LEOPOLD TAKAWIRA HOUSING CO-OPERATIVE SOCIETY
versus
INNOCENT PEDZISAI
and
INNOP HOUSING DEVELOPMENT (PVT) LTD
and
MARIMBA HOUSING CO-OPERATIVE SOCIETY
and
OFFICER COMMANDING HARARE SOUTH DISTRICT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 22 October 2014 and 17 December 2014

Opposed Application

C. Takaendesa, for the applicant
G. T. Mharapara, for the respondent

MAFUSIRE J: The applicant was a registered cooperative society. By motion court proceedings it sought the eviction of the first, second and third respondents from a piece of land in Harare that had been allocated to it by the government for the development of houses for its members. The order sought was in the following terms:

> "1. 1st, 2nd and 3rd Respondents shall forthwith, that is to say, within two (2) hours of service of this order upon them or their agents, members, employees or invitees surrender vacant possession and occupation of Stand No. 48 Aspindale, Marimba, Harare through the Sheriff for Harare or his lawful Assistant by removing all their structures, goods, possessions and chattels failure [of] which the Sheriff or his authorised Assistant be and is hereby directed authorised and empowered, with the assistance of armed police officers availed by 4th Respondent if need be to forcibly evict 1st, 2nd and 3rd Respondents and all those claiming occupation through them from Stand No. 48 Aspindale, Marimba, Harare.
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> 2. 1st, 2nd and 3rd Respondents shall be prohibited and barred from interfering with the operations of the Applicant at Stand No. 48 Aspindale, Marimba, Harare.
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> 3. 1st Respondent is no longer chairman to the Applicant.
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> 4. 1st, 2nd and 3rd Respondents shall pay Applicant's costs of suit on a legal practitioner and client scale."

Applicant's case was this. The first respondent was its former chairman. He had been deposed. His sins had been legion. Among them was his failure to convene any meeting of members since inception in 2004. When land had been allocated to the applicant first respondent had taken it personally for himself and his company, the second respondent. He ran the second respondent with his wife and brother. He siphoned applicant's money through the second respondent. The money would be deposited into second respondent's bank account. The first respondent would then withdraw it. He had purported to change applicant's name from "Leopold Takawira Housing Co-operative Society" to "Leopold Takawira Housing Development trading as Innop Housing Development (Private) Limited." He was parcelling out individual pieces of land from applicant's land and selling them to third parties for the benefit of himself and his company, the second respondent. He had been convicted of fraud for this and sentenced to a term of imprisonment. The third party victim had been an entity called National Housing Delivery Trust. But the first respondent was at it again. This time the victim was the third respondent, another co-operative society. First respondent was parcelling out applicant's land and selling to members of the third respondent.

Applicant's case in the affidavits was told by one Naison Muzembe ("***Naison***"). He was supported by one Kevin Murapa. They were part of the new management committee as chairman and treasurer respectively. At inception, Naison had been deputy to the first respondent. The government recognised the new management committee.

It was a gamble for the applicant to have proceeded by way of notice of motion instead of the action procedure. There were numerous allegations of fact, most of them potentially contentious. However, having read the opposing affidavit of the first respondent, the only opposition mounted, and having listened to argument during the hearing of the matter, it turned out that the potential dispute of fact was just illusory. I have decided to take a robust and common sense approach and resolve the apparent dispute on the papers. The law says, per GUBBAY JA, as he then was, in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech*[1]:

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact. See *Room Hire Co (Pty) Ltd v*

[1] 1987 (2) ZLR 338 (SC) @ p 339

Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154; *Joosab & Ors v Shah*1972 (1) RLR 137G at 138G – H; *Lalla v Spafford NO & Ors*1973 (2) RLR 241; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC)"

In the *Room Hire* case cited in the passage above, MURRAY AJP put it this way[2]:

"The crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denial such as he might employ in the pleadings for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent's mere allegation of the existence of the dispute of fact conclusive of such existence."

In *Peterson v Cuthbert & Co.,* Ltd[3], quoted with approval in *Room Hire*, WATERMEYER CJ said[4]:

"In every case the Court must examine the alleged dispute of fact and see whether in truth there is a real issue which cannot be satisfactorily determined without the aid of oral evidence; ……"

Where there is an apparent dispute of fact in motion court proceedings and there is need to adopt a robust approach the procedure was set out in *Plascon- Evans Paints Ltd* v *van Riebeeck Paints (Pty) Ltd*[5]. In this jurisdiction that procedure has been followed in several cases such as *Savanhu* v *Marere NO & Ors*[6]. It is this. Relief can be granted if the facts stated by the applicant together with the admitted facts in the respondent's affidavit justify such an order. CORBETT JA put it this way in *Plascon-Evans*[7]:

"It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 – 5; *DaMatta v Otto NO* 1972 (3) SA 858 (A) at 882 D – H)."

[2] At p 1162 - 1163
[3] 1945 AD 420
[4] At p 428
[5] 1984 (3) SA 623 (A)
[6] 2009 (1) ZLR 320 (S)
[7] At pp 634H – 635B

In *Savanhu's* case above MALABA DCJ said[8]:

> "The appellant chose to proceed by way of court application to claim the order of specific performance against the first respondent. As the proceedings were by way of a court application and there were disputes of fact, the final relief could only have been granted if the facts stated by the first respondent together with the admitted facts in the appellant's affidavit justified such an order: *Plascon-Evans Paints Ltd v van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H – 635B"

In the present case here is what the first respondent was saying which convinced me I could safely adopt the robust and common sense approach. He maintained that he was still the applicant's chairman because there had been no due process followed to depose him. He claimed that Naison had no authority to speak on behalf of the applicant because he was no longer a member. He alleged Naison had not been paying his subscriptions and had therefore been expelled.

It was all respondent's word. There was not a single document to back him up. There was not a single set of minutes to show how, among other things, Naison had been removed from the management committee of the applicant or how his membership had been terminated. Yet, on the other hand, Naison produced several letters, by both the applicant and the government, through the then ministry of National Housing and Social Amenities, and the ministry of Small and Medium Enterprises & Co-operative Development. They affirmed the new management committee and the removal of the first respondent from office. Naison produced newspaper adverts of notices of meetings, minutes of meetings and other documents all relating to the removal of the first respondent from office and the assumption of positions by the new management committee.

Section 55 of the Co-operative Societies Act, [*Cap 24:05*] disqualifies a person from being elected to, or being co-opted into the management committee of a co-operative society, or from holding office as such who, in the last five years, has been sentenced to a term of imprisonment for six months or more for fraud or any offence involving dishonesty. Naison produced proof of the first respondent's conviction of fraud in the regional magistrates' court in October 2012 in the case involving the National Housing Delivery Trust. The first respondent was sentenced to three years' imprisonment with one year suspended for five years on condition of good behaviour, and the remaining two years suspended on condition he paid restitution.

[8] At p 324D - E

The first respondent admitted the conviction and sentence but said that he had appealed. In the opposing affidavit the first respondent, and in heads of argument and oral submissions, his counsel, maintained that the appeal suspended the conviction and the sentence and that therefore he was still eligible to retain his office. With respect, that was plain ignorance of the law. Except for corporal punishment whose execution is suspended by an appeal in terms of s 64 of the Magistrates Court Act, [*Cap 7:10*], s 63 of that Act states plainly that the execution of a sentence of imprisonment, a fine or community service is not suspended by the noting of an appeal unless bail pending appeal has been granted. It was not canvassed what the status of the first respondent's appeal was and whether or not he was out on bail. Nonetheless, even if the first respondent was out on bail pending appeal, in my view, the prohibition in s 55 of the Co-operative Societies Act would still stand until such time that the conviction was set side. In my view, bail pending appeal only suspends the execution of the sentence but not the conviction, let alone its effects, such as those set out in s 55 of the Co-operative Societies Act.

I am satisfied that the first respondent was properly removed from office and that Naison and the rest of the management committee were properly voted in. I am also satisfied that because of his conviction on fraud charges, which conviction was still within the prohibited period of five years in terms of the Co-operative Societies Act, the first respondent was disqualified from being in the management committee of any co-operative society.

The government's offer letter of land dated 13 January 2010 was addressed to the "***Chairperson, Leopold Takawira Housing Co-operative Pvt (Ltd)***" (sic). The actual offer paragraph read as follows:

> "**OFFER TO DEVELOP A PORTION OF STAND 48 ASPINDALE**
> After consulting with the Ministry of Local Government Rural and Urban Development you are now permitted to develop a portion of stand 48 Aspindale along [H]igh Glen Road which you occupied before Operation Restore Order (Murambatsvina)".

The first respondent claimed that the offer had been to him personally. With respect, that was rather silly. Among other things, it was common cause that it was members of the applicant who had occupied the piece of land in question, not the first respondent or his company, and who had had their illegal structures razed to the ground in the operation referred to in the offer letter. Furthermore, all the other documents produced spoke to one thing: the land had been offered to the applicant, not the first respondent.

Naison produced evidence, in the form of a copy of a billboard that had been erected by the first and second respondents at the applicant's land in question, advertising residential stands for sale. It read: "INNOP HOUSING DEVELOPMENT (PVT) LTD" / "LEOPOLD TAKAWIRA HOUSING DEVELOPMENT". Naison averred that the first and second respondents were undertaking unsanctioned developments on the applicant's land in the form of land surveys, road construction and actual housing developments, yet according to the conditions stipulated by the government in its offer letter, no development could commence *inter alia*, before the grant of a subdivision plan by the department of physical planning. Furthermore, water and sewerage reticulation had to be put in place and inspected by the City of Harare. None of these had been done.

In response, the first respondent not only admitted to having started extensive developments on the property, but also and actually produced several documents that showed how far such developments had gone, which engineers were involved and what payments had been made or were to be made. He alleged that his company, the second respondent, was into property development. He claimed that there had been a commercial agreement between the applicant and his company, the second respondent, whereby his company would carry out developments on the site and the members of the applicant would pay. He alleged that Naison could not have known about this because he was no longer a member of the applicant.

The first respondent also argued that the conditions precedent to the development of the land, as stipulated in the offer letter, did not specify the order in which they could be tackled. As such, he argued, he could start with any one of them. Again it was just his word. There was not a single document, let alone minutes of any agreement by the applicant's members to engage his personal company to do any work for a fee at applicant's land. His counsel seemed oblivious to, or unfazed by, the obvious conflict of interest. In the opposing affidavit, the first respondent did not even refute Naison's claim that he was parcelling out applicant's land for sale to third parties and that payments meant for the applicant were being diverted to his company. With respect, lawyers should not overburden the courts by taking up dead causes and tenaciously seek to muck the waters.

The first respondent claimed that the applicant had formed a joint venture arrangement with the third respondent whereby both co-operative societies would develop the land together. The third respondent would meet part of the costs of development. In return its members would get pieces of land for themselves. Characteristically, he produced nothing to back him up on this. But as Naison stressed, the land in question was offered to the applicant

only. The government recognised no one else other than the applicant as the beneficiary. To me, the alleged joint venture arrangement was manifestly another fraud in the making.

Plainly, the third respondent was running riot with applicant's rights. Amongst his own set of documents was a letter from the Ministry of Small and Medium Enterprises and Co-operative Development dated 23 January 2012. It was addressed to the police serious fraud squad. The contents were substantively inconsistent with a beneficiary of land allocation by government having the right to go into joint venture arrangements with third parties to enjoy the fruits of such allocation. The letter read as follows:

> "**RE: CLARIFICATION ON STATUS OF LEOPOLD TAKAWIRA HOUSING COOPERATIVE SOCIETY LIMITED**
>
> Reference is made to your request for information as regards the above referred housing cooperative society, in your endeavour to institute criminal investigations. The following is the Ministry's submissions that may assist your office in the afore mentioned investigations.
>
> **Background Information**
> Leopold Takawira Housing Cooperative Society was registered in 2004 by the then Ministry of Youth Development and Employment Creation in terms of section 17 of the Cooperative Societies Act Chapter 24:05.
>
> It was physically situated along Glen Eagles Road on stand No 48 Aspindale and at the time of registration Innocent Pedzisai was the Chairperson.
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> The cooperative unprocedurally began developing stands and the illegal structures were razed to the ground during the clean up exercise in Harare. Since then no meaningful developments have been taking place.
>
> **Section 80 of the Cooperative Societies Act (Chapter 24:05) prohibits any member of a cooperative society or the society itself from disposing of any property of the society in any way without the prior approval of the Registrar of Cooperatives**. The society can however expel any member in accordance with the society's by-laws.
>
> The Registrar of Cooperatives has jurisdiction over registered cooperative societies only. Since the land deals were between Leopold Takawira Housing Development (Pvt) T/A Innop Housing Development (Pvt) Ltd, a private company, and National Housing Trust and Billy Ruetenburg, a non-member of the society, the whole issue falls outside the ambit of the Registrar's jurisdiction.
>
> We hope this information will be of assistance to you." (my own emphasis)

I am satisfied that the applicant has proved its case on a balance of probabilities. None of the other respondents filed opposing papers. The applicant is entitled to relief. However, costs on a higher scale have not been justified. Therefore, it is ordered as follows:

1 The first, second and third respondents shall vacate the piece of land known as Stand 48 Aspindale, Marimba, Harare within seven (7) days of the date of service of this

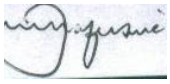
order and give vacant possession of the same to the applicant through its authorised representatives or agents, failing which the Sheriff for Zimbabwe, or his lawful deputy or assistant deputy, duly assisted by the police if need be, shall be authorised, empowered and directed to evict from the property in question the aforesaid respondents, and all those claiming occupation through them and hand over vacant possession of the same to the applicant.

2 The first, second and third respondents are hereby barred and shall be prohibited from interfering with applicant's operations at, and enjoyment of, the property aforesaid.

3 The removal of the first respondent from the position of chairman of the applicant is hereby confirmed and upheld.

4 The costs of this application shall be borne by the first, second and third respondents jointly and severally**.**

17 December 2014



Charamba & Partners, applicant's legal practitioners
Mtombeni, Mukwesha, Muzawazi & Associates, first, second and third respondents' legal practitioners