KENMARK (PVT) LIMITED
and
STUDIO ARTS INCOPORATED
and
MUZUVA NOEL t/a NMC CONSULTING ENGINEERS
and
CRAFT VIEW CONSULTANTS (PVT) LTD
and
VANGUARD ENGINEERING SERVICES (PVT) LTD
and
NCUBE BURROW (PVT) LTD
and
PRODUCAN INVESTMENTS (PVT) LTD
and
ASTRA STEEL & ENGINEERING SUPPLY (PVT) LTD
and
PHEROSTEEL (PVT) LTD
versus
ZIMBABWE DIAMOND TECHNOLOGY CENTRE (PVT) LTD
and
SM BUILDERS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 19 & 26 February 2014

Urgent chamber application - interdict

J. Dondo, for the applicants
T. R. Tanyanyiwa, for the respondents

MAFUSIRE J: This was an urgent chamber application. The applicants sought an interlocutory interdict to restrain the respondents from proceeding with construction activity at a certain site over which the applicants claimed a builder's lien. The interdict was sought pending the determination of the dispute in the main matter. It was said the main reason for seeking the interdict was so as to preserve the evidence which would possibly be used at the trial of the main matter.

The facts in brief are that in the main matter the applicants have sued the first respondent for various sums of money for services rendered by them at the construction site. The applicants were the technical team comprising the builders, the architects, the engineers,

the quantity surveyors and the providers and suppliers of goods and services that the first respondent had engaged to put up a diamond cutting factory. After about a year the applicants had ceased operations. They cited non-payment of fees for the work done up to that stage. A dispute arose. The applicants instituted the main action. It was common cause at the hearing of the urgent chamber application that the main action was awaiting a trial date.

It was also common cause that the applicants had carried out no further work for almost a year up to the time that they had filed the urgent chamber application. What triggered the urgent chamber application was an article that had appeared in a local weekly newspaper about a week before the application was launched. The article was reporting on a visit to the site by a group of parliamentarians who, together with the first respondent, had spoken glowingly about the economic prospects of the new project once it had become operational. The group had also expressed the hope that construction at the site would be completed by the end of the year.

Upon reading the article the applicants, through their legal practitioners, had issued an ultimatum to the first respondent demanding the immediate cessation of any further construction work. When no response was forthcoming the applicant filed the urgent chamber application.

The first respondent opposed the application. It took a number of points *in limine.* One of them was that the matter was not urgent. The respondents maintained that construction at the site had never stopped; that it was preposterous for the applicants to have brought such an application on an urgent basis when it had been almost three years since the applicants had abandoned the site; that the newspaper article should not have triggered the application because the applicant could not have suddenly realised that they stood to suffer an irreparable harm when there had been no change to their situation for the last three years.

The respondent also argued that the applicants had since lost possession and control of the site and that therefore the right to assert any builder's lien had also been lost. However, the applicants maintained that their tools and equipment were still at the site and that therefore they had never lost possession. They also stressed that the main reason for the interdict was the preservation of the evidence to be used at the trial of the main matter.

After having gone through the application and having listened to submissions by counsel, I am of the view that the matter was not urgent. The newspaper article that the applicants alleged had prompted them into action said this in the opening paragraph: "***The diamond centre, which is expected to be the country's cutting and polishing hub, is***

currently under construction and is expected to be operational before the end of the first half of the year."

Mr *Tanyanyiwa*, for the respondents, stressed that construction at the site had not stopped even after the applicants had abandoned the project. This sounded more plausible. If the applicants had still been in possession of the site as they argued, then they would not have had to wait for a newspaper report to alert them to the fact that there were now other contractors on the site who were now carrying on with the project to completion. The applicants would have known about it the moment that the new comers had arrived. In asserting a builder's lien, it is one of the requirements that the claimant be in effective and continuous possession of the premises: *Scholtz* v *Faifer* 1910 TS 243. Symbolic possession is insufficient. It cannot substitute actual or effective possession: *Louw h/a Intensive Air* v *Aviation Maintenance and Technical Services (Edms) Bpk* 1996 (1) SA 602 (T) and *Singh* v *Santam Insurance Ltd* 1997 (1) SA 291 (A).

From the plaintiff's summons and declaration in the main action, from the submissions by counsel and from the newspaper report itself the diamond centre was a multimillion dollar project. Apparently the dispute between the parties over fees concerned *inter alia* whether or not the applicants had done any work at all on the site. Therefore, if the building was set for completion during the first half of the year it must have meant that a significant structure had already been put up. The applicants must have seen it or they must have known about it if they had retained possession or control of the site as they claimed. In my view they were no longer in possession. Undoubtedly, this loss of possession had not been a recent development,

The other reason why I have felt that the matter was not urgent was that according to the applicants the major reason for the interdict was the preservation of the evidence to be used at the main trial. The applicants' point was that the dispute between the parties in the action was the extent to which they had carried out work on the premises. The applicants envisaged that there would be an inspection *in loco* in the main trial. Therefore, counsel argued, if construction was not stopped the evidence of the work done by the applicants would be destroyed.

In my view, quite apart from the onerous requirements for an interdict that an applicant has to show, in this matter I did not think that the applicants had shown any real necessity for an inspection *in loco* that would warrant the matter being heard on an urgent basis. The applicants admitted that photographs of the work done by them had been taken.

Their drawings and certificates as experts on the project were available. In my view, the chances for a visual inspection by a judge during trial would be next to nothing. This matter was not urgent.

The conclusion that I have reached on the aspect of urgency has rendered it unnecessary to consider the rest of the points *in limine*, let alone the merits of the application.

In the premises the application is hereby dismissed with costs

Dondo & Partners, applicant's legal practitioners
Manase & Manase, respondent's legal practitioners