

BALWEARIE HOLDINGS (PRIVATE) LIMITED
versus
NEVER JOFRIS
and
ZEBEDIAH PHIRI
and
JOHN GWISALU

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 28 May 2020; 5 June; 10 June & 16 June 2020

Urgent Chamber Application

Advocate A Saunyama and Ms G Chitsaka, for the applicants
Mr V Mhungu, for the respondents

MUSITHU J: On 22 May 2020 applicant filed this urgent chamber application seeking relief set out in the draft provisional order as follows:

“TERMS OF THE FINAL ORDER

1. Respondents be and are hereby interdicted and barred from visiting Applicant’s immovable property namely the Remainder of Westhey of Sabonabon Estate Kadoma.
2. Respondents be and are hereby prohibited from disposing Applicant’s agro Plots situated at the Remainder of Westhey of Sabonabon Estate Kadoma.
3. Respondents to pay costs of suit.

INTERIM RELIEF GRANTED

Pending the finalization of this matter Applicant be and is hereby granted the following interim relief.

1. Respondents be and are hereby barred and interdicted from entering any part of Applicant’s premises known as the Remainder of Westhey of Sabonabon Estate Kadoma.
2. Respondents be and are hereby barred and interdicted from selling Plots belonging to Applicant situate at the Remainder of Westhey of Sabonabon Estate Kadoma and presenting themselves as employees of Balwearie Holding (Private) Limited....”

The application was placed before me on 26 May 2020 and I proceeded to set down for hearing on 28 May 2020. On the day of the hearing, a Mr *Magodora* appeared in court and advised that he was representing clients who had an interest in the matter though they were not cited in the application. They wished to be joined in the application as respondents. His clients had just

received evictions summons from applicant in connection with the same piece of land which is at the centre of the dispute between applicant and the cited respondents. With the consent of the parties' lawyers, I postponed the matter to 5 June 2020 to allow for engagement between the parties. The postponement was also meant to afford Mr *Magodora* an opportunity to make an informed position on behalf of his clients after studying the application. To that end, I directed him to update the court and the other parties herein of his clients' position on or before 3 June 2020.

On 5 June 2020, and a few minutes before the commencement of the hearing, I received from Mr *Magodora*, a 50 paged notice of opposition (inclusive of supporting affidavits and annexures), prepared on behalf of 72 respondents. At commencement of the hearing, Ms *Saunyama* appearing for the applicant objected to the filing of the notice of opposition by the 72 respondents, before their joinder to the application in terms of *order 13 rule 85*. In reply, Mr *Magodora* conceded that the 72 respondents were not cited in the urgent chamber application, and neither had they been joined to the proceedings. They were improperly before the court and they could not be heard. I excused Mr *Magodora* from taking further part in the proceedings.

A notice of opposition was filed on behalf of the cited respondents on 28 May 2020. Only first respondent deposed to an opposing affidavit. The affidavit does not state whether he also speaks on behalf of second and third respondents. The opposing affidavit, raises the following points *in limine*. Absence of authority to depose to the founding affidavit; defective certificate of urgency; absence of urgency and defective draft order. The opposing affidavit does not address the merits of the application, except to state that "*save for admissions expressly made above, I deny each and every averment made by the Applicant and put it to the strictest of proof*". Towards end of day on 4 June 2020, a day before the hearing on 5 June 2020, I received in chambers a supplementary affidavit filed by first respondent. It came at the same time as the applicant's answering affidavit. The supplementary affidavit introduced a new ground of objection. The absence of *locus standi* on the part of applicant. I shall revert to these matters latter in the judgment after a brief exposition of the background facts.

BACKGROUND FACTS

Believe Guta deposed to the applicant's founding affidavit in his capacity as applicant's company secretary. Applicant claims that sometime in 1992 it purchased a piece of land known as the Remainder of Westhey of Sabonabon Estate Kadoma (the property). The property measures

97,0653 hectares and is situated in the city of Kadoma. Applicant was granted permission by the Municipality of Kadoma to subdivide the property through permit number TP/SUB/1/97. The effect of the subdivision was to create further pieces of land called stands 4497 – 4674 Kadoma Township and R/E of Westhey of Sabonabon Estate. In his capacity as company secretary, Guta asserts that he makes regular visits to the property to check on progress being made by surveyors and engineers engaged in the servicing of the stands. The last such visit was on 29 March 2020, a day before the COVID 19 National Lockdown commenced.

On 17 May 2020, Guta claims to have visited the property to check on progress as aforementioned. He met Agenia Muzanenhamo, a resident at the property. Muzanenhamo informed Guta that during the lockdown, respondents made several visits to the property during which time they presented themselves as having the mandate to sell the subdivided stands on applicant's behalf. The trio offered to regularize Muzanenhamo's stay at the property if she paid them a US\$1000.00 deposit, as well as sign an agreement of sale. The respondents also frequented one Mrs Manjera's residence during their visits. Guta claims that Mrs Manjera is an illegal occupant of one of the stands. Muzanenhamo attached a supporting affidavit which essentially corroborates Guta's account. She adds that when respondents offered to regularize her stay at the property, she informed them that she did not have the required deposit. On their subsequent visits, respondents would enquire if she had managed to raise the required deposit. She still did not have the money. Respondents also came with prospective buyers who wanted to view some of the stands.

A visit by Guta to Manjera's property revealed that she was related to second respondent. She also confirmed that respondents had visited her residence on numerous occasions during the lockdown. They presented themselves as employees of applicant. Guta claims he then called first respondent on a mobile number supplied by Muzanenhamo, demanding to know who had authorized him to sell applicant's stands. First respondent was hostile and allegedly threatened Guta on the phone. All the respondents are unknown to applicant. Applicant believes that if they are not restrained, they will swindle unsuspecting buyers of their cash through the unlawful sale of applicant's stands. Guta reported respondents at Eiffel Flats Police station on 19 May 2020.

Applicant seeks an interdict barring respondents from disposing of its stands, in order to preserve its property as well as protect innocent buyers. Applicant also wants respondents barred from visiting the property.

The application was accompanied by a certificate of urgency from Angela Matarutso. She certified the urgency of the matter as follows:

“I have read the Applicant’s founding affidavit, the supporting affidavit and annexures and I certify that the matter is urgent for the following reasons;

- (a) Applicant is the registered owner of a certain piece of land known as Remainder of Westhey of Sabonabon Estate Kadoma.
- (b) Respondents who are not employees or agents of Applicant took advantage of Applicant absence from the immovable property during the initial phase of the COVID 19 lockdown period and attempted to sell Applicants agro plots.
- (c) Applicant only became aware of the Respondent’s activities at the immovable property when its employees visited the property on the 17th of May 2020 and immediately took action to protect Applicant’s interests.
- (d) The only way that Applicant can adequately protect its interest in the immovable property and protect unsuspecting members of the public is through an urgent interdict prohibiting Respondents from visiting Applicants immovable property and disposing Applicants plots.
- (e) If this matter is not allowed to jump the queue of other matters awaiting hearing on the ordinary roll Applicant and unsuspecting members of the public stands to suffer irreparable harm and prejudice and the relief that Applicant currently prays for will no longer be available.
- (f) For the above reasons I certify this matter to be urgent.....”

For convenience, I asked counsel to address me on the points *in limine* and the merits at the same time. The matter would be disposed of on the basis of the preliminary points if I found them meritorious.

POINTS IN LIMINE

Absence of Locus Standi

As already stated, first respondent’s supplementary affidavit introduces a new ground of objection. It challenges applicant’s *locus standi*. First respondent submits he established that applicant was registered in 2020 under company number 1898/2020. Apparently at the time of applicant’s registration, there was already another entity with a similar name registered under company number 45/1977. The position was confirmed by the Registrar of Companies in a letter attached to the supplementary affidavit. The letter of 2 June 2020 reads as follows:

“.....

Kindly be advised that

1. There are two different companies registered under the name Balwearie Holdings (Private) Limited, that is 1898/2020 and 45/1977.
2. There was an error in the registration of Balwearie Holdings (Private) Limited 1898/2020 due to the fact that there was already an existing company using the same name.
3. The re-registration process has not yet commenced as required by the New Companies and Other Business Entities Act Chapter 24:31.
4. Companies registered under company numbers 45/1977 and 1898/2020 are completely different companies
.....” (Underlining for emphasis).

Mr *Mhungu* submitted that a company incorporated in 2020 could not have acquired land in 1992. He further submitted that the property was owned by Balwearie Holdings (Pvt) Ltd registered under company registration 45/1977 (hereinafter referred to as Balwearie 1977), and not the applicant. Applicant was trying to reap where it did not sow. The registration of applicant under 1898/2020 was a deliberate ploy to assume ownership of the property unlawfully. In paragraph 9 of the supplementary affidavit, first respondent claims to be an employee of Balwearie 1977, and that he is authorized in that capacity to represent this entity. Nothing was attached to the supplementary affidavit to back up these claims.

In reply Ms *Saunyama* argued that the supplementary affidavit was not properly before the court. Supplementary affidavits are permitted in very exceptional circumstances, all the more when they are tendered after an answering affidavit has been filed. A party that seeks to file such affidavit must provide a satisfactory explanation that negates bad faith or deliberate failure to act timeously. The court must also be satisfied that no prejudice will be occasioned to the opposing party through its filing. The manner in which first respondent acted violated the procedure on concatenation of affidavits. There is no room for the filing of a supplementary affidavit without the leave of court. The effect of this additional affidavit was to introduce a fresh line of defence and an entirely new matter which did not afford applicant adequate opportunity to refute that submission. Ms *Saunyama* further submitted that the supplementary affidavit was intended to cause unnecessary confusion as well as cure defects in the opposing affidavit in which first respondent had sorely committed to four grounds of objection. First respondent had not even explained the capacity in which he was employed by Balwearie 1977.

In the answering affidavit, applicant explains the fate of Balwearie 1977 as follows. The company was deregistered in terms of section 283 of the then *Companies Act*¹, sometime in 1981. As proof of deregistration, applicant attached an extract of the Government Gazette of 18 December 1981, which contains General Notice 1178 of 1981. The notice carries a list of companies to be struck off the register of companies. The relevant part reads as follows:

“IT is hereby notified in terms of section 283 of the Companies Act, [Chapter 190], that at the expiration of three months from the date of publication of this notice, the names of the companies set out in the Schedule will, unless cause is shown to the contrary, be struck off the register, and the said companies will thereby be dissolved”

Balwearie 1977 is one of the companies listed in the notice. Its date of registration is stated as 14 February 1977. What is however not clear is what befell the company after the expiration of the three months’ notice. Contrary to applicant’s submission, the gazette of 18 December 1981 is no proof of deregistration. It merely called upon the companies listed to show cause why they should not be struck off the register after the expiry of three months’ notice. Applicant avers that first respondent is manipulating the papers of Balwearie 1977 to give an impression that the company still exists yet it was deregistered. First respondent denies that Balwearie 1977 was deregistered, and points to the letter of 2 June 2020 from the Registrar of Companies.

In order to explain the acquisition of the property by applicant 1992, Ms *Saunyama* applied to tender a memorandum of agreement of sale between Gatooma Development Corporation (Private) Limited and William Guta (acting as a promoter of a company about to be formed “Balwearie Holdings (Private) Limited”). She also applied to tender applicant’s memorandum and articles of association. Mr *Mhungu* vehemently opposed the tendering of the agreement of sale between Gatooma Development Corporation (Private) Limited and William Guta (the agreement of sale) and the memorandum and articles of association. While justifying the tendering of the supplementary affidavit on the basis that it raised a point of law which can be advanced at any stage of proceedings in line with the *dictum* in *Muchakata v Netherburn Mine*², Mr *Mhungu* argued

¹ Chapter 190

² 1996 (1) ZLR 153 (SC) at 157A, KORSAN JA said:

“Provided it is not one which is required by a definitive law to be specially pleaded, a point of law, which goes to the root of the matter, may be raised at any time, even for the first time on appeal, if its consideration involves no unfairness to the party against whom it is directed: *Morobane v Bateman* 1918 AD 460; *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23D-G.”²

that the same could not be said of the agreement of sale. He submitted that the agreement ought to have been disclosed in the founding affidavit in order to explain how a company formed in 2020 acquired a property in 1992.

In the exercise of my discretion in terms of *Order 32 Rule 246 (1)(a)*³, I allowed the production of the supplementary affidavit, applicant's memorandum and articles of association and the agreement of sale, to form part of the evidence before me. The agreement of sale and applicant's memorandum and articles of association speak to matters raised in first respondent's supplementary affidavit. The agreement of sale is concerned with the purchase of the property by applicant represented by William Guta acting as promoter of the company still to be formed. Such contracts are permissible under section 47 of the old *Companies Act*⁴. In *Ian Spence Gray & Another v The Registrar of Deeds*⁵, GOWORA J (as she then was), stated the position of the law on pre-incorporation contracts as follows:

“The issue has received attention from the learned authors Nkala and Nyapadi in their book *Company Law in Zimbabwe 1995 Edition*. The view of the learned authors is that a company can adopt contracts made on its behalf before incorporation provided that it (the company) meets the following five conditions- viz; that the contract is in writing; the person making the contract on behalf of the company to be formed, irrespective of how he describes himself must at least profess to act as agent for the company; the memorandum and articles of association must contain at the time of incorporation the contract as one of its objects; the contract must be delivered to the registrar simultaneously with the memorandum and articles of association and the contract must be legally enforceable. This view expressed on pp55-59 is in accord with the provisions of the Act”

Clause 'q' of applicant's memorandum of association states as one of applicant's objects:

“To manage land, buildings and other property whether belonging to the company or not,Also to adopt pre-incorporation contract in respect of a property known as the remainder of Westhey of Sabonabon Estate. Deed No. 4110/92” (Underlining for emphasis)

The agreement of sale ties in with the deed of transfer of the property attached to the applicant's founding affidavit. I must state that at this stage I am not required to interrogate the competing claims in these two companies, or put differently which of the two Balwearies is the legitimate one, and concomitantly the lawful title holder of the property. That is a matter for the

³ Rule 246 (1) states:

- (1) A judge to whom papers are submitted in terms of rule 244 or 245 may –
 - (a) Require the applicant or the deponent of any affidavit or any other person who may, in his opinion, be able to assist in the resolution of the matter to appear before him in chambers or in court as may to him seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require

⁴ [Chapter 24:03]

⁵ HH-114/10 at page 4 of the cyclostyled judgment

return day or for another forum. All that is required of me at this stage is to determine whether applicant has established a *prima facie* case that entitles it to the remedy it seeks. The papers that have been placed before me show that applicant's name corresponds with the name on the title of the property. The memorandum and articles of association authorized applicant to adopt the pre-incorporation contract in respect of the same property once it was incorporated. Accordingly, I find that applicant has *locus standi* to institute these proceedings. The point *in limine* is accordingly dismissed.

Absence of authority to depose to the founding affidavit

In his opposing affidavit first respondent submits that Believe Guta's founding affidavit is defective as he is not applicant's company secretary. He claims that applicant's company secretary is Sabre Services (Private) Limited. To buttress his point, he attached a Form CR14 date stamped 9 January 2009 by the Registrar of Companies. It was presented for filing by Sabre Services (Pvt) Ltd (Sabre). It cites the company number as 45/77. The directors of the company (Balwearie 1977) are listed as Zane Patrick HEYNS and Lorraine Elizabeth HEYNS. As at 24 July 2008, their residential address/business address is stated as Balwearie Farm, Chegutu. Further, first respondent asserts that the board resolution attached to the founding affidavit is fraudulent. The two directors did not participate at the meeting which gave birth to the attached resolution, and neither did they sign the extract of the minutes of the said meeting. Consequently, the application was not sanctioned by the applicant.

In reply, applicant averred that Sabre is unknown to it. It claims that Sabre is a creation of the respondents. Applicant also approached the Registrar of Companies seeking the constitutive documents for Balwearie Holdings (Private) Limited. The same registrar who was approached by first respondent furnished applicant with the following documents. Form CR14 which cites 1898/2020 as the company number. The directors are listed as Believe Guta and Christabel Mafirakurewa all of No 675 Victory Park, Kadoma. The company secretary is cited as Believe Guta. Also attached is a certificate of incorporation issued on 21 January 2020. Ms *Saunyama* submitted that first respondent did not have the standing to speak on behalf of Balwearie 1977, if at all it existed. He did not attach any document to assert his employment status with the company. Nothing connects him to Balwearie 1977. If the directors of the company existed as per the CR14

attached to his affidavit then they were expected to confirm first respondent's allegations. He appeared to be on a frolic of his own. That raised questions about his interest in this matter.

I find the submission persuasive. I have already intimated that there is a dispute regarding the status of the two companies that share the same name, and lay claim to the same property. Guta's authority to represent applicant cannot be impugned on the basis of protestations by first respondent whose own association with Balwearie 1977 is questionable. In any event, the letter of 2 June 2020 from the Registrar of Companies attached to first respondent's supplementary affidavit suggests that applicant and Balwearie 1977 are completely different companies. If they are different then first respondent cannot claim to speak on behalf of both entities. The objection is without merit and is dismissed.

Urgency

Mr *Mhungu* submitted that the subject matter of the application is land. It is not a fungible. No irreparable harm can be suffered by applicant if the matter joins the queue of ordinary applications. In reply Ms *Saunyama* insisted the matter is urgent. Respondents were selling applicant's stands claiming to be doing so on behalf of applicant. They did not have authority to represent applicant. There was also potential for material and reputational harm to applicant. Third parties could be misled by respondent's conduct. There was no point in waiting and watching respondents persist with an illegality or self-help, and then approach the court when damage had been done. In any case, commercial interests constituted a valid ground for seeking relief on an urgent basis. The court was referred to the case of *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs and Excise*⁶. Whether or not a matter is urgent is an issue for exercise of discretion by the presiding judge. In *Econet Wireless (Pvt) Limited v Trustco Mobile (Proprietary) Limited & Another*⁷, GARWE JA made the following point on urgency:

“It is clear that in terms of Rules 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of a discretion...”

⁶ 1999 (1) ZLR 490 where SMITH J held that-

“The court has the power to hear an application as a matter of urgency not only where there is serious threat to life or liberty but also where the urgency arises out of the need to protect commercial interests”.

⁷ SC-43/13 at page 14 of the judgment.

I am satisfied that the matter is urgent. In any case, the essence of first respondent's objection is not so much about a delay in the launching of the application by applicant. It is about the nature of the property in dispute. I am satisfied that applicant did not have to remain idle while its rights in the property were being violated. That the subject matter of the dispute is land does not disqualify an interested party from approaching the court on an urgent basis to forestall the alleged self-help. The preliminary point is without merit and is accordingly dismissed.

First respondent had in his affidavit averred that the certificate of urgency is defective. Mr *Mhungu* did not pursue the point in his oral address. I considered the objection abandoned.

Non Joinder of the Registrar of Companies and Balwearie 1977

Mr *Mhungu* submitted that the matter cannot be resolved without submissions from the Registrar of Companies. There was also need to cite Balwearie 1977 since the Government Gazette did not explain whether it was subsequently deregistered or not. The Registrar of Companies would articulate the correct position regarding the two companies. Ms *Saunyama* on the other hand argued that Balwearie became defunct after 1981. In any event, the Registrar of Companies would not have registered the applicant if Balwearie 1977 still existed.

I am not persuaded by the submission that Balwearie 1977 ceased to exist in 1981, for reasons that I have already stated. There is clearly a dispute pertaining to the status of the two companies and their ownership. That is an argument for the return day. I am however not convinced that the failure to cite both the registrar of companies and Balwearie 1977 is fatal to the application. At this stage I am not required to decide which of the two entities is legitimate, and consequently the rightful owner of the property. The Registrar of Companies has already articulated his position on the issue by suggesting the two entities are different. First respondent has been far from convincing in expressing his association with Balwearie 1977. In any case, if first respondent was genuinely authorized to represent Balwearie 1977, then he ought to have sought its joinder in these proceedings. He cannot expect applicant to do so when the same applicant claims Balwearie 1977 does not exist. There is no merit in this objection and it is accordingly dismissed.

Defective Draft Order

Mr *Mhungu* submitted that the application is defective for want of a proper draft order. The interim relief sought is essentially similar to the terms of the final order sought. The application

was therefore dismissible on that basis alone. The court was referred to the judgment by CHINAMORA J in *Ecocash Zimbabwe (Private) Limited v Reserve Bank of Zimbabwe*⁸, as authority for the proposition that such defect renders the application dismissible. Ms *Saunyama* argued that such defect is not fatal but is remediable through an amendment which the court has discretion to accept or reject. She applied that the terms of the final order be amended by the repeal of paragraphs 1 and 2 and their substitution with “*First, second and third respondents are prohibited from transferring title in any part of the remainder of Westhey of Sabonabon Estate Kadoma.*” Paragraph 3 would remain as it is.

First respondent’s objection brings to the fore the significance of *Order 32 Rule 246 (2)*. It reads:

“Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he shall grant a provisional order either in terms of the draft filed or as varied”

From a reading of *rule 246 (2)*, a judge needs to be satisfied that the papers before him/her establish a *prima facie* case. That is the primary consideration. The structure of the draft order is not the paramount consideration. After all as the appellation implies, the order accompanying the application comes in draft form. The order to be granted at the end of the day is an order of the court. That explains why in my view *rule 246(2)* allows the judge to make modifications to the order. The judge must grant an order which will serve a purpose at the end of the day. I do not believe that the observations by CHINAMORA J in *Ecocash Zimbabwe (Private) Limited* matter should be construed as laying a firm foundation that similarities between the interim relief and final relief sought render an application dismissible. On page 10 of the judgment, my brother judge remarked as follows:

“It requires no second guessing that the temporary order sought is final in nature. Equally evident *ex facie* the provisional order is that the relief sought in the interim order is the same or substantially the same as in the final order. The impropriety of such an approach has received ample emphasis in this jurisdiction.....”

The honourable judge found that the interim relief sought by applicant in that case was final in nature, in addition to it being similar to the final order sought. That may not have been proper in the circumstances of the case before him, as he went on to observe on page 11 of the judgment:

“There is no difference in effect between this order and the orders sought in paragraphs 1 and 2 of the interim relief. The result is to unfreeze and allow the concerned agents access

⁸ HH 333/20

to their accounts. The question that I pose is: is there anything remaining to incentivize the applicant to come back to court on the return day when the accounts have already been unfrozen and access gained to the ecocash platform? The answer is obvious. In other words, the appellant can gleefully sit back since it would have achieved through the provisional order what it required by way of final order on the return day”

What makes the *Ecocash Zimbabwe (Private) Limited* case distinguishable from the present case is that *in casu*, it has not been alleged that the interim relief sought is final in nature. It is certainly not final in the mold of the one in *Ecocash Zimbabwe*. The only blemish is that the relief sought though interim in nature, is similar to the final relief sought. That in my respectful view, does not make the relief sought defective or rather make the application susceptible to dismissal or striking off. I believe this is the kind of scenario contemplated by *rule 246 (2)*. Once a judge is satisfied that a *prima facie* case has been established, he cannot decline the relief sought on the basis that the interim relief sought is similar to the terms of the final relief sought. I am fortified in this regard by the views of MAFUSIRE J in *Amalgamated Rural Teachers Union of Zimbabwe & Another v Zimbabwe African National Union [Patriotic Front] & Another*⁹. He said:

“*In casu*, it is true that the interim relief sought in the original draft order was almost identical to the final order sought on the return day. In essence this relief was the interdict to restrain the respondents from continuing with the activities complained of. But my view is that the principle or requirement that the interim relief in an urgent chamber application should not be the same as the final relief to be sought on the return day is not cast in stone. Every case depends on its own facts. In appropriate situations it may be that the relief sought in the interim may be all that an applicant was concerned with yesterday, today and tomorrow. He may want it today on an urgent basis. That does not stop him from wanting it again on a permanent basis on the return day. If it is granted today on an interim basis, all he may want on the return day is its confirmation. All he shows in the interim, among other things, is an actual or perceived infringement of a *prima facie right*, even if that right be open to some doubt. On the return day he must prove, *on a balance of probabilities*, an actual or perceived infringement of a *clear right*. It is not altogether uncommon for the court to grant interim relief, only to discharge it on the return day. Thus, I found the first respondent’s objection a moot point and lacking in merit”

I fully associate myself with these observations. Once a judge is satisfied that a *prima facie* case has been established, then he must in my view grant the interim relief sought. Errors in the construction of the draft order, and in turn the interim relief sought are remediable¹⁰. It is for this reason that *rule 246(2)* endures¹¹. In the exercise of my discretion, I allowed the proposed

⁹ HMA 36/18

¹⁰ See *Qingsham Investments (Private) Limited v Zimbabwe Revenue Authority* HH 207/17 at page 2

¹¹ See also *Phillip Chiyangwa v Interfin Bank Limited (In Liquidation) & Another* HH 982/15 at page 2 of the judgment

amendment to the terms of the final order sought by applicant, although it is not the only matter that the court should contend with on the return day. The parties require the court to determine the statuses of applicant and Balwearie 1977, and their competing claims to the property. The entity so determined to be the lawful holder of title in the property can deal with the property as it wishes. Accordingly I find that the objection lacks merit and is accordingly dismissed.

MERITS

The requirements for the granting of interim interdict were set out in *Airfield Investments (Pvt) Ltd v Minister of Lands, Agriculture and Rural Resettlement & Ors.*¹² MALABA JA (as he then was said):

“It must be borne in mind that an interim interdict is an extraordinary remedy, the granting of which is at the discretion of the court hearing the application for the relief. There are, however, requirements which an applicant for interim relief must satisfy before it can be granted. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F, CORBETT J (as he then was) said an applicant for such temporary 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 interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- (b) that, if the right is only *prima facie* established, 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) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy.”

I now turn to consider these requirements in detail.

***Prima facie* right**

Ms *Saunayama* submitted that the founding affidavit sets out the factual premise on which interim relief is sought. The annexures attached to the founding affidavit, and the other documents tendered during oral submissions all connect applicant to the property. Mr *Mhungu* submitted that the question whether an applicant has a right is a matter of substantive law. Whether that right has been established is a question of evidence. Once it is established that no right exists then the question of harm does not arise. Mr *Mhungu* argued that even if it were to be accepted that applicant acquired rights in the property through a pre-incorporation contract, it was improbable that it could have obtained title before incorporation. In all probability the applicant only ratified the alleged pre-incorporation contract in 2020 on registration. It could not have obtained title

¹² 2004 (1) ZLR 511 (S) at 517 C-E

before ratification of the contract. Mr *Mhungu* further submitted that in view of the letter of 2 June 2020 from the Registrar of Companies, applicant's registration violated the law. I have already expressed my position on the statuses of the applicant and Balwearie 1977. The question of the legitimacy of the two entities is not a matter that arises for consideration at this stage. It's a matter for the return day. That is certainly desirable if this dispute is to be resolved.

What complicates respondents' case at this stage is that first respondent, who seeks to assert rights on behalf of Balwearie 1977 does not appear to have the authority to do so. I am not persuaded by the submission that he speaks as an employee of the company. That would have been the easiest of things to prove, considering he filed a supplementary affidavit in an attempt to discredit the status of the applicant. As was pointed by MAFUSIRE J¹³, all the applicant needs to show at this stage is a *prima facie* right, "...even if this be open to some doubt". I am satisfied that applicant has established a *prima facie* right, even though on the papers before me it is open to some doubt. I say so because of the potentiality of a claim by Balwearie 1977, if it is eventually proved to exist.

Well-grounded apprehension of irreparable harm to the applicant

Ms *Saunyama* submitted that the irreparable harm that may arise is too ghastly to contemplate if respondents are not restrained. It means third parties will be transacting with respondents and officials of applicant at the same time. That would have disastrous consequences. Applicant did not have to wait for harm to occur before approaching the court. Mr *Mhungu* argued that the kind of harm contemplated by the law is that which cannot be compensated by an award of damages. I am not persuaded by this submission. I note that first respondent's affidavit does not respond to the merits of the application in detail. First respondent did not deny that he is culpable of the conduct that applicant seeks to impugn. His contention that he is an employee of Balwearie 1977 is not supportable by the facts or evidence before me. That makes his position insecure. I am persuaded that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted.

Balance of convenience

Ms *Saunyama* argued that the balance of convenience favoured the granting of the interim relief. She submitted that if Balwearie 1977 genuinely existed, then it ought to have been joined

¹³ *Supra* at page 10 paragraph 27 of the judgment

to these proceedings. The court could not rely on the evidence of first respondent whose association with Balwearie 1977 was suspicious. Mr *Mhungu* on the other hand submitted that it was unsafe to grant the interim relief on the backdrop of the letter from the Registrar of Companies suggesting Balwearie 1977 still existed. He submitted that there were glaring deficiencies in the applicant's account, which made it highly improbable. He also pointed to material disputes of fact inherent in the dispute. I have already stated that at this stage all that is expected of applicant is to establish a *prima facie* right, which may still be open to some doubt. The parties competing claims and the alleged material disputes are not matters for consideration at this stage. I accordingly find that on a balance of probabilities, the balance of convenience favours the granting of the interim relief.

Absence of other satisfactory remedy

Ms *Saunyama* drew the court's attention to paragraph 5.2 of the first respondent's opposing affidavit, which reads, "*if it were to be assumed that there is any truth to the deponent's averments, it still remains a truism that the relief of rei vindicatio is available to the applicant*". The import of the submission is that a party in the position of applicant cannot assert rights or seek protection through a prohibitory interdict as long as it can also assert those rights through the *rei vindicatio*. Counsel submitted that such proposition offends the spirit of a prohibitory interdict which should be available to any party who satisfies its requirements.

Mr *Mhungu* on the other hand submitted that this requirement was not addressed in the founding affidavit, an indication that it was not established. In any case, applicant indicated that it made a police report, which showed it had an alternative remedy. I am not persuaded by this submission. The requirements of an interdict are as set out in case law. They are part of the common law. The fact that a party may not have canvassed them in the papers does not mean they do not exist in that particular case. In an urgent chamber application, legal and factual submissions can be made from the bar. The procedure is not cast in stone. I am satisfied, that if applicant has established a *prima facie* right to the property, then it need not wait to assert those rights through a *rei vindicatio* claim while respondents continue selling the stands. Respondents did not deny that they acted in the manner complained of. Further a police report, being criminal in nature, is no bar to the institution of these proceedings.

In the final analysis, I am satisfied that the application meets all the requirements for the granting of an interim interdict. The situation on the ground needs to be arrested to avoid chaos.

As things stand, respondents may continue offering and advertising the stands for sale presumably under the banner of Balwearie 1977. On the other hand, applicant will also continue advertising and selling the stands under its own name. That will obviously confuse prospective buyers and regulatory authorities alike. That cannot be allowed to happen. Courts of law cannot condone, let alone allow lawlessness to prevail. In my view, it follows that on the return day the court is enjoined to consider, not only the confirmation or discharge of the provisional order, but the statuses of applicant and Balwearie 1977, and which one of them holds title in the property.

Accordingly it is ordered that:

Pending determination of this matter, the Applicant is granted the following interim relief:

1. First, second and third respondents be and are hereby barred and interdicted from entering applicant's property known as the Remainder of Westhey of Sabonabon Estate Kadoma.
2. First, second and third respondents be and are hereby barred and interdicted from selling applicant's stands situate at the Remainder of Westhey of Sabonabon Estate Kadoma and presenting themselves as employees of the applicant.

Bherebhende Law Chambers, applicant's legal practitioners

Mlotshwa & Maguwudze Legal Practitioners, respondents' legal practitioners