLICATION

S. Mahuni, for the applicants
S M Guwuriro, for the respondent

CHITAKUNYE J: On 11 December 2015 I granted the following provisional order in HC 12177/15 wherein respondent was the applicant and the current applicants were the respondents:-

Pending the determination of this matter, the applicant is granted the following relief-

1. The respondents be and are hereby interdicted from destroying any infrastructure, cutting trees at Cloverdale B of Galway Estate, Goromonzi.
2. The respondents be and are hereby ordered to restore the applicant and its lawful occupants back at Cloverdale B of Galway Estate, Goromonzi.
3. The respondents be and are hereby ordered to remove all its earthmoving equipment and all its employees and agents or anyone acting through them, that they have on the said immovable property.
4. The respondents, their agents and employees or anyone acting through them be and are hereby interdicted and prohibited from occupying or entering Cloverdale B of Galway Estate, Goromonzi and from utilising or occupying any improvements thereon.
5. The respondents, their employees or agents and anyone acting through them be and are hereby interdicted from restraining or controlling the movements of the applicant and any

of the applicant's lawful occupants onto the immovable property and off unless and until the applicants are lawfully evicted from the said immovable property.

This was as sought by the present respondent against the three applicants in this application. The interim order was essentially to interdict the present applicants from interfering with respondent's occupation of Cloverdale B of Galway Estate, Goromonzi and for applicants to remove the earthmoving equipment they had brought onto the property. The applicants filed their notice of opposition on 23 December 2015.

The applicants have now approached court with this chamber application for the setting aside of the provisional order granted on 11 December 2015 in terms of r 449 of the High Court Rules, 1971.

> Rule 449(1) states that:-
> "The court or a judge may, in addition to any other power it or he may have, *mero motu* or upon the application of any party affected, correct, rescind, or vary any judgment or order----
> (a) That was erroneously sought or erroneously granted in the absence of any party affected thereby; or
> (b) In which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
> (c) That was granted as the result of a mistake common to the parties."

In *casu*, the applicants' basis for seeking the setting aside of the provisional order are succinctly set out in paragraph 7 of the applicants' founding affidavit whereby it states that:-

> "The basis upon which this application is made is hinged on the fact that the Respondent misled the Honourable judge into believing that the above described property belongs to it or is private land whereas in actual fact it is a State land. The manner in which the Honourable judge was misled is clearly captured in annexure A to this application. To this extent I beg leave to incorporate all the contents of that annexure to this application. I will not repeat the contents of annexure A suffice to state that the Respondent, who was the applicant under HC12177/15, did not have *locus standi* to institute the proceedings in that matter. The respondent did not fully disclose the true status of that property to the Honourable judge leading to the latter granting an order prayed for by the respondent. To be more precise the Respondent did not disclose to the Honourable judge that the order which it relied on, in asserting its rights, title and interest in the above mentioned property, was set aside by this Honourable court under case number HC6280/15. The fact that that order was set aside meant that all the rights which accrued to the Respondent as a result had also been set aside or nullified. In other words, that order did not give them the rights to institute proceedings without involving the responsible Ministry. It is for that reason that I argue that the Applicant under case number HC 12177/15 did not have *locus standi* to institute those proceedings."

The Annexure A referred to is the Notice of Opposition to HC 12177/15. Some of the salient aspects stated in that annexure include that:-

The land in question was gazetted as State land on 6 July 2001 and so in terms of s 16 B of the repealed Constitution of Zimbabwe (and currently section 72(4) of the Constitution of Zimbabwe Amendment no. 20 of 2013, the property in question became State land.

On 23 August 2013 the property was handed over to the Ministry of Local Government, Rural and Urban Development from the Ministry of Lands and Rural Resettlement. The Ministry of Local Government in turn appointed the second applicant to carry out infrastructure development for residential stands.

In 2014 respondent applied to the High Court under case number HC 559/14 to have the property in question declared a private property as well as to have it transferred into its name. The Ministry of Lands was cited as the first respondent in that application with the Registrar of Deeds as the second respondent. On 16 April 2014 a default order was granted in favour of the respondent and against Ministry of Lands and Rural Resettlement.

On 22 July 2015 the Ministry of Lands and Rural Resettlement successfully applied for the rescission of the default judgement of 16 April 2014.

It would appear that before the rescission of the default judgement respondent had obtained a subdivision permit and gone ahead to subdivide the property.

By virtue of the rescission the main application in HC 559/14 whereby the respondent is the applicant with Ministry of Lands as the first respondent remained to be determined.

It was in these circumstances that the applicants, as the developers granted authority by the Ministry of Local Government, Rural and Urban Development, sought to proceed with the infrastructure developments on the property by bringing onto the property earthmoving equipment and start subdividing the property. This is what led the respondent to approach this court on an urgent basis in HC 12177/15.

In its application in HC 12177/15 the respondent gave a narration of the events leading to the granting of a default order by Uchena J on 16 April 2014.

In that regard the respondent in para 17 and 18 of its founding affidavit stated thus:-

> "17. As a consequence of the foregoing, the applicant approached the courts with the express and tacit approval of the officials of the Ministry of Lands in Harare and Marondera. The matter has always been well known and several directors in the Ministry of Lands are well acquainted with it.
>
> 18. The Ministry of lands being guided by the Permanent Secretary in the Applicant's Ministry duly acknowledged that the Court Application was unassailable and could only be left unopposed. For avoidance of doubt these actions by the Ministry of Lands constituted a waiver and or consent to the application."

It is in these circumstances that the default order was granted as according to respondent the application was simply unopposed.

The impression given was that after that order a green light was given by the Ministry of lands for respondent to proceed with the registration of its own subdivisions with the registrar of deeds.

It would not be farfetched to say that respondent deliberately left out information that it felt would be detrimental to its claim of title to the property.

The respondent gave the impression that its title to the land was now unassailable. At no point did respondent reveal that the judgement in HC 559/14 had in fact been rescinded and that its application was pending and that parties were awaiting the filing of heads of arguments and for the application to be set down on the opposed roll.

When this application was argued before me I did not hear respondent's legal practitioner to deny that this was clearly misleading on the part of the respondent.

In my view it is an act bordering on dishonesty on the part of the respondent.

It is difficult to understand why the respondent chose that route. An application for a spoliation order does not depend on ownership of the land or property. All that the respondent was required to allege and prove is that it was in peaceful and undisturbed occupation of the property and that the applicants deprived it of its occupation forcefully or wrongfully against its consent. Thus the issue of ownership would be irrelevant.

It is in these circumstances that applicants argued that the respondent's application ought not to have been treated as urgent in that the situation at the property in question has been in existence for some time. The persons respondent alleged had invaded the property at the instance of the applicants had in fact been resident there, co-existing with the respondent for some years now.

The applicants as the entities that were given the mandate to develop the property were desirous of proceeding with the infrastructure developments hence heavy equipment was brought onto the property.

From the documents filed on record and submissions made, it is clear to me that though respondent's ownership has been taken away by the acquisition of the land; it has nevertheless remained in occupation. It is that occupation that the applicants disturbed when they moved earthmoving equipment onto the property and started creating roads and doing other civil works in furtherance of their mandate to develop the area. As the respondent's

case against the Ministry of Lands, HC559/14, is pending it is only proper that parties await the determination of that case before embarking on any developments.

The applicants' argument that the respondent no longer had any right to be on the property was misplaced as no court has yet been issued an order for the eviction of respondent or interfering with its occupation. A party cannot take the law into its own hands and seek to constructively evict another or even interfere with that other's occupation without an order of court.

The further argument by the applicants that the respondent had no *locus standi* to institute the application for spoliation order was equally misplaced. As alluded to above, an application for a spoliation order does not depend on ownership but on possession or occupation of the property at the time a party claims it was despoiled. *Locus standi* is thus established by that peaceful occupation.

Accordingly, whilst acknowledging that respondent presented misleading information in its quest to get an order of court, such was not fatal in as far as the principle issue was not on ownership of the property but on being despoiled of its peaceful occupation of the property. It was not seriously disputed that applicants' activities interfered with respondent's occupation of the property. The activities of the respondents amounted to, at the very least, constructive eviction. This must therefore be stopped until, preferably, such time that Case HC 559/14 is determined or applicants obtain a court order authorising interference with respondent's occupation.

Another aspect to note is that r 449 refers to a decision made in the absence of another party. In *casu*, some representatives of the applicants attended the hearing, albeit just to advise court of the non-availability of some official representatives of the applicants. They did not appear as authorised representatives of the applicants. They however did not deny that what in fact triggered the respondent's application were the activities by applicants on the ground. Those are the activities that disturbed the peaceful co-existence that had been there.

In the light of what was revealed as the actual situation obtaining prior to the respondent's application I am inclined to vary the provisional order to be in sync with that situation. Thus the interim relief will be varied to now read as follows:-

That pending the determination of this matter, the applicant is granted the following relief:

1. The respondents be and are hereby interdicted from destroying any infrastructure, cutting trees at Cloverdale B of Galway Estate, Goromonzi.
2. The respondents be and are hereby interdicted from engaging in any infrastructure development.
3. The respondents, their agents and anyone acting through them be and are hereby ordered not to interfere with applicant's and its lawful occupants occupation of Cloverdale B, Galway, Goromonzi unless and until the applicant and its lawful occupants are lawfully evicted from the said immovable property.

Mahuni & Mutatu Attorneys, applicants' legal practitioners
Matipano & Matimba, respondent's legal practitioners