HH 35-24
HCHC 688-23

VEVHU RESOURCES (PVT) LTD
Versus
OPERATION NEHEMIAH COOPERATIVE

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 18 and 24 January 2023

Opposed application

A. Jakarasi for applicant
C. Chiperesa for respondent

CHILIMBE J

BACKGROUND

[1] On 21 November 2023, applicant unsuccessfully moved to have this matter heard on an urgent basis. On 23 November 2023, I handed down the reasons, under judgment number HH 628-23, for deferring the matter to the ordinary roll. The matter was, in due course, set down on the normal roll and argued on the merits on 18 January 2024. Herewith the judgment.

[2] I will refer to, and retrace (or "regurgitate", as CHITAPI J expressed it in *Exavier Maoneke v Trustees of Mount Olive Trust* HH 640-22), in quote or paraphrase, discussion and findings in HH 628-23 for convenience.

THE DISPUTE

[3] The applicant ("Vevhu") is a land developer. Respondent ("Operation Nehemiah") is a housing cooperative registered in terms of the Cooperative Societies Act [chapter 24:05]. In such respective capacities, the two parties collaborated to establish a township (residential estate) on a piece of land known as Lot 12 of Spitzkop. This being a parcel of virgin land on the western edge of Harare falling under the administrative jurisdiction of Zvimba Rural District Council ("the Local Authority").

[4] Lot 12, together with Lot 14 of Spitzkop forms the 348.68 hectares of state land sold to Vevhu under a land development structure in 2019. A dispute arose between Vevhu and

Operation Nehemiah over the development of the township. The two parties referred their dispute to an arbitrator for resolution. This matter is still pending.

[5] Vevhu alleges that part of the dispute arose when Operation Nehemiah swooped down on Lot 12 and commenced haphazard and unlawful civil works to establish infrastructure on Lot 12. This action was contrary to the parties` contract. In that respect, Vevhu prays that Operation Nehemiah be stopped from continuing with such civil works until the dispute is addressed by the arbitrator.

[6] In the present application, Vevhu claims that it enjoys rights under contract and statute which rights were breached by Operation Nehemiah. But Operation Nehemiah disputes that Vevhu enjoys any such rights. It argues that firstly, Vevhu` s interpretation of contract and statute is incorrect. And secondly that if indeed Vevhu possessed such rights, it waived or compromised them.

THE REQUIREMENTS OF AN INTERDICT

[7] Both parties correctly identified the requirements of a temporary interdict. Indeed, such is an established position at law summarised as follows in *LF Bashof Investments (Pty) Ltd* v *Cape Town Municipality* 1969 (2) 3A 256 (C) at 267 A-F, per Lorbett J (as he then was) who held that an applicant seeking a temporary interdict must show:

> "(a) that the right which is the subject matter of the main action which he seeks to protect by means of an 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 favour the granting of the interim relief, and
>
> (d) that the applicant has no other satisfactory remedy".

[8] This court, per ZHOU J recently restated the above principles in *Khan v Masuku & 4 Ors* HH 79-23 [1] .The learned judge further held that (a) the existence of a right is a question of substantive law and (b) that the extent to which such right is established (whether clear or only prima facie) is a matter of evidence. I will proceed to examine the matter on the basis of the above principles.

THE RIGHTS SOUGHT TO BE ESTABLISHED.

[9] The rights claimed by either side to this dispute principally repose in two main contracts as well as two ancillary instruments. The main agreements are (a) the contract between Vevhu and the Government of Zimbabwe ("the MOA") and (b) the contract of sale of land between Vevhu and Operation Nehemiah ("the Lot 12 Agreement"). The ancillary instruments are (i) the subdivision permits ("the Permits"), and (ii) the addendum to the Lot 12 Agreement ("the Addendum").

[10] The MOA was executed on 27 June 2019.In terms of that agreement, the Government of Zimbabwe (GOZ), sold Lot 12 and Lot 14 of Spitzkop 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. This objective forms a central consideration in the resolution of this application. In that respect, as the "land developer", Vevhu was invested with extensive authority to ensure delivery of the township.

[11] Its role was to superintend all the processes necessary to set up the townships. Of particular importance was the obligation imposed on Vevhu to observe the town planning and regulatory formalities associated with the project. This authority came in the form of obligations set out-particularly in clauses 3 and 4 of the MOA.

[12] 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 tasked to utilise its land developer status to raise funding to (a) pay consideration to Government and (b) fund the

[1] The learned judge also referred to *Econet (Pvt) Ltd v Minister of Information* 1997(1) ZLR 342(H) at 344G-345B; *Watson v Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Nyika Investments (Pvt) Ltd & Ors* 2001(1) ZLR 212(H) at 213G-214B

execution of the civil works necessary to deliver the township infrastructure. Namely roads, drainage, public lighting, water and sewerage reticulation.

[13] Failure to fulfil the obligations set out in Articles 3 and 4 amounted to breach as defined in Article 13. This, as read with Article 15, entitled the GOZ to terminate the relationship and seek the usual remedies for breach. Effectively, the GOZ could eject Vevhu from Spitzkop for breach. Apart from termination by breach, the MOA was, according to Article 7.1, due to elapse (unless renewed) after a period of five (5) years. Mr *Jakarasi* for the applicant drew considerable emphasis to the peril of termination in his submissions.

[14] Vevhu duly obtained, on 19 July 2022, the Land Development Permits for both lots 12 and 14, in terms of section 43 of the Regional Town and Planning Act [Chapter 29:12] ("the RTP Act"). The Permit for Lot 12 was referenced SL1132. It prescribed the specifications meant to define the character and layout of the township. The Permit provided for the following; -

i. Allocated a reference or number to each and every stand in the entire estate-under a total of 12 categories of land use -from residential, institutional and service.
ii. Defined-under 16 headings- the development conditions applicable to the establishment, incorporating survey, establishment of roads, public lighting and water infrastructure- including water purification and pump stations.
iii. Stipulated the special conditions on reservation or restriction of change of use, as well as preservation of servitudes.
iv. Fixed the formula for demarcating GOZ`s 10% endowment and also prescribed how the land itself was to be transferred.
v. Specified development or building conditions for various structures ranging from dwellings and flats to commercial and industrial facilities.
vi. In particular, by paragraph 11 of Part 1 of the Lot 12 Permit, prohibited occupation of the stands until the Local Authority had approved the buildings, structures, water and sewerage systems.

[15] In all this, the Permit recognised no one else besides Vevhu as the "Developer". It looked to Vevhu to meet and discharge the conditions and obligations set out therein. Meanwhile, Vevhu concluded, on 5 October 2019, the Lot 12 Agreement with Operation Nehemiah. This contract was later amended by the Addendum executed by the parties on 12 June 2023. By clause 4.1 of the Lot 12 Agreement, Operation Nehemiah paid an amount of ZWL $6,000,000 as purchase price for 20 hectares of virgin or undeveloped land.

[16] The Lot 12 Agreement incorporated, by the preamble/recitals and clause 18.1, the over-arching MOA between Vevhu and the GOZ. Ms *Chiperesa* for Operation Nehemiah accepted that the provisions of the MOA fully applied to the Lot 12 Agreement.

[17] The question of who held the rights and responsibility to develop the piece of land formed the core, contentious issue in this matter. Mr. *Jakarasi* argued that Vevhu did so. And that such rights and responsibility emanated from its obligations set out in the MOA, the Permit and the Lot 12 Agreement.

[18] Ms *Chiperesa* for Operation Nehemiah did concede the existence of such responsibilities. She argued however, that those rights were supervisory and non-exclusive. She submitted that consistent with that position, Vevhu had delegated, and properly so, the responsibility to establish infrastructure on Lot 12 to her client. Counsel relied, in that contention, on clauses 7.4 and 7.5 of the Lot 12 Agreement which stated that Vevhu would; -

> "7.4 Ensure compliance with the Memorandum of Agreement signed with the Government of Zimbabwe on the 27th of June 2019, to utilise the money paid by the 2nd Party to finance the purchase price of the land.
>
> 7.5 Ensure, the roads are developed with roads, water supply, electricity and sewage reticulation to enable a Compliance Certificate to be obtained."

[19] Mrs *Chiperesa* reiterated that use of the word "*ensure"* in the two clause 7.4 and 7.5 demonstrated beyond argument, that Vevhu`s role in developing the piece of land (as specified

in the MOA and Permit) was merely supervisory. The question arising from her argument was; - was the alleged delegation express, implied or tacit?

[20] Ms *Chiperesa* was not unequivocal. Her position was that a reading of the contracts suggested that the delegation was implicit. Firstly, in addition to citing clauses 7.4 and 7.5 counsel also referred to clause 5.1 of the Lot 12 Agreement which provided that; -

> "5.1 Possession shall pass to the 2nd Party on transfer of the subject property or the date the 1st Party accesses the net sale proceeds/price, whichever occurs first from which date all benefit and risk in the property shall pass to the 2nd Party."

[21] Operation Nehemiah had duly paid the purchase price. It was thus entitled to move in and occupy the land to commence development. Counsel argued further that clause 5.1 had to be read together with clause 9. The latter made additional provision for Operation Nehemiah`s right to occupy the land. Similarly, clause 8.6 obliged Operation Nehemiah to meet development costs, which according to Ms *Chiperesa,* also evidenced Operation Nehemiah`s right to effect the civil works.

[22] Counsel rounded off this point with a question; - if not for purposes of allowing Operation Nehemiah to move in and develop the land, why else would the parties provide, in the Lot 12 Agreement, for occupation and vacant possession? The second point raised by Ms *Chiperesa* was that whatever the provisions of the Lot 12 contract, Vevhu had in any event, confirmed Operation Nehemiah`s right to effect development. The parties had both progressed on that understanding. Vevhu`s consultant had supervised Operation Nehemiah`s contractors on the ground, including Engineer Masake. It was rather disingenuous for Vevhu to now distance itself from the civil works being carried out on Lot 12 when the record bore evidence of Vevhu`s consent.

[23] Ms *Chiperesa*` s third point was a legal argument. She contended that Vevhu was estopped from raising the issue of exclusive authority to develop the land for reason that it had waived and or compromised that right or authority.

[24] This matter may be speedily disposed of. The starting point is to recognise an age-old position; - this court is obliged to have regard and give effect to the parties` contracts. (See *Book v Davidson* 1988(1) ZLR 365(S)). The terms of the MOA, the Lot 12 Agreement and

Permit are most clear. They place the responsibility to develop the estate on Vevhu. The responsibilities of Operation Nehemiah ("the 2nd Paty") are set out in clause 8 of the Lot 12 Agreement subtitled "Obligations of 2nd Party". Nothing in that clause, nor anywhere else expressly confers on Operation Nehemiah the right or responsibility to carry out civil works on Lot 12. Put differently, there was no explicit provision in the contract, nor confirmation in writing that Operation Nehemiah would establish the civil works.

[25] At most, the arguments raised on Operation Nehemiah`s behalf merely question the extent of Vevhu`s authority and therefore its rights under the contracts. They therefore become matters for the tribunal that sists to resolve the parent dispute between the parties. So too is the issue of those contractual provisions relating to occupation and vacant possession, as noted in HH 628-23. Herein, the issue is whether Vevhu has established the existence of *prima facie* rights. And based on the indisputable provisions of the contracts, Vevhu has demonstrated that it enjoys superior rights as the main project agent.

[26] In any event, Vevhu disputed waiver. Its protestations are set out in the demand addressed on 23 October 2023 to Operation Nehemiah which contained the following; -

> "We further state that it is your contractual obligation to meet developmental costs of the land to be purchased by you as you have no permit to develop the land yourself. Rather, our client is the only one permitted to undertake development of the entire land on terms imposed on the Local Government permit. Logically therefore, your haphazard and unsanctioned developmental works are *ultra vires* the agreement, the development permit and the laws of Zimbabwe.
>
> Consequently, your brazen intention to "resume work" constitutes a unilateral variation of the agreement whereby you substitute yourselves to be a land developer, which itself, is a serious breach of the terms of the agreement and the law." [Underlined for emphasis]

[27] I now return to Ms *Chiperesa'*s legal argument that Vevhu waived its rights. Counsel cited *Barclays Bank of Zimbabwe v Binga Products* 1985 (3) SA 1018[2] in support. This decision is not supportive of her argument given the facts as well as relief sought herein. *Barclays v Binga*

[2] 1984 (1) ZLR 76

Products held that the duty to prove waiver or abandonment lay on the party claiming that such waver had indeed taken place.

[28] *Barclays v Binga Products* was cited with approval in *Ellof & Anor v Dekker* CPD, Judgment Number 1461/06[3] ,where the court expressed the same duty in the following terms at 59; -

> "There exists in our law a strong presumption against waiver and the onus of proving waiver is not easily discharged. Innes CJ in Laws v Rutherford 1924 AD 261 at 263 stated; "...The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. See also Hepner v RoodepoortMaraisburg Town Council 1962(4) SA 772 (A). Clear proof is required especially of a tacit as opposed to express waiver." [Underlined for emphasis]

[29] (see also *Kanyasa v Peterhouse Boys High School & Anor* HH 547-22). Herein the alleged waiver was not expressly stated. Further, there is an additional reason why the strict onus to prove waiver becomes more acute. The Lot 12 contract between the parties carries a non-variation clause. As a general rule, non-variation clauses have a twofold effect. First, they bind and restrict the parties to only those terms recorded in their written contract. Second; -non-variation clauses oblige a court to recognise the operation of such restrictions. (See *Munyanyi v Luminary Investment & Anor* HH 38-10.)

[30] I also advert to this court`s remarks in *Jinda & Anor v Viewbit Investments (Pvt) Ltd & Anor* HH 14-17, which went thus [at page 3]; -

> "The impact of a non-variation clause in a contract can never be taken lightly. Courts universally derive comfort in enforcing such a clause because it accords well with public policy and it brings certainty to the contractual relationship between or amongst the contracting parties. R. H. Christie in a lengthy discussion on the topic of non-variation clause concludes as follows; "*A non-variation clause ... entrenches not only the other clauses in the contract but also itself against the*

[3] https://www.saflii.org/za/cases/ZAWCHC/2007/71.pdf

> *possibility of informal variation, so if it is desired to vary any clause in the contract informally or to do informally whatever it is that a restriction clause entrenched by a non-variation clause restricts the parties to doing in writing, the nonvariation clause must first be varied."* In the light of the existence of the restrictive clause that characterised the contract between the parties to this case, the applicants must be taken seriously when they alleged that they acted fully in compliance with the contract."

[31] Ms *Chiperesa* did not, with respect, specifically train her argument on the non-variation clause. (See for example the arguments raised in *Dairibord Zimbabwe Limited v Chivandire* HH 90-23 as well as the article Escaping the 'Shifren Shackle' through the application of public policy: An analysis of three recent cases shows Shifren is not so immutable after all by Lauren Kohn[4].In any event, as stated earlier, this being an application for a temporary interdict, the applicant only needed to establish the existence of a *prima facie* right even if such may be subject to some doubt. The applicant has in my view, succeeded in doing so.

APPREHENSION OF HARM, ALTERNATIVE REMEDY AND BALANCE OF CONVENIENCE.

[32] The nature and purpose of the primary contract (the MOA) answers the above three considerations. Before the court is are parties involved in the quest to establish a township on Lot 12 of Spitzkop. This entire enterprise forms a critical matter herein. The principal and enabler of the project is the GOZ.The importance of the project to the GOZ was outlined in the recitals and terms of the MOA. The objects of appointing Vevhu as the land developer was to deliver a residential estate supported by ancillary institutions in line with the GOZ developmental blueprint at the time known as ZIMASSET.

[33] To confirm how seriously it regarded this venture, the GOZ availed a total of 348.68 hectares of state land for the two projects Lot 12 and Lot 14 of Spitzkop. Similarly, the Permits issued in terms of section 45 of the RTP reiterated the importance of approaching the establishment of the townships in strict compliance with the law.

[4] https://www.saflii.org/za/journals/SPECJU/2014/5.pdf

[34] Herein Vevhu is the main agent in the delivery of the township. It has protested that Operation Nehemiah, a subordinate party has mutinied. Clearly, the authority of Vevhu is under threat. This situation places the entire arrangement in jeopardy. Vevhu argued that the development works (which Operation Nehemiah has openly admitted it is effecting) are being done improperly.

[35] The possible negative impact of unauthorised civil works become rather alarming. Operation Nehemiah has not stepped in to demonstrate that there is no hazard and that the works are being done per Permit. As regards the alternative remedy, firstly no viable option has been proffered. Secondly, it does not appear that the responsible Local Authority Zvimba Rural District Council has the appetite to step in and remedy matters. For that reason, the relief sought becomes merited.

[36] The balance of convenience favours putting a stay on the works. In stating this, I recognise that the term "balance of convenience" may take the effect of embracing the lesser of two diablos. Because quite clearly, putting a stay to civil works risks putting a strain the project. Operation Nehemiah has drawn attention to the financial prejudice like to befall it. But (a) the bigger concern is lawfulness of the process and (b) it must be noted that the parties can procure a speedy conclusion of the arbitral process, get a definitive result and revert to their project properly guided.

DISPOSITION

[37] The applicant has met the requirements of a temporary interdict and is entitled to the relief sought. Except for its prayer that it be permitted to proceed on a "business as usual basis" as set out in paragraph (d) of the original provisional order draft,

Accordingly, a provisional order is issued in the following terms; -

TO: THE RESPONDENT

TAKE note that, on 24 January 2024 the Honourable Mr. Justice Chilimbe sitting at Harare issued a provisional order as shown overleaf. The annexed Urgent Chamber Application, affidavit/s and documents were used in support of the

application for this provisional order. If you intend to oppose the confirmation of this provisional order, you will have to file a Notice of Opposition in Form No. CC14, together with one or more opposing affidavits, with the Registrar of the High Court at Harare within ten (10) days after the date on which this notice was served upon you. You will also have to serve a copy of the Notice of Opposition and affidavit/s on the applicant at the address for service specified below. Your affidavits may have annexed to the documents verifying the facts set out in the affidavits. If you do not file an opposing affidavit within the period specified above, this matter will be set down for hearing in the High Court at Harare without further notice to you and will be dealt with as an unopposed application for confirmation of the provisional order. If you wish to have the provisional order changed or set aside sooner than the Rules of Court normally allow and can show good cause for this, you should approach the applicant/applicant's legal practitioner to agree, in consultation with the Registrar, on a suitable hearing date. If this cannot be agreed or there is great urgency, you may make a chamber application, on notice to the applicant, for directions from a judge as to when the matter can be argued.

.....

JUDGE/REGISTRAR

TERMS OF FINAL ORDER SOUGHT

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

following terms –

(a) The provisional order be and is hereby confirmed.

(b) The Respondent, its agents, subsidiaries, if any, or anyone acting on through it or at its behest be and are hereby interdicted from carrying out road construction works, storm water drainage works, sewer, water and or electricity reticulation

works at lot 12 Spitzkop Zvimba without lawful authority until the dispute concerning such rights have been determined and confirmed by a competent forum.

(c) The Respondent or anyone acting through it are prohibited from carrying out any activity

that is contrary to the Memorandum of Agreement between the Applicant and the Government of Zimbabwe, the subdivision permit issued to the applicant or any law relating to town planning and land development without lawful authority until the dispute referred for arbitration has been finalized or until rights of the parties have been determined by a competent forum whichever comes first.

(d) The Respondent shall pay costs of suit on an attorney and client scale.

INTERIM ORDER GRANTED

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

(a) The Respondent, its agents, subsidiaries, if any, or anyone acting on through it or at its behest be and are hereby interdicted from carrying out road construction works, storm water drainage works, sewer, water and or electricity reticulation works at lot 12 Spitzkop Zvimba without lawful authority.

b) The Respondent or anyone acting through it are prohibited from carrying out any activity

that is contrary to the Memorandum of Agreement between the Applicant and the Government of Zimbabwe, the subdivision permit issued to the applicant or any law relating to town planning and land development without lawful authority.

(c) The Respondent or anyone acting though it be and are hereby interdicted and prohibited

from preventing the Applicant from carrying out any work aimed at complying with the Memorandum of Agreement between the Applicant and the Government of Zimbabwe recognizing the Applicant as the developer, the Subdivision permit

from the Ministry of Local Government dated 19 July 2022 and any other law governing land development.

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

[CHILIMBE J ___24/1/24]