ADMIRE RUBAYA
and
MIRIAM CHIBA
versus
MAZVEL INVESTMENTS (PRIVATE) LIMITED
and
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE 11 March 2021 and 23 March 2021.

Urgent Chamber Application

T Tabana with *B Mutero,* for the Applicants
S Bhebhe with *H Muromba,* for the respondents

CHITAPI J: This is an urgent application for an interim interdict. The applicants' draft provisional order is couched in the following wording

> "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:
> 1. It be and is hereby declared that the intended withdrawal of Stand 805, Sumben Housing Project, Mt Pleasant, Harare measuring 3384 square metres from the applicants is unlawful and of no force and effect.
> 2. The respondents' pay costs of the application jointly and severally the one paying the other to be absolved on a higher scale as between legal practitioner and client
>
> INTERIM RELIEF GRANTED
> Pending determination and finalization of HC 329/21, the applicant is granted the following relief:
> 1. The respondents be and are hereby interdicted from withdrawing stand 805, Sumben Housing Project, Mt Pleasant, Harare measuring 3384 square metres from the applicants pending the finalization of the action matter filed under case Number HC 329/21.
> 2. The respondents be and are hereby interdicted from offering Stand 805, Sumben Housing Project, Mt Pleasant, Harare, measuring 3384 square metres to any person other than applicants pending the finalization of the action matter filed under case Number HC 329/21.
>
> SERVICE OF PROVISIONAL ORDER
> 3. Service of this Provisional Order shall be effected by the Sheriff of Zimbabwe or his lawful Deputy or by the Applicant's legal practitioners upon the respondents."

The background to this application is that the second respondent flighted a newspaper advertisement wherein it invited interested persons to purchase residential stands in what was described in the said advertisement as

> "the leafy Mount Pleasant area Harare's newest residential suburb Sumben Residentials, will be the perfect opportunity for that dream home or an enticing investment property. Get in touch with us at our offices."

The first and second applicants who are a married couple responded to the advertisement and made an offer to purchase one of the stands on offer. The applicants averred that they made an offer as follows:

(a) a deposit of US$9 000.00

(b) monthly instalments of US$1 084.00

(c) payment of an insurance cover to ZB life

(d) Payment of US$30.00 per square

The applicants averred that their offer was accepted by the second respondent on or about 19 September, 2017. Following the acceptance as alleged by the applicants, they made payment of a deposit of US$9 050.00 on 19 September, 2017. It is the applicant's position that the sale was perfecta upon acceptance of the applicants offer as aforesaid. The applicants averred that the validity of the sale was not conditional upon the execution of a written agreement to be concluded in the future.

The applicants averred that upon the acceptance of their offer by the second respondent a valid contract between the parties came into existence thus creating rights and obligations enforceable at law. The applicants averred that the respondent had threatened to dispose of the property to another intending buyer after 9 March, 2021 without notice to the applicants. The bone of contention between the applicants and the second respondents is that whereas the applicant aver that a contract of sale of the stand in issue came into being upon the alleged acceptance of their offer by the second respondent, yet the second respondent avers that no binding contract came into existing and that the contract would only have come into existence had the applicant's signed a written sale agreement with the second respondent. The second respondent averred that the respondents did not in any event accept the Plaintiff's offer on 19 September, 2017 as alleged by the applicants. The respondents averred that the applicants only deposited money into their

homesaver account. The deposit was part of the requirements to be met by the applicants to prequalify them for allocation of a stand. The respondents averred that after payment of the deposit the applicant's application stood to succeed or fail. They therefore submitted that no contact came into being.

Correspondence and documents between the parties forming part of the application shows that on 21 August, 2017 the second respondent's representative sent an email to the applicants setting out the requirements for stand allocation. I do not consider it necessary to detail the requirements for purposes of determining this application. The conditions are nonetheless detailed in the e-mail which is attached as annexure AR2 to the applicant's application. Proof of payment of the deposit of US$9 050.00 by electronic transfer was also attached to the application. An unsigned agreement of sale in relation to stand 805 of Sunbeam Housing Project which was allocated to the Plaintiffs by the respondents was attached to the Plaintiff's application as well. There is an e-mail sent to the applicants by the second respondents' representative on 2 September, 2020 which accompanied the unsigned agreement sent to the applicants. The e-mail invited the applicants to sign the agreement and return the signed agreement to the second respondent. By e-mail dated 13 November, 2020, the applicants referred the second respondent to what they referred to as issues needing to be interrogated. The issues were listed as the price per square metre and the period of repayment for the stand.

In addition to the correspondence noted above, there was also attached to the application, a letter dated 3 November, 2020 written by the applicants to the second respondent. I do not intend to go into much detail contained in the three paged letter. In short, the letter reiterated the applicants' position that there was in existence an offer and acceptance which brought a contract for the sale of the stand in issue into existence. It was the terms of payment and price per square metre which the applicant contended that the second respondent was seeking to unilaterally alter. By letter dated 23 February, 2021, the second respondent replied the applicants' letter of protest. The second respondent reiterated that there were market forces which it considered in coming up with the terms and condition of the sale of stands to ensure viability of the project. The second respondent then indicated that the applicants were free to withdraw their deposit in the event that they were not agreeable to the terms and conditions in the agreement. The second respondent advised in the same letter that if the applicants did not sign the agreement by 9 March, 2021, the

second respondent would assume that the applicants were not interested to proceed with the sale in which event, the second respondent would offer the stand for sale to other interested purchasers.

The applicants next filed and caused the issue of summons against the same respondents herein as defendants in case No. HC 329/21 on 5 March, 2021. The applicants in the foresaid case, seek a declatur that there is an existing sale agreement between them and the defendants in relation to stand 805 Sumben Housing Project, Mount Pleasant, Harare, such contract having been concluded in 2012. The defendants had not, at the time of hearing of this application filed any response to the summons. The applicants followed up on the summons case by filing this urgent application to interdict the respondents from disposing of or offering stand 805 for sale to anyone pending the determination of the summons case No. HC 329/21.

The above paper trail is what informs this application. Having set out the background as above, I proceed to deal with the issue which arises for determination. The respondents in opposing this application objected to its hearing on the basis that it is not urgent. It is of course very rare not to find this objection being raised as a point *in limine* by respondents' counsel in most urgent applications. In the case of *Telecel Zimbabwe (Pvt) Ltd* v *Potraz & Ors* HH 446/15 MATHONSI J (as then he was) noted that counsel had developed a tendency to blow out of proportion the concept of self created urgency. The learned judge in holding that delay of 22 days could not be construed to be so inordinate as to constitute self-created urgency, noted that objections centered on urgency had become fashionable and that in most cases they should not be made at all. The learned judge noted that litigants did not, eat, drink and move with court proceedings in the bag. They attend to other issues and should not be expected to drop everything and dash to court unless the case was founded on a "holocaust". Simply put, the learned judge was expressing the view that the circumstances of each case determined the urgency of the mater and whether the applicant has acted with urgency or not. A finding of urgency or non urgency therefore becomes a matter for the exercise of a judicial discretion by the judge before whom the urgency or non urgency of a matter is raised.

In casu the respondents averred that the matter was not urgent because the need for the applicants to act arose in May, 2020 when the applicant did not sign the draft agreement with terms which they did not accept. The paper trail however shows otherwise. It was only in the letter dated 23 February, 2021 written by the second respondent to the applicant that a threat to cancel the sale

and offer the stand to some other prospective buyers by 9 March, 2021 if the applicants did not sign the agreement was made. The applicants acted on the threat aforesaid by filing case No. HC 329/21 on 5 March, 2021 before following it upon on 9 March, 2021 through filing the current application to for an interdict to pressure the subject matter of the claim in case NO. HC 329/21. The delay between the filing of this application would otherwise have been arguable had this application not have been preceded by the filing of the summons case HC 329/21. The applicant did not sit on their backsides or laurels after receiving the second respondent's letter of 23 February 2021. They filed a summons claim and followed it up with this application. In the circumstances, I determine that the applicants did not self-create urgency in this matter.

The respondents' also averred that the application was not urgent because there was no evidence that the applicants would suffer irreparable harm which could not be remedied by other action which the court could take. In particular, it was alleged that the applicants could always sue for breach of contract and obtain damages. I have noted that this argument is invariably pleaded as a matter of course. In my view, where there has been a breach of contract and the injured party sues for the breach, the principal remedy that must be granted is specific performance. Specific performance emphasizes the need for contracting parties to honour their contractual obligations. The court has a discretion however to grant or decline an order of specific performance if such order is no longer available or feasible. There will therefore be no logic in expecting or requiring the applicant to leave the subject matter of the dispute to be disposed of and opt for damages instead. The applicant would be acting with reason and logic to seek an order to preserve the subject matter of the dispute if it is still there, rather than to let go the subject matter and hope to be recompensed in damages. In *casu*, stand 805 sunbeam if sold would mean that it is lost to the applicants and damages would not necessarily assure them on getting a similar stand to the once lost. The respondent did not establish the harm and prejudice they would suffer if the subject matter of the dispute is preserved. The objection to urgency was not a meritable obj**e**ction and it falls to be dismissed.

On the merits of the matter, the applicant seeks a temporary interdict wherein the subject matter of the dispute between the parties should be preserved until the rights and obligations of the parties in a disputed sale agreement of the property in issue is resolved under case No. HC 329/21.

In the Supreme Court judgment on *Zesa Staff Pension Fund* v *Mushambadzi* SC 57/07, ZIYAMBI JA listed the requirements for a temporary interdict as;

a) a right which, though *prima facie* established is open to some doubt.
b) a well-grounded apprehension of irreparable injury
c) the absence of any other remedy
d) the balance of convenience favours the applicant.

In my consideration of all papers filed of record and hearing counsel, I was persuaded to accept that there was justification to grant the interim interdict. The applicants established *prima facie* the existence of a contractual relationship between them and the respondents albeit the terms thereof being subject of dispute and he court being called upon to determine them. The parties have been in this disputed contractual relationship since 2017 and in my view there is no reasonable justification to hold that the balance of convenience favours the respondents. It favours the applicant if not both parties because the dispute is common cause. It only makes sense and logic to preserve the *status quo* pending the determination of the rights of the parties.

It is also my view that there is a well-founded apprehension of irreparable harm by the applicant because the disposal of the stand if not suspended will mean that the plaintiffs claim in case No. HC 329/21 is defeated because it is a declaration of rights dispute. There is again in my view no other suitable remedy available to the applicants if the property is not preserved pending the rights determination, the existence or otherwise of the sale and its terms.

In the circumstance the provisional order is granted.

Rubaya Chatambudza, applicant's legal practitioners
Kantor & Immerman, respondents' legal practitioners