TAFARA MUCHENJE
and
ZANELE MUCHENJE
versus
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
AROSUME PROPERTY DEVELOPMENT (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 8 & 17 August 2023

Urgent Chamber Application- Interdict

T S T Dzvetero, for the applicants
S M Bwanya, for the 2nd respondent

MUSITHU J: There is a long drawn out dispute between the parties herein. The parties have been in and out of this court over an immovable property identified as Stand Number 227 Carrick Creagh Estate Borrowdale, Harare (the property). The applicants have approached this court again seeking the following relief:

> "**TERMS OF FINAL ORDER SOUGHT**
> That you should show cause to this Honourable Court why a final order should not be made in the following terms:-
> 1. The provisional order be and is hereby confirmed.
> 2. All parties be and are hereby interdicted and prohibited from erecting any pegs, buildings or structures and from effecting any developments or improvements on stand number 227 Carrick Creagh estate pending the determination of eviction proceedings in **HRE C-CG 2474/22**.
> 3. The first and second respondents to pay costs on an attorney-client scale jointly and severally the one paying the other to be absolved.
>
> **INTERIM RELIEF GRANTED**
> Pending the return date; the Applicants be and are hereby granted the following interim relief:
> 1. A preservation order of the status quo of Stand Number 227 Carrick Creagh Estate Borrowdale, Harare be and is hereby granted and all parties herein be and are hereby interdicted and prohibited from erecting any pegs, buildings or structures and from

effecting any developments or improvements on stand number 227 Carrick Creagh Estate pending the determination of proceedings in HC 2816/23.

2. The 2nd Respondent be and is hereby prohibited and interdicted from demolishing any of the Applicants' buildings or structures at Stand Number 227 Carrick Creagh Estate Borrowdale, Harare pending the determination of eviction proceedings in HC 2816/23.
3. 1st and 2nd Respondents to pay costs of suit.

SERVICE OF THE PROVISIONAL ORDER

A copy of this Application together with the Provisional Order shall be served upon the Respondents by the Applicant's Legal Practitioners or an officer in their employment."

Background to the application and the applicants' case

The applicants claim to have entered into a rent to buy agreement for the property with the first respondent sometime in 2008. That agreement was renewable on a yearly basis. The agreement with the first respondent was borne out of a Public Private Partnership (the PPP) arrangement which involved the first respondent, second respondent and Sally Mugabe Housing Cooperative (the Cooperative). The PPP agreement was for the development of an upmarket residential area in Carrick Creagh in which the second respondent was responsible for all the developmental work. The PPP agreement regulated the acquisition of rights to occupy, use and own residential and commercial stands in Carrick Creagh. That includes the property in dispute.

Further, in terms of the PPP arrangement, a potential beneficiary of the scheme was identified and vetted by the Cooperative and then recommended to the second respondent as the developer. On successful completion of the vetting process, the beneficiary was required to pay the cost of development which was determined by the size of the stand applied for. After the payment, the beneficiary was recommended to the first respondent for a lease agreement which had an option to purchase the identified property. The first respondent conducted its own vetting and if successful, the would be beneficiary was required to pay the cost of the land, which is known as the intrinsic value. The beneficiary would take occupation in terms of a lease agreement or agreement of sale.

The applicants claim that the initial rent to buy fee was ZW$443 440 000 000 (Four hundred and forty-three billion hundred and thirty million dollars). That amount was varied through an addendum to US$15 011. The applicants claim to have discharged this obligation by paying the sum of US$15 018. That amount was never refunded to the applicants. For that

reason, the applicants claim to have fully complied with their obligations under the lease to own arrangement.

On 25 July 2019, the second respondent wrote to the applicants informing them they had failed to pay the sum of $377 183.98, being the outstanding amount for development costs incurred by the second respondent on the said property. The first respondent had earlier demanded payment of the said amount by 21 December 2018, failing which the applicants' offer for the property would be withdrawn. The letter proceeded to advise that as a result of the applicants' failure to pay the said amount demanded by the first respondent, the property was now being re-allocated to another beneficiary. The applicants responded to the letter on 2 October 2019, through their legal practitioners of record. In their response, they claimed that the letter of 25 July 2019 had only been received on 27 September 2019. They further argued that the respondents herein had no lawful right to withdraw the offer for the property because there was already a summons case instituted by the respondents pending at the courts. The letter further warned the respondents to cease any attempted repossession and reallocation of the property as it belonged to the applicants.

The applicants claim that on 7 April 2020, they paid a sum of $327 183.98 to the second respondent. That amount, which constituted development fees, was paid under protest. On 18 May 2020, the applicants received a letter from the first respondent informing them of the withdrawal of the lease for the property. The letter referred to an earlier letter of 21 December 2018 which called upon them to pay the outstanding development fees. That demand had not been complied with, and hence the withdrawal of the lease. The withdrawal of the lease and the repossession of the property was with immediate effect.

On 29 June 2022, the respondents instituted summons for the eviction of the applicants and the demolition of their structures from the property. Those proceedings were instituted out of the Magistrates Court, Harare under C-CG2474/22. The applicants entered appearance to defend the claim. They also filed their plea simultaneously with a counterclaim. The counterclaim exceeded the jurisdiction of the Magistrates Court and the applicants made an application for a pronouncement on excess jurisdiction and stay of action pending the determination of their counter claim by the High Court. That application was granted on 14 December 2022.

The applicants instituted their own claim in the High Court on 27 April 2023 under HC2816/23. In that claim, the applicants seek the following *declaraturs*: that they discharged their obligations in terms of the purchase price and development costs for the property; that the cancellation of the lease agreement between the first respondent and the applicants was not valid and the agreement remained extant and valid; that rights, interests and title in the property be transferred to the applicants by the first respondent against tender of completion of construction by the applicants within 12 months from the date of the order sought, failing which the Sheriff would sign all necessary papers to pass transfer to the applicants. That matter remains pending before this court.

Despite the two matters pending before the court, the applicants were informed by their caretaker, one Godknows Musidzaramba that some people from the second respondent came to the property on 21 July 2023 and erected some pegs made of stones, wood logs and plastic containers. The same people returned on 25 July 2023 with a grader intending to construct a road on the pegged area. The applicants' cottage and part of the durawall were to be affected by the road if it was to be constructed on the pegged area. The applicants were advised to attend to the removal of the structures within two weeks failing which an excavator would be brought in to demolish them. The two week period was set to expire on 8 August 2023.

The deponent to the founding affidavit claims to have visited the site on 27 July 2023, and confirmed the position on the ground. The applicants contend that in view of their lease agreement with the first respondent, and having paid the development fees, they have a *prima facie* right to have the *status quo* of the property preserved pending the determination of the aforementioned pending matters.

The Second Respondent's Case

In its notice of opposition, the respondent raised the following preliminary points at the outset. Firstly it averred that the matter was not urgent. The applicants were aware that after the cancellation of their lease by the first respondent in 2020, a new lease agreement had since been issued to one Tanyaradzwa Sharon Bwanya (Tanyaradzwa) who became the lawful lessee. The applicants were former tenants who had challenged the cancellation of their lease under HC 3750/20. That matter had not been pursued since November 2020. The applicants were aware of

Tanyaradzwa's intention to subdivide the property. She had advised them in writing to vacate the property but they ignored her.

The second point was that the applicants were in unlawful occupation of the property and were busy constructing unapproved structures. The court could not be asked to protect their unlawful conduct. That point had been made by the court in *Morgan Havire* v *Arosume Property Development (Private) Limited*[1]**.**

The third point was that the application was just an abuse of process. ZHOU J, in a ruling involving the same parties had made it clear that the applicants had lost their rights in the property following termination of their contract with the first respondent. The applicants had no right therefore to found the interlocutory relief sought.

The last point was that there was a material non-joinder. The parties had failed to cite an interested party, Tanyaradzwa who held an extant judgment in her favour against the applicants. That judgment barred the applicants from constructing permanent structures on the property.

As regards the merits, it was contended that the deponent to the applicants' affidavit was not privy to the details of the matter. He was relying on hearsay evidence. He had conveniently avoided disclosing several other cases that had a bearing on the present matter. Cases HC 3750/20, HC 8434/22 and HC 4459/22 were all decided against the applicants. It was denied that the applicants ever fully paid for the property. The applicants never acquired rights in the property. There was no court process challenging the repossession of the land by the first respondent. The application for review under HC 3750/20 that had been filed by the applicants had been withdrawn. It was further averred that the applicants' occupation of the property was criminal as it contravened s 3 of the Gazetted (Consequential Provisions) Act[2].

The court was urged to dismiss the application with costs on the punitive scale as the applicants' conduct was clearly an abuse of court process. The applicants were in the habit of routinely filing these urgent applications just to frustrate the enjoyment of rights by a third party who had since acquired rights in the property. It was alleged that the applicants brought an urgent chamber application in HC 3900/22 seeking an order suspending the enjoyment of rights by the new tenant pending the hearing of the matter in HC 3750/20. That application was withdrawn on the day of the hearing of the matter.

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[1] SC 90/21
[2] [*Chapter 20:28*]

An application for an interdict was filed under HC 4459/22, pending the determination of the matter in HC 3750/20. On the day of hearing the matter in HC 3750/20, it was withdrawn but the relief in that application was insisted upon. Another urgent application for an interdict was filed in HC 8434/22 pending the conclusion of eviction proceedings in the Magistrates Court in HRE CG 2474/22. The applicants had now approached this court pending the determination of another matter filed under HC 2816/23. All these court cases were only meant to delay the day of reckoning.

The answering affidavit

In their response, the applicants insisted that the cancellation of their lease agreement was the subject of pending litigation under HC2816/23. The new matter was instituted following the withdrawal of proceedings in HC 3750/20. The withdrawal followed sentiments expressed by the court that the applicants' cause of action ought to have been grounded in contract law and not in review proceedings. The allegation that the applicants were not prosecuting HC 3750/20 was therefore a misrepresentation. The agreement between the applicants and the first respondent ceased to be one for a lease but a sale agreement.

It was also alleged that Tanyaradzwa was the wife of the second respondent's legal practitioner, and her lease agreement with the first respondent was meant to frustrate the applicants own efforts to challenge the cancellation of the agreement between applicants and the first respondent. The alleged Tanyaradzwa was not even an innocent purchaser.

The applicants denied that they were in unlawful possession of the property. The first respondent was the owner of the land. No court order had been granted for their eviction. There was a court order for the stay of eviction proceedings pending the determination of the proceedings instituted that had been instituted earlier. The applicants stay on the property was therefore lawful to the extent that there was an extant court order which stayed their eviction.

It was argued that the alleged non-joinder of Tanyaradzwa was not material as the applicants complaint was against the first and second respondents.

THE SUBMISSIONS AND THE ANALYSIS

Urgency

Mr *Bwanya* for the second respondent submitted that the matter was not urgent. As far back as 6 June 2022, the applicants had been warned through a letter from Tanyaradzwa's legal

practitioners of her intention to subdivide the property on the basis of a lease that she had received from the first respondent. The letter of 3 June 2022 from *Mutuso, Taruvinga & Mhiribidi* also advised the applicants that their continued occupation of the property was unlawful, and the legal practitioners were under instructions to seek the eviction of the applicants as well as demolish their illegally constructed structures. The applicants were therefore aware all along of the threat of eviction and demolition of their structures. The threat of eviction had not been initiated by the second respondent, but by a third party whom the applicants had neglected to cite herein.

In response, Mr *Dzvetero* for the applicants submitted that the letter of 3 June 2022 was written before the proceedings under HC 2816/23 were instituted. Counsel further submitted that the applicants' fears had been allayed by an order granted by ZHOU J in HC 4459/22 on 25 July 2022. In that matter, the applicants herein were the applicants therein. Tanyaradzwa was the first respondent while the second respondent herein was the second respondent therein. The first respondent herein was the third respondent therein. The fourth respondent was the Registrar of Deeds, while the Munyaradzi S Bwanya was the fifth respondent. Paragraphs 4 and 5 of that order stated as follows:

> "4. 1st respondent be and is hereby directed, pending the determination of HC 3750/20, not to visit; deliver any building materials to; or commence construction or any alteration of what is on the ground on stand 227 of Carrick Creagh Estate, Borrowdale, Harare.
> 5. Parties be and are hereby ordered not to apply for set down of the eviction proceedings pending in the Magistrates Court under case number Hare C-CG 2274/22 until the consolidated matters under HC 3750/20 are determined by the High Court."

Mr *Dzvetero* submitted that in view of the above consent order, the need to act would not have arisen on 6 June 2022 when the applicants received the letter from Tanyaradzwa's legal practitioners. Both Tanyaradzwa and the second respondent had therefore agreed that the *status quo* be preserved.

Having heard the submissions on the question of urgency, it is the court's view that the urgency of the matter cannot be considered in the context of the letter of 3 June 2023. The threat posed by that letter was arrested by the consent order of ZHOU J referred to above. It is the events of 21 and 25 July 2023 as set out in the applicants founding affidavit and the supporting affidavit of Musidzarimba that must be considered in determining the question of urgency.

In his judgment in HC 3750/20 (HH 840/22), ZHOU J made the observation that in light of the cancellation of the lease agreement between the applicants and the first respondent, and the withdrawal of the application for review which sought to challenge the cancellation of the lease, the applicants indeed stood on shaky ground. However, following the handing down of that judgment on 18 November 2022, the applicants herein instituted summons action under HC 2816/23 on 27 April 2023. As already noted, in that action, the applicants seek certain *declaraturs* and that matter remains pending before this court. There is no indication that the respondents sought to evict the applicants during the period between the handing down of the judgment by ZHOU J and the institution of the proceedings under HC 2816/23. The applicants remained in occupation of the property. The threat which triggered the instant application are the events of 21 and 25 July 2023, as already highlighted. The court therefore determines that the matter is urgent.

Lawfulness of the applicants' occupancy

The preliminary point was made in the context of the provisions of the Gazetted Land (Consequential Provisions) Act. Mr *Bwanya's* submission was that property in dispute was gazetted State land which required one to be in possession of an offer letter or a permit or a land settlement lease for them to be considered to be in lawful occupation of such land. In response, Mr *Dzvetero* submitted that the property in question was a mere stand whose rights were regulated by a lease issued by the first respondent. The provisions of the said law did not apply to the property.

The preliminary point is without merit. Earlier on in the judgment I alluded to the PPP arrangement between the three parties involved and how a beneficiary ended up signing a lease with the first respondent. All the documents relating to the property specifically cite it as *"Stand No. 227 stituate in the township of Carrick Creagh in the district of Harare as morefully described in the plan hereunto annexed…."* That description suggests to me that the land in dispute is private land and not State land.

Abuse of court process

This point was made in the context of the finding by ZHOU J when he stated that the applicants had lost their rights in the property following the termination of their contract with the

first respondent. Mr *Dzvetero* submitted that the views expressed by the learned judge were obiter in the proceedings before him.

I agree with the applicants' counsel that the views expressed by the learned judge were clearly obiter and made in relation to the situation that the applicants found themselves in following the withdrawal of their matter which was challenging the cancellation of their lease agreement. At that stage, the applicants had not yet instituted the action under HC 2816/23. The present application is predicated on the matter that is pending under HC 2816/23. The preliminary point is therefore devoid of merit.

Material non joinder

The preliminary point has no merit. The alleged non joinder of Tanyaradzwa to these proceedings is not fatal. The applicants' complaint is specific to the conduct of the second respondent's officials. That is clear from the founding affidavit and the supporting affidavit of Musidzaramba. The mere fact that Tanyaradzwa may have made threats of eviction and expressed her intention to subdivide the property in the past, does not necessarily justify her joinder in these proceedings in the absence of an imputation of wrongdoing on her part.

THE MERITS

In *Airfield Investments (Pvt) Ltd* v *Minister of Lands, Agriculture and Rural Resettlement & Ors.*[3] MALABA JA (as he then was) discussed the requirements for the granting of a temporary interdict as follows:

> "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."

From a consideration of the papers and the submissions by counsel, the court is satisfied that the applicants managed to establish a *prima facie* case for the granting of the interim relief

[3] *2004 (1) ZLR 511 (S)* at 517 C-E

sought herein. The applicants are currently in possession of the property on the basis of a lease that was allegedly cancelled by the first respondent. The cancellation of that lease agreement is being challenged in proceedings that are pending before this court under HC 2816/23. The applicants have invested in that property and it is only proper that the court forestalls any disturbances pending the determination of the action under HC 2816/23. That action will determine the status of the applicants' rights in that property. The balance of convenience therefore favours the preservation of the status *quo* pending the return date.

Accordingly, the following interim relief is granted:

TERMS OF FINAL ORDER SOUGHT

That you should show cause to this Honourable Court why a final order should not be made in the following terms:-

1. The provisional order be and is hereby confirmed.
2. All parties be and are hereby interdicted and prohibited from erecting any pegs, buildings or structures and from effecting any developments or improvements on stand number 227 Carrick Creagh estate pending the determination of eviction proceedings in **HRE C-CG 2474/22**.
3. The first and second respondents to pay costs on an attorney-client scale jointly and severally the one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending the return date; the Applicants be and are hereby granted the following interim relief:

1. A preservation order of the status *quo* of Stand Number 227 Carrick Creagh Estate Borrowdale, Harare be and is hereby granted and all parties herein be and are hereby interdicted and prohibited from erecting any pegs, buildings or structures and from effecting any developments or improvements on stand number 227 Carrick Creagh Estate.
2. The 2nd Respondent be and is hereby prohibited and interdicted from demolishing any of the Applicants' buildings or structures at Stand Number 227 Carrick Creagh Estate Borrowdale, Harare.

SERVICE OF THE PROVISIONAL ORDER

A copy of this Application together with the Provisional Order shall be served upon the Respondents by the Applicants' Legal Practitioners.

Antonio & Dzvetero, applicants' legal practitioners
Jiti Law Chambers, second respondent's legal practitioners