

Diamond Bird Services & Anor v Massbreed Investments & Anor

HH 413-21
HC 4045/21
Ref Case No HC 3072/20

DIAMOND BIRD SERVICES [PRIVATE] LIMITED
and
TRUSTEES OF ZIMNAT VALUE PRESERVATION PROFESSIONAL TRUST FUND
versus
MASSBREED INVESTMENTS [PRIVATE] LIMITED
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE

Date of written judgment: 11 August 2021

Urgent chamber application

On the papers

MAFUSIRE J

[1] This is an urgent chamber application for an interim interdict. Due to the lockdown measures currently in place to check the spread of the covid-19 world pandemic and in terms of which the courts have virtually shut down, except for bail and remand matters, this application is being decided on the papers and thus, without the benefit of oral argument.

[2] The draft provisional order is improperly crafted. In terms of it, for interim relief, the applicants call upon the respondents to show cause why a final order should not be made directing the respondents to immediately cease developing, or in any way dealing with a certain piece of land in Alexandria Park, Harare, described as Stand 3189 Salisbury Township [*“the property”*]. This formulation is not in the nature of an interim relief. It is in the nature of a final order. It is a rule *nisi* seeking final relief. Yet a proper rule *nisi* is a provisional order of court that comes into force at a future date, unless certain conditions are met to prevent it from becoming absolute.

[3] As final relief, the applicants want that the rights and obligations accruing to the respondents in terms of a certain agreement of sale between them in respect of the property be

suspended until the finalisation of certain proceedings which are pending before this court under the case reference no HC 3072/21 [*“the main application”*]. That seems to be the interim relief. I wonder whether the applicants’ legal practitioners have simply mixed up the headings for the types of orders intended, or whether the arrangement is purposeful. Certainly, such formulation is not in accordance with Form No 29C, which is prescribed by r 247[1][a] of the old High Court Rules. Nonetheless, in the adjudication of disputes, the courts try and avoid being unnecessarily fastidious. They go to the nub of the matter and hope to solve the real dispute between the parties. Sometimes form has to defer to substance. What is clear in this case is that the applicants want the respondents interdicted from carrying out any form of development on the property pending the final determination of the main application which pits them and the respondents.

[4] Despite my reservations about the draft order, I do not see any prejudice in construing it in the manner I have done above. That enables me to deal with the real substance of the dispute. I note that in its heads of argument, the first respondent has taken the point that the draft order is defective in that the interim relief sought is final in both form and substance, allegedly in that there is no averment as to when this order will be discharged. However, this particular argument, which has not been presented as an objection *in limine*, whilst well taken, does not detract from dealing with the matter, either on the points *in limine* or, if need be, the merits. This is because a draft order is merely the mould into which the actual order of court will be cast, if the application is granted. An order of court must be efficacious. If an applicant succeeds, simple variations to the draft order, which do no violence to the substance of the remedy sought, or cause any injustice to the respondents, can be effected in terms of r 240[1] of the old Rules.

[5] The facts of this matter are straightforward. The applicants, both of them juristic entities, are owners of pieces of land adjacent to the property. It is on this basis that they claim *locus standi*. The property is owned by the second respondent, a local authority for the purposes of the Urban Councils Act [*Chapter 29:15*]. The property is designated for recreational use. The second respondent sold the property to the first respondent, a private company, in terms of an agreement of sale signed by the parties in November and December 2019. The applicants

are objecting to the sale. They filed the main application in June 2021. In it, they seek a declaratory order in the following terms:

- that the process leading to the agreement of sale [between the respondents] should be declared unlawful, and
- that the written agreement of sale between the respondents pursuant to the impeached process be declared null and void.

[6] In the main application, the applicants allege that the processes undertaken by the second respondent prior to the agreement of sale was defective for want of compliance with the Urban Councils Act, more particularly in that:

- in the advertisement, the property was described as Stand 3189 Harare Township, yet this is not the stand sold to the first respondent, and also it is not the [correct] description of the property;
- the sale was only published once in a newspaper, as opposed to twice;
- the publication lacked the requisite details;
- no proof of the notice required to be posted at the second respondent's office has been produced.

[7] The respondents are opposing the main application. Distilled, their main grounds of opposition are that the applicants are being frivolous and vexatious in that the sale was properly advertised and the property properly described. The requirements of the Urban Councils Act were complied with. The applicants failed to lodge objections timeously when the intended sale was advertised and are now seeking to do so improperly in this court, instead of eating humble pie and seeking condonation from the Administrative Court.

[8] In the present application, the applicants allege that the respondents are behaving as if there are no proceedings pending before the court because they have done all the preparatory work to carry out construction work on the property. They have drilled a borehole on site; ten thousand bricks have been ferried; two cabins have been erected, and some water pumping equipment is being installed. If not stopped, the applicants will suffer irreparable harm in that, among other things, buildings will be put up; underground water will be depleted; the recreation

park will disappear. They allege that the main application will be rendered academic, and any order issued by the court afterwards, if the applications succeed, will be a *brutum fulmen*.

[9] The respondents also oppose this application. The grounds are essentially the same as those in the main application. They have taken two points *in limine*. The first is that there is no valid application before the court because the purported certificate of urgency, which is an integral part of the application, and is the *sine qua non* for any matter being heard on an urgent basis, is incurably defective in that it was executed well ahead of the founding affidavits whose contents it purports to vouch for as establishing urgency.

[10] As a matter of fact, the certificate of urgency is dated 22 July 2021. The founding affidavits by the applicants are both dated 23 July 2021. It is trite that a certificate of urgency cannot vouch for anything said in the founding affidavit that was not there when the certificate was itself executed. A certificate of urgency must show, *ex facie*, that the legal practitioner who executes it, carefully examined the founding affidavit for facts which support the belief that the matter is indeed urgent: see *General Transport & Engineering [Pvt] Ltd & Ors v Zimbabwe Banking Corporation [Pvt] Ltd* 1998 (2) ZLR 301 [H] and *Chidawu & Ors v Shah & Ors* 2013 [1] ZLR 260 [S]. That an urgent application is incurably defective if the certificate of urgency purports to vouch for facts which were non-existent at the time the certificate was itself executed is trite: see for example, *Condurago Investments [Pvt] Ltd t/a Mbada Diamonds v Mutual Finance [Pvt] Ltd* HH 630-15.

[11] In the present matter, and on the face of it, the respondents' objection is well taken. But it cannot succeed. The first applicant, in an answering affidavit, attaches two affidavits: one by its legal practitioner of record, and the other by the lawyer who executed the certificate of urgency. It is alleged in these affidavits that the date on the certificate of urgency suggesting that it was executed a day before the founding affidavits was a mistake. They swear that the certificate of urgency was indeed signed on the same day as those affidavits. It is stated that the lawyer certifying the matter as urgent had the founding affidavits with her when she executed the certificate. On his part, the legal practitioner of record attaches some contemporaneous e-mails between himself and the applicants to support the point that under no circumstances could the certificate of urgency have come into existence any day prior to 23

July 2021 because by then he had not yet been given final instructions to proceed with the urgent chamber application.

[12] I accept that predating the certificate of urgency to the founding affidavit was just a mistake. Such mistakes are not uncommon with legal practitioners, especially in the rush to prepare and file documents urgently. That is not to say they are acceptable. They are merely understandable. I adopt the same approach as I did in *Zimbabwe Lawyers for Human Rights v Minister of Transport & Ors* 2014 [2] ZLR 44 [H]. Sometimes such minor mistakes must be allowed to stand in the interests of pragmatism and practicality, especially when there is no discernible prejudice.

[13] Furthermore, whilst two wrongs do not make a right, I cannot help but notice the respondents' own clumsiness, or that of their lawyers in preparing the opposing affidavits. The one affidavit is a mere reproduction of the other, almost word for word, mistakes, warts and all. The nadir is para 18 of the second respondent's opposing affidavit. It regurgitates para 18 of the first respondent's affidavit. In its para 18, the first respondent, as buyer, says, "*The land was sold to me as recreational land...*" The second respondent, the seller, also says in its own para 18, "*The land was sold to me as recreational land ...!*" These are supposed to be serious documents prepared in a serious matter for serious consideration by a serious court and for which serious money has probably been paid. That is why earlier on, I alluded to the fact that in the adjudication of disputes, the courts sometimes simply pay a blind eye to maladroit presentations in order to dispense justice. At any rate, the respondents, particularly in their heads of argument, do not at all comment on the affidavits by the applicants' lawyers, or argue why I should not take their word at face value, especially as they are officers of the court. Accordingly, the respondents' first objection *in limine* is hereby dismissed.

[14] The respondents' second objection *in limine* is that the matter is not urgent. This objection is predicated on the observation that the order sought in the main application is merely declaratory the efficacy of which, if the applicants succeed, cannot be affected by anything done, or being done by the respondents in the interim. It is argued that what is sought in the main application is merely the nullification of the agreement of sale between the respondents. The order sought is not to declare the property as such an area as cannot be sold and transferred;

or to prohibit the construction of any buildings on it; or to maintain the land in its current state; or to prevent the abstraction of underground water through a borehole. As such, the argument concludes, there is no imminent danger to any perceived rights of the applicants. At any rate, the applicants have not shown that there is no alternative remedy, especially given that damages are generally an alternative remedy, unless shown to be unsuitable.

[15] However, I rule that the matter is urgent. The respondents' second ground of objection is properly dealt with under the merits of the dispute. The arguments are not acceptable as preliminary objections if the effect of them is to non-suit the applicants, right at the outset. Whether the nature of the remedy sought in the main application is merely declaratory, and not substantive, is a question that is properly decided under the merits of the dispute. It is also the same with regards the question whether the applicants have an alternative remedy. The applicants allege that the respondents, with the full knowledge that the main application is pending, have proceeded to carry out developments on the property. The applicants got to know about this on 21 July 2021. On 23 July 2021, a mere two days later, they filed the urgent chamber application. The respondents' second objection *in limine* is hereby dismissed. That paves the way for the determination of the matter on the merits.

[16] On the merits, it is always necessary to lay out the requirements for an interim interdict. Doing so, is akin to setting up a directional compass to navigate the course on the merits. These requirements are now so well-known as to require no citation of authorities beyond the *locus classicus* *Setlogelo v Setlogelo* 1914 AD 221. An applicant must show a *prima facie* right having been infringed, or about to be infringed, even if it be open to some doubt; an apprehension of an irreparable harm if the interdict is not granted; a balance of convenience favouring the granting of the interdict; the prospects of success on the merits, and the absence of any other satisfactory remedy. But legal principles are not an exact science like mathematics where, for instance, one plus one is always equals to two. These factors are considered objectively, cumulatively and in the context of the facts. One or other of them may be more important in some cases than they may be in others.

[17] The basis upon which the applicants claim *locus standi* has not been properly laid out. All that they say is that they are owners of premises adjacent to the property. It is not clarified

by what law, whether common law, statute, or otherwise, such circumstances grant them the requisite *locus standi in judicio*. Except for a fleeting reference to s 152 of the Urban Councils Act in the main application, the court has not been invited to take judicial notice of any circumstances or legal provisions as would establish *locus standi* for persons in the position of the applicants. However, since the respondents do not challenge the applicants' *locus standi*, I hold that having shown that there are legal proceedings pending before this court which pit the same parties and in which the same or kindred remedies are being sought, the applicants would have the right to ensure that those proceedings are not undermined by anything done by the respondents in the interim. On the face of it, they have the right to demand that the *status quo ante* be preserved until final determination of the main matter. On the face of it, they have the right to ensure that the main application is not negated. That right may be open to some doubt, as is self-evident from my concerns regarding *locus standi*. However, all that is in the nature of an interim interdict, and is therefore tolerable at this stage. The applicants only need to establish a *prima facie* right. But that hardly is the end of the enquiry.

[18] It is on the second requirement for an interim interdict that the application flounders, namely, an apprehension of an irreparable harm if the interdict is not granted. As the respondents argue, all that the applicants seek in the main application is a declaration of invalidity of the process leading to the agreement of sale between the respondents in respect of the property. Concomitantly, they also seek the setting aside of that agreement. Demonstrably, the main application shall not declare the property as one not open to a sale and transfer by the second respondent to any interested buyer, including the first respondent. It shall not lead to an impeachment of the second respondent's power to dispose of the property. It shall not lead to a prohibition against the construction of any buildings on it or the abstraction of any water from it. It shall not lead to an order maintaining the property in its current state for all time, or preserving it exclusively as a recreational park for use by the respondents alone or other persons in their class or similar situation.

[19] The applicants argue that all those disparate remedies above are implied in the declaratory order, or are consequential to it. They maintain that the developments that are now happening at the property stem from the impugned agreement of sale. That cannot be correct.

At the very most, if the applicants succeed in the main application, the respondents will simply have to go back to the drawing board. If their agreement of sale is nullified, it will not mean that the second respondent will no longer be able to correct whatever mistake it might have committed and proceed to dispose of the property, if it will still be so minded. In other words, it may well be that a court has the power to stop the second respondent from disposing of the property in any way, or prevent it from changing its character from recreational to something else. But this will not be possible in the main application. I have looked at the pleadings. Not only have they been made part of this application, but also the whole record has been placed before me. There is no chance of the court going beyond the four corners of the *declaratur* being sought therein, or its precincts.

[20] In the circumstances, I reject the applicants' argument that the efficacy of the main application stands compromised by what the respondents are alleged to be doing, or that the order of the court in that application will be negated, or will be a *brutum fulmen* if the interdict sought in this interim period is not granted. It follows from this that the balance of convenience weighs in favour of not granting the interdict. It seems a substantial amount of money has already been laid out in the purchase of the property and the commencement of development. The agreement of sale in question expressly ensures that the property remains recreational. Any buildings to be erected shall be designed for recreational purposes to the satisfaction of the second respondent. The purchase price was above RTGS\$1.89 million. The applicants say this was too little and that this is evidence of bias or favouritism. However, this is just a nude allegation which takes no one anywhere. There is no information why it is alleged that the amount was too little. Thus, there seems to be no justification for the court to intervene at this stage.

[21] It is always dicey to comment on the prospects of success of the main application without having had the benefit of argument, worse still when pleadings are apparently still being filed. However, it is a task that must necessarily be embarked upon in an application of this nature. Therefore, I proceed to do so. It is my considered view, albeit *prima facie*, that the applicants' case is limping. For example, it seems that the bulwark of their attack against the agreement of sale, or the process preceding it, is the alleged misdescription of the property. But

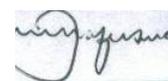
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it is doubtful that a description that says “*Harare Township*”, instead of “*Salisbury Township*”, will be found to be 180⁰ off the mark. Furthermore, it is doubtful that on the papers currently on record, a conclusion will be reached that there was non-compliance with the pre-disposal obligations in respect of urban council land as set out in s 152 of the Urban Councils Act. Still further, the reason why the applicants lodged no objection timeously when the property was advertised for sale, shall probably weigh heavily against them.

[22] It is upon a consideration of the more relevant factors for an interim interdict that I have come to the conclusion that the present application cannot succeed. Accordingly, it is hereby dismissed with costs.

11 August 2021



Gill, Godlonton & Gerrans, legal practitioners for the applicant
Manase & Manase, legal practitioners for the first respondent
Gambe Law Group, legal practitioners for the second respondent