HH 628-23
HCHC 688-23

VEVHU RESOURCES (PVT) LTD

Versus

OPERATION NEHEMIAH COOPERATIVE

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 21 and 23 NOVEMBER 2023

Urgent chamber application

A. *Jakarasi* for applicant
C. *Chiperesa* for respondent

CHILIMBE J

BACKGROUND

[1] Applicant ("Vevhu") styles itself as a land developer. Respondent ("Operation Nehemiah") affects to call itself a housing cooperative. Both terms "land developer" and "housing cooperative" will be hereunder defined.

[2] Vevhu approached this court on an urgent basis in terms of rule 40 of the Commercial Court Rules SI 123-20. It sought a provisional order, pending arbitration, interdicting Operation Nehemiah from carrying out certain civil works on a tract of land known as Lot 12 of Spitzkop. This parcel of virgin land ("Lot 12"), lies due west of Harare in the rural district of Zvimba.

[3] Lot 12, together with Lot 14 of Spitzkop formed the 348.68 hectares of state land sold to Vevhu under a land development structure. It is this structure that has given rise to the dispute before the court.

THE AGREEMENTS OVER LOTS 12 AND 24 OF SPITKOP OF ZVIMBA

[4] By a memorandum of agreement ("MOA") dated 27 June 2019, the Government of Zimbabwe sold Lot 12 and Lot 14 to Vevhu. Vevhu paid an amount of $ 3,857,710 as consideration. The principal purpose behind this conditional sale was to enable Vevhu to establish on the two pieces of land, residential low and middle-density residential suburbs or townships. In that respect, as the "land developer", Vevhu was invested with extensive authority. Its role was to superintend all the processes necessary to set up the townships. Of particular importance were the town planning and regulatory formalities associated with the project.

[5] Ahead of all else, Article 3 of the MOA required Vevhu to procure a land development permit from the Department of Physical Planning. Additionally, Vevhu was to utilise its land developer status to raise funding to (a) pay consideration to Government and (b) fund the execution of the civil works necessary to deliver the township infrastructure. These works included establishing the roads, drainage, electricity, water and sewerage reticulation.

[6]. Empowered by this cuirass, Vevhu duly followed through and obtained, on 19 July 2022, the land development permits for both lots in terms of section 43 of the Regional Town and Planning Act [Chapter 29:12]. This permit prescribed the specifications which defined the character and layout of the township. It also detailed the development conditions as well as sale, transfer and occupation of the individual land demarcations or stands. In terms of this permit, Vevhu was recognised as the "Developer". It was again, charged with, among others, the responsibility to ensure that the infrastructure was delivered and in terms of specifications.

[7] Meanwhile, Vevhu concluded, on 5 October 2019, a contract of sale of land with Operation Nehemiah, an entity registered in terms of the Cooperative Societies Act [chapter 24:05]. This contract was amended by an addendum executed by the parties on 12 June 2023. (The terms of the main and addendum contracts later proved a source of discord). By clause 4.1, Operation Nehemiah paid an amount of ZWL $6,000,000 as purchase price for 20 hectares of virgin or undeveloped land.

[8] Vevhu managed to generate the funds to meet payments to Government. Operation Nehemiah`s financial clout drew from its membership. These "housing cooperative" folks pooled funds together in return for allocation of pieces of land upon which they would build

their homes. None of the parties dwelt on this aspect in their papers and it impacted a key source of conflict herein; -occupation of the land as shown below.

[9] The following provisions of the agreement are also pertinent to the dispute before the court. Firstly, clause 5 dealt with "possession, profit and risk" in the 20 hectares. Clause 5.1 thereof stipulated that Operation Nehemiah would receive possession upon transfer or receipt of net sale proceeds -presumably from off takers.

[10] Secondly, clause 9 titled "Occupation" offered Operation Nehemiah the right to occupy the 20 hectares upon payment of the purchase price, or issuance of the permit. Thirdly, clause 11.1 under "Transfer of Property" provided for the transfer of rights, title and interests in the self-same 20 hectares within a reasonable period after issuance of the development permit.

[11] It is not in contention that the development permit was granted on 19 July 2022. The question is; -other than having its members move in onto their little plots, how else was Operation Nehemiah to occupy the land? Other than such assumption, how else was Operation Nehemiah, a body corporate, to occupy 20 hectares of virgin land in Spitzkop?

[12] Finally, the agreement obliged Operation Nehemiah by clause 8.6, to meet all infrastructural development costs. It appears that this obligation generated disagreement between the parties as Operation Nehemiah contested and protested some invoices raised by Vevhu amounting to US $ 191,304 in that regard.

THE DISPUTE BETWEEN THE PARTIES

[13] The parties exchanged a series of letter during the months of September and October 2023. One of the letters is dated 23 October 2023.It was addressed by applicant`s present legal practitioners to Operation Nehemiah and contains the following line; -

> *On 5 September 2023, our client wrote to you calling you to stop road works at lot 12 as you had not paid the amounts stated in the invoices and had no lawful authority to do so.*

[14] The correspondence escalated the dispute to a demand by Vevhu. This dispute was eventually referred to arbitration by letter dated 27 October 2023. The matter is apparently pending. Vevhu then approached this court on an urgent basis on 9 November 2023.The urgent chamber application was accompanied by a certificate of urgency issued by a legal

practitioner Kimberly Chenyani. I may state that the filing of certificates of urgency to accompany urgent applications in no longer a requirement under r 40 of the Commercial Court Rules. [See CHIRAWU-MUGOMBA J`s fuller discussion on the point in *Redan Petroleum (Pvt) Ltd T/A Puma Energy v Redan Coupon (Pvt) Ltd* HH 327-22]

[15] The gist of Vevhu` s urgent protest was that Operation Nehemiah had swooped down on Lot 12 and commenced haphazard and unlawful civil works. Mr. *Jakarasi,* for the applicant Vevhu, submitted that his client had acted at earliest opportunity after this invasion by Operation Nehemiah. The need to act arose on 6 November 2023 after effort to dissuade Operation Nehemiah to desist came to nought.

[16] Ms *Chiperesa* for Operation Nehemiah argued that the matter was not urgent. The need to act arose as early as June 2023 when Vevhu lawfully moved on site. The notice of opposition attached supporting affidavit from Mr. Emmanuel Makase.He described himself as "the respondent's engineer undertaking the road civil works on the twenty (20) hectare of virgin land on Lot 12".

[17] Mr. Makase indicated that he was personally witnessed the handover of the 20 hectares by Vevhu to Operation Nehemiah in June 2023. He further detailed the activities and processes that took place as Operation Nehemiah, with the consent, knowledge and approval of Vevhu, moved to undertake infrastructural development on Lot 12. The answering affidavit did not materially controvert the engineer`s testimony.

[18] Having heard both counsel`s submissions on the issue of urgency, I set out the reasons for my ruling on the point. But before doing so, I will make a few general remarks on urgent matters.

THE LAW ON URGENCY

[19] The judicial drum-beat proclaiming what constitutes urgency is now an all too familiar tune in the jurisdiction. This court, per CHATIKOBO J`s enduring remarks in *Kuvarega v Registrar-General & Anor* 1998 (1) ZLR 188 H stated at page 193 that; -

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by

the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

[20] "Urgency" denotes the issues taken into consideration by our courts in determining the order in which litigants access the court or judge`s attention. This access is in turn predicated on the competition or queue by such litigants to secure relief from the courts [1].The key considerations in determining urgency [2] include (i) the conduct or diligence of the applicant[3], (ii) in particular, the causa and relief sought[4] (iii), timing as a general precept[5], (iv) the cause of justice and need to avert irreparable prejudice[6] as well as (v) the special place of commercial interest (or "commercial urgency") as a source of urgency[7].

THE CASE OF "COMMERCIAL INTEREST" OR "COMMERCIAL URGENCY"

[21] Vevhu' s case was premised in part, on concerns of commercial urgency. The argument was that if the matter was not heard urgently, irreparable harm of a commercial nature could befall it. This peril was summarised as follows in the founding affidavit; -

i. Paragraph 37

"…This situation will undoubtedly lead to cancellation, revocation or disapproval of the applicant`s rights as the land developer. This has adverse financial and proprietary consequences on the applicant, other innocent purchasers of stands, project financiers and other players on the project."

ii. Paragraph 39

"The applicant is clothed with rights and obligations of carrying out development works to the specifications imposed in the MOA, the subdivision and other legal entities responsible for development. Applicant has the right to supervise any

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1 See in particular the dictum of GOWORA J (as she then was) in *Triple C Pigs and Anor* v *Commissioner-General* ZRA 2007 (1) ZLR 27 (H) and the "wheels of justice" expression in *Documents Support Centre*.

2 In *Mathias Madzivanzira & 2 Ors v Dexprint Investments Private Limited & Anor* HH145-02 it was held that "For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed." (Underlined for emphasis).

3 CHATIKOBO J`s parting shot in *Kuvarega* was "Those who are diligent will take heed. Forewarned is forearmed". The learned judge also coined the oft-used expression "imminent arrival of day of reckoning" and "doomsday". In In *Sibanda v Sibanda & Ors* HH 198-21, the need for applicant to "act promptly" was emphasised.

4 *Documents Support Center (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H).

5 *Documents Support Centre, (supra); Chiwenga v Mubaiwa* SC 86-20 and *Gwarada* v *Johnson* 2009 (2) ZLR 159.

6 *Documents Support Centre; Mathias Madzivanzira & 2 Ors v Dexprint Investments Private Limited & Anor HH145-2002*

7 *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise 1999 (1) ZLR 490 (H);*

development works on the land to ensure that there is no breach of any duty on it. It follows that, where there is evidence of unsanctioned works or threats thereof, the applicant`s rights must be protected".

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[22] I will revert to the import of averments shortly. Before doing so, let me comment briefly on the subject of commercial urgency.

[23] Previously, litigants pleading commercial urgency were accorded subordinate priority in the courts. In *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & Anor* 1981 (4) SA 108 (W) at 113-4 per FAGAN J opined thus; -

> "Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person 's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this differential treatment is that the courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the roll."

[24] This court per SMITH J in *Silver's Trucks (Pvt) Ltd & Anor v Director of Customs & Excise* (supra) effectively traduced FAGAN J`s approach. It was held instead, in *Silver`s Trucks*, that the prioritisation of matters on the roll depended entirely on the urgency prescribed by the circumstances of a particular matter. Commercial matters were equally important. They too deserved prioritisation where urgency was proven.

[25] This position was followed in *Documents Support Centre*. Therein, MAKARAU J (as she then was, and opining in the most circumspect manner), confirmed that urgent matters of

a "purely commercial interest" could access justice ahead of the queue. This privilege was a matter of deserved entitlement rather than a charitable after-thought.

[26] Importantly, MAKARAU J favoured, in the same decision, the application of an objective test in order to establish what amounted urgency. Including commercial urgency. The learned judge held as follows at 244 D; -

> "It is my further view that the issue of urgency is not tested subjectively. Most litigants would like to see their disputes resolved as soon as they approach the courts. The test to be employed appears to me to be an objective one where the court has to be satisfied that the relief sought is such that it cannot wait without irreparably prejudicing the legal interest concerned."

[27] By reiterating the need for an objective test, MAKARAU J in *Documents Support Centre* went further in my view, than *Silver`s Trucks* in defining what constituted commercial urgency. In *Silver`s Trucks*, the court had based (and possibly limited) its determination of urgency on the potentially ruinous circumstances which threatened to bankrupt the applicant before it. But my humble conclusion is that the court in *Documents Support Centre,* held that commercial urgency was not necessarily confined to instances where an applicant faced total bankruptcy.

[28] This general principle has guided the courts over the years. An innumerable list of decisions has dealt with commercial urgency since *Silver`s Trucks*.[See the random list of *Bozimo Trade & Development Company (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR 1;*Manline Freight (Pty) Ltd v Kanengoni & 42 Ors* HH 139-15; *Merspin Ltd v Cecil Madondo NO* HB 276-18; *Williams v Katsande & Anor* HH 198-10; *Econet Wireless v The Minister of Labour, Public Service and Social Welfare & 2 Ors* HH 350-15; *Ilasha Mining (Pvt) Ltd v Yatakala Trading (Pvt) Ltd T/A Viking Hardware Distributors* HB 3-18 and *Shandong Taishan Sunlight Investments Limited v Yunnan Linkun Investments Group Company Limited & 2 Ors* HH 6-16.]

[29] In 2017, the Zimbabwean legislature, indirectly perhaps, underpinned this recognition of commercial urgency. It enacted the Judicial Laws Amendment (Ease of Settling Commercial and Other Disputes) Act Number 7 of 2017 ("JLA"). The JLA in turn did two things. Firstly,

it restated by section 5 thereof, the concept of divisions or areas of specialisation in the High Court. Secondly, it amended the High Court Act [Chapter 7:06] by introducing therein section 46A. This new section enabled the Chief Justice of the land to proclaim the Commercial Division of the High Court of Zimbabwe ("Commercial Court"), on 27 October 2017.

[30] As a specialised tribunal, the Commercial Court was charged with the expeditious disposal of disputes qualifying as "commercial disputes" per r 3 of the rules of court. Whilst the speedy resolution of disputes-all disputes, is a standard and demand placed on all courts, each court or division thereof must deliver to its specialised mandate. The Commercial Court`s own mandate is borne out, inter alia, in its rules of court. These rules are framed, generally and specifically, to support speedy resolution of commercial matters.

[31] What then is the import of this background? In my view, the specific dimension of commercial urgency in commercial disputes requires further reflection. One may recognise that commercial urgency can in fact arise from all sorts of threats. It may arise fortuitously, or be triggered contractually as early-warnings, risk incidents, or events of default. How a party will frame, express, or demonstrate commercial urgency [and the relief sought] will be a matter of causa, style (degree/ detail) and circumstance.

[32] In saying so, I hasten to emphasise that the determination of what constitutes urgency remains a function and responsibility of the court. Naturally, no attempt whatsoever must be made to subvert or limit the established principles that guide the courts in the exercise of that function. Neither is it being suggested here that commercial disputes will only become urgent if characterised exclusively by commercial urgency. Nor that commercial urgency is endemic to commercial disputes.

APPLICATION OF THE AFOREGOING PRINCIPLES TO THE PRESENT DISPUTE

[33] I revert once again to the founding affidavit. The deponent recounted, as at 7 November 2023, the series of events as follows; -

i. Paragraph 17

"The respondent has, in its letter dated 5 October 2023 (annexure H4) made imminent intention or threats of commencing land development activities at lot

12, without complying with any subdivision permit, planning laws and environmental laws. This threat was made surreptitiously…."

ii. Paragraph 19

"On the 20th of October 2023, the applicant discovered that the respondent, whilst pretending as if it wants to negotiate its position with the Applicant, has surreptitiously and speedily moved its equipment for purposes of carrying out road works and other development works at lot 12.

iii. Paragraph 35

"…. This is seen from numerous letters, the last of which is dated 26 October 2023

(annexure H5) where Respondent`s legal practitioner writing for the Respondent stated "Your client actions of stopping our client from developing its land is illegal".

iv. Paragraph 36

"The respondent has persistently threatened or suggested that it is going to undertake development works or road works before the onset of the rainy season and has shown in its letters dated 28 September 2023 and annexure 5 October 2023 which are now annexure H3 and H4 respectively."

[34] The underlined phrases in the excerpts above lead to one conclusion. It cannot be denied that Vevhu was aware of (i) Operation Nehemiah's presence on Lot 12 and (ii) of Nehemiah`s intention to effect the civil works thereon. Even by its own admission in Annexure H1, Vevhu became aware of Operation Nehemiah's threats as early as 5 September 2023.

[35] These threats were clear expressions to breach the contract between the parties, disregard the governmental conditions and reject the terms of the development permit. They constituted direct indications to override Vevhu' s responsibility and authority as a land developer. The question then is how did Vevhu respond to such audacity? Vevhu`s request for urgency hinges on the answer to this question.

[36] Further, Vevhu`s founding affidavit blurs the exact point when it the unlawful conduct occurred. In one breath, there is an allegation that Operation Nehemiah moved insidiously ("surreptitiously") as early as 5 September 2023. In the next, Vevhu avers that it became aware of the sudden invasion of earth moving equipment on 20 October 2023. In yet another version, Vevhu insinuates that Operation Nehemiah has merely uttered threats and an invasion is now imminent.

[37] Another dimension suggests that Vevhu has been on the ground-literally since June 2023.These conflicting versions are further compounded by the opposing papers. Firstly, Operation Nehemiah strongly argues compromise of the contractual terms. The letter dated 23 October 2023 (see [12] above]) betrays Vevhu`s lack of firmness with Operation Nehemiah. Vevhu's cause is further dented by the lack of clarity on Operation Nehemiah`s rights and timing of occupation /possession of the land as framed in the contract between the two parties.

[38] Then came the damning testimony of the engineer Mr Masake. As noted above, the claim by Mr. Masake that Operation Nehemiah took occupation in June 2023 was not seriously contested. Further, the engineer painted a picture of Operation Nehemiah fully immersed, with Vevhu`s knowledge, in development activities on the 20 hectares.

[39] Vevhu explained that it attempted to resolve the matter through negotiation with Operation Nehemiah. These efforts took it right up to the eve of this present application. Which meant, according to Mr. *Jakarasi,* that the need to act only arose after the breakdown of negotiations. Vevhu therefore elected to negotiate with a clearly intransigent offender rather than proceed with speed to court. One also notes that negotiations occurred after the offending conduct had commenced or been threated.

[40] This means that the engagements were never going to reverse the breach that had already taken place. At best, the offending party could cease or abate its breach. But according the Vevhu`s papers, the breach amounted to an incurable violation of the land development arrangement. And in so many ways especially the regulatory.

[41] In *Williams & Anor v Delitte Products (Pvt) Ltd* HMA 198-10, the parties negotiated in a bid to avert the injury. Clearly, Vevhu`s response to the breach and threats of breach did not

match the extent of the alleged wrong. It is also noteworthy that faced with blatant disregard of contractual and regulatory requirements.

[42] Even by Vevhu`s own account, the dateline still reveals unexplained gaps of inaction. The final demand was issued on 27 October 2023. The present application was filed on 9 November 2023, some 13 days later. This delay is inconsistent with the alarm characterising the application for urgency.

[43] I comment on the claim of commercial urgency as argued by Mr. *Jakarasi.* Vevhu did not favour the court with sufficient detail regarding the unlawful execution of the civil works. One would have expected quite a bit on this. It is not clear what exactly it is that Operation Nehemiah did on the ground.

[44] Were the works executed to great environmental detriment? Or did Operation Nehemiah`s agents and contractors actually deliver professionally as argued by the engineer? Were there indications that extensive remedial works would be required to correct Operation Nehemiah's forays? And at what cost-calculated or estimated?

[45] Further, Vevhu did not escalate matters. It did not report, by way of disclosure and complaint) to any of the authorities affected. The project was governed among others, mainly by a series of statutes falling under Title 20-Land, Water and Environment, and Title 29-Local Government. Such a report would have evidenced both the infraction as well as the necessary remedies.

DISPOSITION

[46] This application is based on allegations of breach of contract. Ordinarily, the law extends remedies to a wrong party. As noted above, the definition of contractual rights, especially that of occupation, appears unclear. Not only because of the clauses referred to above but given (i) the two contracts (main and addendum) (ii) and the tripartite structure of the project involving Government, Vevhu and the housing cooperative. It will be the task of the court dealing with the matter on the merits to delve further into the contractual terms. Applicant Vevhu has not made out a sufficient case for urgency and the matter will be referred to the ordinary roll.

It is therefore ordered

That the matter, being found not urgent, be and is hereby struck off the roll of urgent matters with costs.

Madzima and Company Law Chambers -applicant's legal practitioners
Mkuhlani Chiperesa -Respondent`s legal practitioners

[CHILIMBE J ___23/11/23]