

DIVINE AID TRUST COMPANY (PVT) LTD
and
MISHECK KAENDEZA
versus
LUNA ESTATES (PVT) LTD

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 10,11 & 22 June 2020

Urgent Chamber Application

Mswelanto with TP Jonasi, for the applicant
GR Sithole, for the respondent

MUZOFA J: In this urgent chamber application, the applicants seek a provisional order in the following terms:

‘TERMS OF FINAL ORDER SOUGHT:

That you show cause to this Honourable Court why a final order should not be made on the following terms,

1. Respondent and all those claiming occupation through it be and are hereby interdicted from unlawfully occupying and/or interfering with operations at **LOT 5 of Paarl measuring 2,0711 hectares, LOT 7 of Paarl measuring 1,7604 hectares, LOT 9 of Paarl measuring 1,7878 hectares, LOT 19 of Paarl measuring 1,8503 hectares, and LOT 20 of Paarl measuring 1,6960 hectares.**
2. Respondent and all those claiming occupation through it be and are hereby interdicted from unlawfully occupying and/or interfering with operations at **LOT 11 of Paarl measuring 1,6188 hectares.**
3. That the Respondent pay costs of this application on an attorney-client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter, the Applicants are granted the following relief;

1. Respondent be and is hereby ordered to give access, and restore possession of **LOT 5 of Paarl measuring 2,0711 hectares, LOT 7 of Paarl measuring 1,7604 hectares, LOT 9 of Paarl measuring 1,7878 hectares, LOT 19 of Paarl measuring 1,8503 hectares, and LOT 20 of Paarl measuring 1,6960 hectares** to the 1st Applicant

2. Respondent be and is hereby ordered to give access, and restore possession of **LOT 11 of Paarl measuring 1,6188 hectares** to the 2nd Applicant.”

The application is opposed. Both parties raised preliminary points. I directed parties to make submissions on both the preliminary points and on the merits for convenience in the disposal of the matter.

A point *in limine* was taken for the applicants that there is no opposition before the court since the deponent to the respondent’s notice of opposition did not attach the board resolution authorizing him to represent the company. Reference was made to relevant authorities in this regard¹. In response Mr *Sithole* submitted that the court has to satisfy itself whether it is the company that is litigating. Where there is evidence that parties have litigated before and the deponent represented the company, the Court should accept that it is the company that is litigating. He relied extensively on the judgment by retired Justice CHINHENGO in this regard². In this case, it was further submitted that the parties entered into an agreement of sale and the deponent to the opposing affidavit represented the respondent and they have been to court and the deponent has represented the company. That evidence should be enough to show that the deponent is acting on behalf of the respondent.

It is trite that a company can only litigate through a representative appointed by way of a board resolution as indicated in the *Zvarivadza* case (*supra*). It would seem our courts have accepted that this is a matter of evidence which is the thrust in the *Air Zimbabwe Corporation* case. This gives credence to the approaches taken in the cases relied upon by the respondent. In any event in the *Zvarivadza* case the court did not make a determination on whether evidence *aliunde* can be considered in this regard. The proposition that there is no opposition before the court is untenable for the sole reason that in an urgent application the respondent can oppose the matter and make oral submissions. In this case the respondent’s legal practitioner appeared before the court and made the requisite submissions. To that extent there is valid opposition and I am prepared to accept the opposition affidavit for the reason that parties have litigated before and the deponent

¹ *Madzivire and others v Zvarivadza and others* 2006(1) ZLR 514(S) : First Mutual Investment (Pvt) Ltd v Roussaland Enterprises (Pvt) (Ltd) t/a Third World Bazaar and Others HH301/17

² *Air Zimbabwe Corporation v The Zimbabwe Revenue Authority* HH 96/03

to the respondent's opposing affidavit represented the respondent. A reading of the *Zvarivadza* case shows that the remedy is not to dismiss the matter but to order that the deponent produce the board resolution. The preliminary point has no merit and it is dismissed.

The respondent's preliminary point is that the matter is not urgent. It avers that both the legal practitioner who prepared the certificate of urgency and the applicants do not address the issue of urgency and emphasized the point that there is no indication of when the harm is alleged to have occurred and how it occurred. It also indicates that the applicants became aware of the interference in December 2019 but did not do anything about it. In February and March 2020 respectively there was communication between the parties on the interference but the applicants did not take any action to protect its rights if it had any. *Mr Sithole* for the respondent argued that even if the interference took place on 22 May 2020 there was an unexplained delay from 22 May to 8 June 2020 when the application was filed. In my view the delay alluded to is not long enough to lead to an adverse inference of inaction considering the circumstances of this case.

Mr Mswelanto was at pains to demonstrate to the court when the first applicant's rights were interfered with and how they were interfered. He emphasised that the applicants' rights were interfered with on 22 May 2020 and they immediately took action. The first applicant's founding affidavit is set out in very general terms except in the case of the second applicant.

A certificate of urgency is meant to direct the Registrar to refer the matter to a judge in chambers as a matter of urgency. In considering the application the judge is at large to consider the certificate of urgency together with the founding affidavit. In *casu*, *Mr Mswelanto* who prepared the certificate of urgency set out the reasons why he believed the matter to be urgent. Whether the belief is correct or not is not the issue. The certificate of urgency is silent on the dates when the first applicants' rights were interfered with. Similarly the first applicant's founding affidavit is mum on the dates. The respondent referred to the some incidents in December 2019 and correspondence between the parties in February and March 2020 but all this was not substantiated. The only correspondences in the record are dated after 22 May 2020. Had there been any telephonic communications, I am certain these could have been referred to in the written correspondences.

It is difficult for this court to agree with submissions made for the first applicant. The certificate of urgency just refers to some several attempts to repossess, disturb and evict the

applicants from the plots. There is no indication when these attempts were made on the individual plots and how the attempts to repossess the plots were done. *Mr Mswelanto* referred the court to paragraph 7 of the first applicant's founding affidavit as the basis of the urgency. I reproduce it hereunder to demonstrate the point I make,

'Grievance

7.1 The respondent has been making several attempts to repossess and evict the applicants from the above mentioned plots without any notice to cancel the agreements of sale or any court order.

7.2 The respondent without a legal basis through its employees has been harassing the applicants and denying them peaceful enjoyment of their pieces of land without legal justification.'

A reading of those paragraphs shows that the violations of the rights is not specifically outlined in respect of each plot. The first applicant seeks to protect its rights in five plots but it does not state how they were harassed. However it seems the respondent does not deny that it has taken occupation of the plots as it alleges that the plots have been sold to third parties that have built on the plots. Thus it alleges that the second applicant was denied access in December 2019. I am satisfied that there was some interference at the plots but it is unclear when this took place. Time lines as to when this happened assists the court to make a determination on urgency. Since the first applicant did not state when the respondent interfered with its rights in the five plots I am unable to make a finding that the matter is urgent. It is only the second applicant that has shown that his rights were interfered with on 22 May 2020 and this date cannot be stretched to apply to all the applicants.

Mr *Sithole* also vehemently opposed the granting of the order on the basis that it is fatally defective in that the interim interdict sought is more of an order for spoliation. I do not find any defect in the interim order, the applicant is seeking a mandatory interdict to compel the respondent to give the applicants access to his plot. It must be borne in mind that the purpose of a mandatory interdict is to remedy the effects of unlawful action already taken³. Mr *Sithole* based his argument on the use of "restore possession" to my mind that should not defeat this application. I comment in passing that the interim order could have been couched in better terms. It was also raised that the second applicant has no rights to protect since the first applicant acquired personal rights from the respondent it cannot sell those rights. The second applicant therefore did not acquire any rights.

³ Herbstein and Van Winsen , The Civil Practice of the High Courts of South Africa, 5th Ed Vol 2

This submission is not relevant at this stage of the application. It is trite that an interim order is meant to preserve the *status quo ante* pending the determination of the parties' rights on the return date. I am satisfied that the first applicant bought the plots from the respondent as evidenced by the agreements of sale attached to the application. I am also satisfied that the second applicant bought Plot 11 from the first applicant as evidenced by the agreement of sale attached to the application.

After disposing of the preliminary points I deal with the merits of the case only in respect of the second applicant. The requirements of an interim interdict are trite. The applicant must establish:

- a) A *prima facie* right even if it is open to doubt,
- b) An infringement of such right or a reasonable apprehension of irreparable and imminent harm to the right if an interim interdict is not granted'
- c) A balance of convenience favouring the grant of the interdict and
- d) The absence of any other remedy⁴

The applicants and the respondent made extensive submissions on issues that are best resolved on the return date. I shall not consider those submissions as they tend to cloud the issues for determination in this application.

Mr *Mswelanto* submitted that the respondent sold certain properties known as Lot 5 of Paarl measuring 2, 0711 hectares, Lot 7 of Paarl measuring 1, 7604 hectares, Lot 9 of Paarl measuring 1, 7878 hectares, Lot 19 of Paarl measuring 1, 8503 hectares and Lot 11 of Paarl Farm measuring 1,6188 hectares and Lot 20 of Paarl measuring 1,6960 hectares to the first applicant. The first applicant in turn sold plot 11 to the second applicant. The agreements of sale were attached to the application. From those submissions the first applicants acquired personal rights and these were passed on to the second applicant. At this stage it is unnecessary to make a determination whether the first applicant could pass personal rights to the second applicant.

The respondent did not deny entering into this agreement. However it raised issues to cloud the application that the first applicant did not fulfill the terms of the agreement, that the agreement

⁴ Telecel Zimbabwe Private Limited and others 2015(1) ZLR 651.

of sale was not an agreement of sale and that the development agreement which gave rise to the agreements of sale was cancelled. The applicants therefore have no rights to claim. None of the submissions can succeed. If indeed the first applicant breached the terms of the agreement of sale it was for the respondent to make sure that the agreements of sale are cancelled in terms of the law. As matters stand the agreements of sale are still extant. The respondent cannot expect this court to sanitize its conduct. The respondent's conduct to cancel the agreements and deny the second applicant access to his plot without a court order was unlawful. There is no merit in the argument that what the parties entered into was not an agreement of sale. It was an agreement of sale. The second applicant managed to establish that he has a *prima facie* right. The second applicant has shown that the right has been interfered with and this has not been denied by the respondent. He was denied access his plot and this was not denied.

Mr Sithole for the respondent submitted that the applicants have an alternative remedy in the form of a claim for damages since the plots have been sold to third parties. The court was urged to dismiss the application because there are third parties who are likely to be prejudiced and that the order may not be capable of execution. I agree with counsel for the applicant. The interim order is the suitable remedy available to the applicant. The applicants were surprised to hear in court that the plots were disposed to third parties. Infact I am unable to accept the submission that the plots were sold to third parties because no evidence was placed before the court to substantiate the alleged sales. Secondly the respondent's submission urges this court to protect third parties that are not before the court. It also urges this court to uphold the respondent's conduct to cancel a sale agreement, repossess the plots and dispose them without a court order. The courts cannot be used to further an unlawful conduct it cannot sanitize the respondent's conduct which is tainted with illegalities. There is no alternative remedy in this case. The balance of convenience favors the granting of the order since the applicant stands to be prejudiced by the respondent's conduct.

From the foregoing the provisional order shall be granted in respect of plot 11 only. Accordingly the following order is made,

INTERIM RELIEF GRANTED

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

1. Respondent be and is hereby ordered to give access, and restore possession of **LOT 11 of Paarl measuring 1,6188 hectares** to the 2nd Applicant.”

Hamunakwadi & Nyandoro, applicant’s legal practitioners
Muza & Nyapadi, respondent’s legal practitioners