JOSHUA M NKOMO HOUSING COOPERATIVE SOCIETY LIMITED
versus
MARIMBA RESIDENTIAL PROPERTIES LIMITED

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 8 August 2019 & 14 August 2019

Urgent Chamber Application

M. Nkomo, for the applicant
Adv. K Kachambwa, for the respondent

CHITAKUNYE J. The applicant approached this court on a certificate of urgency seeking the following relief:

INTERIM RELIEF

That pending the determination of applicant's application for review pending under case No. HC 3170/18 in the High Court, the following relief is granted:

1. The respondent be and is hereby barred and interdicted from interfering with Applicant's developments on Stand 48 Aspindale Park, Kambuzuma, Harare.
2. The respondent be and is hereby ordered and directed to remove its personnel and equipment from Stand 48 Aspindale Park, Harare immediately upon service of this order, and in any case, within 48 hours of same.
3. The respondent pays applicant's costs of suit.

FINAL ORDER SOUGHT

1. That the Respondent be permanently barred from interfering with applicant's possession of stand 48 Aspindale Park, Kambuzuma, Harare without an order of Court.
2. That respondent pays applicant's costs.

The applicant is a registered cooperative society in terms of the Cooperative Societies Act [*Chapter 24:05*].

The respondent is a body corporate conducting its business in Zimbabwe.

It is not disputed that the respondent is the registered owner of Stand No 48 Aspindale Park in terms of deed of register number 3928/96 dated 7 June 1996.

It is further common cause that applicant has been in occupation of the stand in question. Its occupation has been a subject of contestation leading to a government intervention in about December 2015. That intervention did not, however, conclusively deal with the legality or otherwise of the applicant's occupation of respondent's stand. With the passage of time respondent has proceeded with its development plans for the stand in question. It is that development that irked the applicants and led to this application. It is pertinent to point out that the Minister of Local Government in about March 2018 purported to withdrawal a purported offer of the stand to applicant in circumstances that led to the applicants bringing the Minister's decision on review in HC 3170/18. It is that application for review that applicant alleges must be awaited by respondent.

In this application the applicant alleged that the applicant was allocated Stand 48 by the Minister of local government on 27 September 2004 after which the applicant proceeded to effect some improvements to the land which included servicing of stands and allocation of the stands to its members. In 2015 when it emerged that respondent was claiming ownership of the same piece of land the then Minister of Local Government held lengthy discussions with both parties and a resolution was made that the applicant and its members should remain on the land. The Minister undertook to find alternative land for the respondent. Thereafter the applicant remained in undisturbed possession of the land till 2018 when the now Minister of Local Government purported to cancel the 2004 offer letter in favour of applicant. It is this purported cancellation of the offer letter that led to the institution of proceedings in HC 3170/18 which proceedings are still pending.

The applicant averred that on or about 2 August 2019, the respondent deployed earthmoving equipment on Stand 48 Aspindale Park and started filling up foundation trenches on some of the stands, excavating water and sewerage pipes and roads. According to applicant, these developments are being done without the knowledge of applicant's Management Committee.

Other averments relevant in the applicant's case were to the effect that respondent has been running advertisements in the media purporting that it is in the process of regularising the settlements on stand 48 Aspindale Park and inviting members of the public to approach them for the purchase of the stands

As a consequence of the respondent's action this has led to clashes with applicant's members. Applicant alleged respondent has also roped in the police to assist it in its self-help

activity yet respondent has not shown applicant a court order authorising it to repossess the stand.

It is these circumstances that applicant alleged occurred as from 2 August 2019 which necessitated the matter being brought on a certificate of urgency.

The respondent opposed the application. In its opposition some *points in limine* were raised. The first *point in limine* was to the effect that the matter was not urgent as 2 August 2019 is not the date respondent begun working on its Stand. The second *point in limine* was to the effect that the deponent to the applicant's founding affidavit had no authority from applicant as the document titled resolution of the management committee she wished to use as a basis for filing this case was invalid. A number of defects with that document were pointed out.

The respondent also alleged material non-disclosure of pertinent facts bordering on dishonesty on the part of applicant.

Urgency: The respondent's counsel contended that this matter is not urgent as the cause of action did not arise on 2 August 2019 but on 15 March 2019 when respondent begun works on its stand. The respondent's version was basically that on 15 March 2019 its contractor moved onto the stand and begun work, the contractor's employees were then disturbed by applicant's members leading to respondent making a police report. Thereafter respondent continued working on the Stand. The necessary developmental survey was done after 15 March, advertisements were flighted in a local newspaper of the developments of the stands and on about 27 May 2019 earthmoving equipment was moved to the stand in question and physical development commenced. Throughout this period applicant's efforts to thwart the respondent's work were handled by reporting them to the police.

In support of the above assertion respondent tendered an affidavit from its contractor confirming that land survey begun on 15 March and the applicant through some of its members had attacked the surveyors leading to a police report. Respondent also tendered photographs showing the earthmoving equipment it said were on site by 27 May 2019 and have been there ever since.

The respondent also referred to advertisements it flighted for the benefit of residents and occupants of stand 48 Aspindale. These comprise an advert on 4 April 2019 inviting all occupants and residents to a meeting concerning regularisation of their occupation of stand 48 on 6 April 2019, J1; an advert inviting residents and occupants of stand 48 to regularise their occupation at the respondent's office by 30 April 2019 - J2; an advert advising of the delay in

completion of civil works due to violent disturbances by rogue residents and also advising that civil works will continue. J 3; an advert informing residents and occupants of a land inspection to be conducted from 12- 25 June 2019 for purposes of examining and assessing the existing developments on the ground J 4; and lastly an advert advising residents of the ownership of stand 48 and that court cases launched by applicant and others had not changed that ownership which is premised on title deeds and the fact that the government had not acquired the Stand in question.

The respondent's counsel argued that all these activities which are admitted to by applicant show that the need to act arose on 15 March 2019 and subsequent activities served to show the continuation of respondent's development of its land. In the circumstances it is not true that the need to act arose on 2august 2019.

The applicant's response as already alluded to was to the effect that activities prior to 2 August 2019 did not pose imminent irreparable harm hence it saw no need to act.

I am of the view that applicant's excuse is without merit. Clearly when it sought to physically resist the respondent's contractor's activities of 15 March 2019 through violence that must have provided an avenue to seek legal recourse if it believed it had rights to protect. The subsequent events as noted in the advertisements were clear indication that respondent was proceeding despite applicant's resistance. The moving of earthmoving equipment to the stand on 27 May 2019 (and not 2 August as applicant had chosen to misrepresent) was another clear sign that applicant's occupation was no longer peaceful and undisturbed.

I am inclined to agree with respondent's counsel that the need to act arose in March 2019 when respondent brought a contractor to do surveying of the stand. The applicant's members were alive to this hence their attack of the contractor's employees. When adverts were flighted again applicant was made aware that the respondent was proceeding with its development because stand 48 belonged to it by virtue of Title deeds in its name and the fact that the government had at no time acquired that piece of land. It must have been as clear as day is from night that applicant no longer had any perceived peaceful possession.

What only happened to activate applicant to approach court was the fact that its violent resistance was subdued by police on the 2 August 2019. It is that subjugation that applicant wants to use as the time when the need to act arose. That is clearly not so. The need to act arose when applicant realised that the respondent as owner had come onto the land on 15 March to begin its own developments. The failure to timeously act is thus fatal to the application.

Where a party fails to act when the need to act arises the party can still be heard upon providing court with a satisfactory explanation for the delay in taking legal action. In *casu*, applicant has not provided such an explanation. Instead it chose to misrepresent to court by alleging that interference to its peaceful and undisturbed occupation only took place on 2 August 2019. It chose not to disclose its violent resistance from 15 March and the fact that it is only bringing this application because its members had been dealt with by the police.

This latter aspect also goes to the issue of material non-disclosure that respondent's counsel raised. It is apparent from applicant's founding affidavit that no mention is made of acts of resistance posed by applicant to respondent's activities on the stand prior to 2 August 2019 yet applicant was fully aware of this. Further, the adverts, though mentioned in the founding affidavit, are not given their proper time space such that someone could easily think such adverts came after the 2 August. It was only through respondent's response and a reading of the adverts that it became apparent that the adverts were for the period before 2 August. The contents of the adverts clearly show that applicant was not being serious in contending that it did not deem them serious enough to warrant taking legal action.

The failure to disclose that earth moving equipment was in fact brought on site on 27 May 2019 is another telling material non-disclosure. Instead applicant wanted court to believe that the equipment was only brought onto the site on 2 August 2019, which clearly was not true. The applicant can surely not expect to benefit from such acts of dishonesty. Had it not been for the fact that the photographs of the equipment on site are digitally imprinted with the date they were taken applicant is such a party as would have viciously contested the date the photographs were taken.

It is trite that as an urgent chamber application is premised on the ex-facie disclosure by applicant of the dire situation it finds itself in due to respondent's actions, it is imperative that an applicant must be candid with court and disclose all material facts relevant to its case. see *Graspeak Investments (Pvt) Ltd* v *Delta Operations & Another* 2001 (2) ZLR 551.

The other aspect that has to be considered is irreparable harm. The basic contention by the applicant was that respondent's actions will lead to demolition of the water and sewer reticulation system it had put in place as it's lay out plan is different from that of the respondent, this will result in some of its members' houses being demolished as well.

The harm that is alluded to is premised on applicant's members having rights to the stand in question which rights the founding affidavit does not allude to. If at all applicant's members will suffer any harm that may be remedied by an appropriate order for damages. In

any case, from the submissions made it is apparent that the respondent has been willing to accommodate the applicant's members in its plan. Some members showed desire to go along with the offer whilst others opted for violent resistance to the gesture. Thus, any harm such members will suffer will be as a result of refusal to recognise that in terms of the law of property, the Stand in question is owned by the respondent and as owner the respondent is entitled to do as it pleases with its property.

I am of the view that the features afflicting applicant's case as alluded to above make this case not urgent at all.

The other ground relied upon by respondent in resisting this application is that the deponent to the applicant's founding affidavit has no authority to institute this application. The respondent contended that there is no proper resolution by applicant, Joshua M Nkomo Housing Cooperative Society Limited, appointing Cecilia Ngwenya to depose to the founding affidavit and to institute this application. Counsel for the respondent outlined a number of alleged anomalies with the document tendered as the resolution. These included that- in terms of that resolution Cecilia Ngwenya was only authorised to appear on behalf of Joshua M Nkomo Housing Scheme, yet applicant is a cooperative Society Limited, not a housing scheme. In this regard counsel contended that the resolution refers to a different entity from applicant.

The other anomaly pertains to the capacity of the said Cecilia Ngwenya. Cecilia Ngwenya is the Chairperson of the Supervisory Committee and not the Management Committee. In terms of the Cooperatives Societies Act, the management of a cooperative is reposed in the Management Committee and not the Supervisory Committee, see s 57 of the Act. In the circumstances counsel contended that Cecilia cannot represent the applicant as she is not in the management committee by virtue of her post.

It must be appreciated that litigation is serious business hence the need to ensure that a person appointed to represent a legal persona has been properly appointed and has the requisite authority to institute proceedings or defend same. In casu, the applicant as a registered cooperative similar to a body corporate requires such a resolution to be made by the appropriate body. See *Mhanyame Fishing and Transport Cooperative Society Ltd & Others* v *The Director General Parks & Wildlife Management Authority N O & Others* HH92/11 and *Madzivire & Others* v *Zvarivadza & Others* SC 10/06

In *casu*, the resolution purports to have been passed by a management committee, but there is no indication as to who signed the resolution. The name of the one who signed is not disclosed and the capacity he /she signed is not stated. As the resolution appears to be on a

template it was essential to disclose the signatory and his/her capacity especially when the authenticity of the resolution is being challenged. The resolution is a blanket cover as it states that Cecilia is to appear on behalf of the Joshua M Nkomo Housing Cooperative Scheme in all litigation matters. Though it provides for two signatories, only one signed.

I am of the view that when the authenticity of a resolution is challenged and anomalies or deficiencies with the resolution pointed out, it is incumbent upon the applicant to attend to those deficiencies satisfactorily. This the applicant did not do thus leaving the issue unresolved.

The need to establish the authenticity of the resolution and that it was in fact made by the appropriate body is further evident from case number HC 3170/19. It was agreed that in that case, involving the same parties, respondent had challenged Cecilia Ngwenya's authority. In that challenge respondent had tendered affidavits from some members of the Applicant who indicated that Cecilia Ngwenya had no such authority to institute proceedings on behalf of the applicant. This is a case applicant was alive to and was thus not surprised when a similar challenge was raised in this application. In the face of such challenge it was incumbent upon applicant to address the deficiencies. The applicant's counsel's argument that those of its members who had deposed to affidavits disowning Cecilia' Ngwenya's authority were in South Africa or in the rural areas was not good enough to rebut the challenge to Cecilia Ngwenya's authority.

I am of the view that the cumulative effect of the deficiencies pointed out in the resolution is such that unless applicant can show that a proper meeting was held at which such a resolution was properly made, the resolution remains questionable.

In my view a resolution that does not state the name and designation of the signatory to it, especially where it comprises simply filling in blank spaces on a template, has the risk of being abused by some busy bodies. Further where a resolution is supposed to be signed by two signatories and only one signs there ought to be an explanation for such.

I thus conclude that the outlined deficiencies are fatal to the validity of the resolution. Accordingly, even on the issue of the resolution this application would not succeed. There is no proper application before me.

Costs

The respondent asked for costs on a legal practitioner and client scale and also that if the issue of lack of authority is successful then Cecilia Ngwenya be asked to bear the costs of the matter in her personal capacity. Upon considering all the submissions made by both sides I am of the view that costs should not be on the punitive scale but on the general scale. My

view is fortified by the nature of the ongoing dispute between the parties. It is a dispute that could have been resolved had other players not encouraged the applicant to resist ownership rights claimed by respondent. The period the dispute has been going on may have given applicant hope that it has an arguable case, thus its resistance is not entirely mala fide but is borne out of a conviction, albeit misplaced, of perceived rights derived from its occupation of the property. I am however not inclined to accede to the request for Cecilia to bear the cost in her personal capacity. The issue of authority was not conclusive in as far as it was not shown that Cecilia Ngwenya had not been authorised. It is the form and manner of the authority that raised questions applicant failed to attend to. If applicant simply failed to do a proper resolution the fault lies with it. If on the other hand Cecilia Ngwenya was on a frolic of her own, the applicant can always have its recourse to an appropriate claim against her and recover whatever costs it would have incurred.

Accordingly. therefore the application be and is hereby struck off with applicant to bear the costs of the application on the ordinary scale.

DNM Attorneys, applicant's legal practitioners
Ahmed & Ziyambi, respondent's legal practitioners