CHAMPION CONSTRUCTORS (PVT) LTD
versus
MILTON GARDENS ASSOCIATION
and
THE CITY OF HARARE
And
THE DIRECTOR OF URBAN PLANNING SERVICES
and
DIRECTOR OF WATER SERVICES
and
DIRECTOR OF ENGINEERING SERVICES

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 30 JANUARY 2013 AND 06 FEBRUARY 2013

**Urgent Chamber Application**

*Z. Chadambuka*, for the applicant
*T. Nyamasoka*, for the first respondent
2nd, 3rd, 4th and 5th respondents in default

MATHONSI J: This matter involves a long standing dispute over ownership and development of stands situated on a piece of land known as Newark of Hilton of Subdivision A of Waterfalls, Harare measuring 25 0532 hectares. The matter has got a chequered history and numerous court processes have been filed by various parties claiming an interest in the property. Historically, the land in question is registered in the name of one Tecla Mvembe who holds title by deed of transfer number 4573/2000 On 6 November 2000, Mvembe penned an agreement of sale with Max Management (Pvt) Ltd in terms of which she sold 76 of the approximately 103 stands making up the property, on certain terms and conditions. Prior to that Mvembe had obtained a permit from the municipality of Harare authorising her to subdivide the property in terms of general plan No SD/670/98.

In due course a roads and storm water drains layout plan was approved by the municipality in terms of which the servicing of stands on the property was commenced. *Max Management (Pvt) Ltd* sold some of the stands on the land to certain individuals including

members of the first respondent. It is common cause that in pursuance thereof the holders of those units commenced construction of houses and some of those houses have been completed. Generally they took occupation of the units. It is also common cause that in accordance with the approved plans, roads, water drains and water reticulation systems were constructed which enabled individual holders to construct houses. It also appears common cause that some of the stands, not only have water supply but also have individual water meters installed by the second respondent following due compliance with its requirements.

Disputes emerged between the various players and interested parties which led to a lot of litigation aforesaid. One such court action led to an order being granted by consent in HC 7312/2006 on 11 March 2008, a case involving the first respondent as the applicant, *Max Management (Pvt) Ltd and Mvembe* and 2 others as respondents. The present applicant was not a party.

In terms of clause 3 of that consent order the first respondent was to service and develop the 76 stands that had been sold by *Max Management (Pvt) Ltd* in accordance with subdivisional permit SD670, I have referred to. That order was granted despite the fact that on 19 September 2007 ( a date hotly contested by the first respondent), the same Mvembe had purported to sell the same property to the present applicant.

The applicant later sued Mvembe the surveyor general and the Registrar of deeds in HC 7398/2011 seeking to enforce the sale agreement it had entered into with Mvembe. Unfortunately the first respondent and the municipality were not cited in that application and, as it was unopposed, an order was granted in default on 14 September 2011 by MUTEMA J in the following:-

"IT IS ORDERED THAT:

1. The first respondent, Tecla Mvembe be and is hereby ordered to sign all transfer papers and give effect to transfer of certain piece of land situate in the District of Salisbury called Newark of Hilton of subdivision A of Waterfalls held under deed of transfer No. 4573/2000 to the applicant within ten (10) days of the date of service of this order on her.

2. Should the first respondent fail to sign the papers within the said period, then the Deputy Sheriff, Harare be and is hereby authorised to sign all papers on behalf of the first respondent to give effect to the transfer.
3. An order be and is hereby granted directing the second respondent (Surveyor general) to cancel any subdivision plan registered with him by the first respondent in respect of the property referred in paragraph 1 above of this order and recognise only the original boundaries of the property as provided for in deed of transfer No. 4573/2000 to the registered subdivision.
4. The first respondent, to pay costs of suit."

The applicant did not waste time promptly advising the surveyor general, by letter of 19 October 2011 to cancel the general plan in terms of the court order. The surveyor general duly complied advising of such cancellation by letter of 20 October 2011. The first respondent then approached this court by urgent application in HC 10716/2011 seeking to intervene against the order issued by MUTEMA J on 14 September 2011. In its founding affidavit sworn to by Michael Chari on 28 October 2011, the first respondent stated in paragraph 15:-

> "15. The applicant has been mobilising resources from its members and other individual stand holders alike <u>to ensure that servicing of the property</u>
>
> <u>proceeds in earnest</u> and as we speak, it is about to complete the installation of the water reticulation system. Attached hereto as Annexure Q" and "R" are various invoices, receipts and quotation highlighting the progress that the applicant is achieving. Sadly, on the 25th October 2011, the applicant through one of its Committee members, Syril Mupanguri, during his routine visits to Waterfalls District Office, which is delegated by the fifth respondent with the administration of the affairs within the District of Waterfalls and surrounding areas, discovered that the General Plan CG2836 relating to the property had been cancelled and that a delegation had been assigned to carry out evaluation of the property in giving effect to the cancellation."

The first respondent went on to attach the consent order I have referred to which authorised it to service the stands in question. That application was served the present applicant who went on to oppose it. On 18 November 2011 MWAYERA J granted a provisional order in favour of the first respondent in HC 10716/2011 the interim relief of which reads:

> "Pending the determination of this case the following interim relief is made:
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> 1. The second respondent (Mvembe) or the Deputy Sheriff or his lawful deputy as the case might be, be and is hereby interdicted from signing such documents and/ or papers passing transfer to the first respondent (the applicant in *casu*) of certain immovable property namely Newark of Hilton of Subdivision A of Waterfalls situate in the District of Salisbury measuring 25,0532 hectares.
> 2. Consequently, the fourth respondent be and is hereby interdicted from accepting, approving such documents and/or papers as may be presented to him to effect such transfer of the aforesaid property into the first respondent's name.
> 3. The third respondent (Surveyor general) is interdicted from implementing a new plan in place of Plan CG2836.
> 4. The fifth respondent is interdicted from implementing any plan brought into effect by the third respondents in place of plan CG2836."

The confirmation or discharge of that provisional order is still to come. Be that as it may, the applicant has approached this court on an urgent basis seeking a provisional order in the following terms:-

> "<u>TERMS OF THE FINAL ORDER SOUGHT</u>
>
> That you cause to this Honourable court why a final order should not be made in the following terms:-
>
> 1. It is declared that the first respondent has no right to carry out any development works on the piece of land described as Newark of Hilton of subdivision A of Waterfalls situate in the District of Salisbury measuring 250532 hectares and which works are founded upon the existence of general Plan CG2838 unless and until the order granted by the Court under HC 10716/2011 has been set aside.

2. The second to fifth respondents are ordered not to approve, supervise or authorise any development works being carried out by the first respondent on Newark of Hilton of Subdivision A of Waterfalls situate in the District of Salisbury measuring 250532 hectares unless and until the order granted by the Court under HC 10716/2011 has been set aside..
3. The first respondent to pay costs of suit.

INTERIM RELIEF SOUGHT (SIC)

Pending the determination of case No. HC 10716/2011, the following interim relief is granted:

1. The first respondent is interdicted from servicing or developing stands on certain immovable property namely Newark of Hilton of subdivision A of Waterfalls situate in the District of Salisbury measuring 25 0532 hectares.
2. The first respondent is interdicted from selling or advertising for and accepting payments towards contributions for service charges for the stands on the property Newark of Hilton of subdivision A of Waterfalls situate in the District of Salisbury measuring 25 0543.
3. The second and fourth respondents are interdicted from supplying water and other services to the first respondent until the issue of the cancelled permit and ownership of Newark of Hilton of subdivision A situate in the District of Salisbury measuring 25 0532 (sic) hectares is finalised.
4. The second, third and fifth respondents are interdicted from authorising supervising or approving construction of roads and storm water drainages being constructed by the first respondent on the property Newark of Hilton of subdivision A of Waterfalls situate in the District of Salisbury measuring 25 0532 hectares."

Among other documents, the applicant annexed the provisional order of MWAYERA J in HC 10716/2011; the consent order of MAVANGIRA J in HC 7312/2006 and a press statement published by the first respondent in the Herald Newspaper of 27 November 2012 which reads in relevant part thus:-

"MILTON GARDENS ASSOCIATION PRESS STATEMENT

We wish to advise that Milton Gardens Association is the holder of a Deed of Cession entered into and signed by *Max Management (Pvt) Ltd* basically ceding its rights and obligations as the Developer of a certain piece of land known as Newark of Hilton of Subdivision A of Waterfalls, Harare.

To enable the Association to comply with the conditions of the Subdivision permit and to ensure substantial servicing of the development, individuals who have interest, right or title in the stands listed hereunder are being called to confirm their interest, right and title and make payments towards contributions for service charges."

At the hearing of the matter both counsel took points *in limine*. *Mr Chadambuka* for the applicant objected to the opposing affidavit of Syril Mupanguri, the current chairman of the first respondent, on the basis that it is not apparent from the papers that he has authority to represent the first respondent in terms of its constitution.

*Mr Nyamasoka* for the first respondent took 2 points *in limine* namely that the chamber application is defective as it does not comply with Rule 241 of the High Court rules in its form as it does not set out concisely the grounds of the application. Secondly, he took the point that the matter is not urgent.

I do not consider it necessary to determine all the preliminary points as I am of the view that the matter is simply not urgent. I have painstakingly set out the history of the matter in order to demonstrate that this is a long standing dispute which has been allowed to perpetuate mainly because the parties have not shown any serious commitment to bringing finality to the dispute. Instead they have contented themselves with filing one application after the other without the slightest desire to bring the matter to a close.

The applicant has been aware for quite some time of the consent order issued by MAVANGIRA J on 11 March 2008 (HC 7312/2006) in which the first respondent was allowed to service or develop the land. That order remains extant and nothing has been done to set it aside. The applicant was served with the urgent chamber application in HC 10716/2011 in which the first respondent made it clear that it was busy servicing the stands and had almost completed the water reticulation system. It however did not do anything about that activity.

Indeed the applicant has produced a press statement published on 27 November 2012, almost 2 months before this application was made, in which the first respondent literally nailed

its colours on the mast about the servicing of the land. It is my myopic to say the least to even suggest that the press statement was only brought to the applicant's attention on 22 January 2013 when it was in the public domain that far back.

What this means is that the applicant has created this urgency in order to jump the queue. Urgency which stems from a deliberate abstention from action is not the kind of urgency contemplated by the rules. *Kuvarega v Registrar general & another* 1998 (1) ZLR 188 (H) 193G.

In any event, there is nothing which the respondents are doing now which they were not doing in November 2011 when the provisional order in HC 10716/2011 was granted. The applicant elected to bid its time and must live with that election. If it had sought finality of that matter it would have long been put to bed by now.

I refuse therefore to deal with this matter as urgent. It is accordingly dismissed with costs.

*Munangati & Associates*, applicant's legal practitioners
*Atherstone & Cook*, 1st respondent's legal practitioner