GLANMONT MANUFACTURING (PRIVATE) LIMITED
versus
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE (IDBZ)
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 17, 24 and 27 March 2023

Urgent Chamber Application

Adv *T Zhuwarara with M S Mujaja,* for the applicant
Adv *Moyo* with Mr *S Bhebe,* for the 1st respondent
No appearance for the 2nd respondent

DEME J: On 24 March 2023, I dismissed the urgent chamber application for interdict filed by the applicant. The applicant subsequently requested for the reasons of the order. Thus, this judgment seeks to explore the reasons of the 24 March order.

The applicant approached this court on urgent basis seeking an order for provisional interdict. More particularly, the applicant prayed for the provisional order couched in the following way:

> "**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. THAT the 1st Respondent be stripped of any mandate to sell land referred to as stand number 45 Tilbury Road, Willovale, Harare pending determination of arbitration proceedings seeking enforcement of concluded contract of sale and revocation of notice terminating lease agreement.
> 2. That the 2nd Respondent stop (sic) transferring ownership of stand number 45 Tilbury Road, Willovale, Harare.
> 3. THAT the costs of this application shall be borne by the 1st Respondent, on a higher attorney and client scale.
>
> **INTERIM RELIEF GRANTED**
> Pending determination of this application, the Applicant is granted the following relief:
> 4. THAT the 1st Respondent is hereby interdicted from selling any portion or whole of stand number 45 Tilbury Road, Willovale, Harare pending the return date.
> 5. THAT the 1st Respondent is hereby interdicted from evicting the Applicant from stand number 45 Tilbury Road, Willovale, Harare pending the return date.
> 6. That the 2nd Respondent does not process any ownership transfer application or approvals in respect of stand 45 Tilbury Road, Willovale, Harare.
> 7. THAT there be no order as to costs."

The applicant and the first respondent entered into a five year lease agreement in terms of which the applicant is a lessee at the property known as number 45 Tilbury Road, Willovale, Harare (hereinafter called "the property".) The lease agreement will expire on 31 July 2026. At the time of the application, the applicant was still in occupation of the property. It is the applicant's case that on 24 February 2023 the first respondent through Mr Chibayamombe phoned the applicant and advised it that the property was up for sale and requested to have a meeting in this regard. According to the applicant the meeting ensued on 27 February 2023 where the property was offered for sale at the price of US$ 1.3 million. The applicant further alleged that the applicant's right of refusal was also alluded to in the meeting. It is the applicant's further allegation that it accepted the terms of agreement. The applicant affirmed that the parties agreed that the purchase price would be paid by way of two equal monthly instalments.

The applicant also averred that the first respondent advised it that the terms of agreement would be reduced into writing. The applicant wrote to the first respondent by way of e-mail seeking the confirmation of the terms of agreement. On 28 February 2023, the 1st respondent served the applicant with the notice for the termination of the lease agreement. According to the applicant it later discovered that the first respondent was now negotiating new terms of agreement with a third party to its prejudice.

The applicant additionally asserted that, with the consent of the first respondent, it effected some improvements, some of which are permanent, on the property to the tune of US$1.3 million. It is the applicant belief that the present application meets the requirements of the provisional interdict.

The present application was opposed by the first respondent. The first respondent affirmed that the meeting of 27 February 2023 held at the first respondent's premises was to discuss the applicant's failure to settle obligations arising from the lease agreement. It is at this meeting, according to the first respondent, where it was disclosed to the applicant that the first respondent was intending to sell the property to a third party. The first respondent vehemently opposed that the meeting reached an agreement of selling the property to the applicant. The first respondent further claimed that Mr Chibayamombe had no authority to sell the property in dispute.

The first respondent also maintained that on 28 February 2023, it dispatched a three month notice for the termination of the lease agreement to the applicant. According to the first respondent, the notice for the termination of the lease agreement was met with stiff resistance of the applicant which insisted that it was entitled to the right of first refusal. The first respondent advised the applicant that the lease agreement did not create such right.

The first respondent asserted that the applicant had outstanding arrears in terms of rentals together with water and electricity bills. This, according to the first respondent, forced the first respondent to terminate the lease agreement. The first respondent also referred the court to the applicant's e-mail of 23 February 2023 where the applicant apologised for its failure to honour its contractual obligations. The first respondent further alleged that the present application is a ploy to frustrate the first respondent to deal with its property in the manner it considers necessary. The first respondent further claimed that the present application does not meet the threshold of the provisional interdict.

The first respondent, in its pleadings, had raised two points *in limine*. Firstly, it sought to challenge the urgency of the application. Secondly, the first respondent also maintained that the relief sought by the applicant is incompetent. On the hearing day, the first respondent did not pursue these points *in limine*.

Consequently, the issue for determination is whether or not the present application meets the basic requirements of the provisional interdict.

The basic requirements for the present application are namely:

1. Existence of a *prima facie* right though open to doubt.

2. A well-grounded apprehension of irreparable harm.

3. The absence of any other satisfactory remedy.

4. That the balance of convenience favours the applicant.

These requirements have been established in the case of *Setlogelo* v *Setlogelo*[1]. In para 33 of the applicant's founding affidavit, the applicant stated that:

> "I submit that the Applicant has a *prima facie* right as evidenced by the valid and extant offer for sale and acceptance in respect of stand 45 Tilbury Road, Willovale, Harare."

On the contrary, the first respondent objected to these allegations. The first respondent asserted that there was no valid offer which had been extended to the applicant for the sale of the property. The first respondent claimed that the purpose of the meeting of 27 February

[1] 1914 AD 221.

2023 was primarily to discuss the applicant's non-payment of rentals. The first respondent further alleged that there is no documentary evidence proving the assertions of the applicant. The first respondent referred the court to the correspondences which contradict the applicant's assertions. Firstly it referred the court to the applicant's E-mail of 23 February 2023 where the applicant apologised to the first respondent for failing to meet its contractual obligations. The E-mail of 23 February 2023 is as follows:

> "We wish to apologise for the late payment of our account. We would like to reassure you that we have rectified the problem and we will make sure that our account will be settled in time. Your patience with us and your co-operation is greatly appreciated."

Secondly, the first respondent referred the court to the E-mail of 28 February 2023 where the applicant stated that:

> "We would like to acknowledge the meeting we had with Mr Chibayamombe on 27/02/2023 pertaining to:
> 1. Sale of property 45 Tilbury Road Willovale Harare at a price of 1,300,000 United States Dollars;
> 2. Glanmot having the right of first refusal;
> 3. The payment terms between Glanmot and IDBZ.
>
> We wish to express our interest to purchase the property at the indicated price and we would appreciate it if your good offices would give us a formal offer letter and your payment terms. Your usual cooperation will be highly appreciated.
>
> Regards."

On 28 February 2023, the first respondent dispatched to the applicant a notice for the termination of the lease agreement. In its letter for the termination of the lease, the first respondent stated as follows:

> "Pursuant to the provisions of the lease agreement signed between the bank and Glanmot Manufacturing (Pvt) Ltd effective 1st of August 2021; the bank has elected to serve you with three months' notice of termination as provided for in terms of Clause 3.3 of the said lease agreement.
>
> The notice of termination is effective 1st of March 2023 and as such you are expected to vacate the premises on or before 31st May 2023.
>
> The bank's personnel shall conduct an outgoing inspection as provided for in clause 6.5 of the lease agreement before you vacate the premises.
>
> During the notice period, you are still obliged to fulfil your contractual obligations in terms of the lease. If there are any outstanding arrears at the time you vacate, the bank will proceed to enforce its rights in terms of the lease agreement.

> We take this opportunity to thank you for the time you stayed on the bank's premises."

On 2 March 2023, the first respondent responded to the applicant's E-mail of 28 February 2023 where it stated that:

> "We refer to the above and to your e-mail dated 28 February 2023.
>
> We appreciate your continued interest in purchasing the bank's property. However, it is important that we set the record straight. The signed lease agreement between Glanmot Manufacturing and the bank does not include the right of first refusal to purchase the property. The bank is therefore under no obligation to entertain your offer before other potential purchasers.
>
> In addition, the bank is currently engaged in negotiations (which are now at an advanced stage) with another Party for the sale of the property and as such cannot consider your offer until such a time when these negotiations fail.
>
> Should the current negotiations fail, we will be more than happy to open negotiations with you."

From the correspondences above, it is apparent that the applicant was busy apologising for the non-payment of its outstanding rentals and utility bills on 23 February 2023. The circumstances of the applicant, according to its version, dramatically changed to the extent that four days later, the applicant had now managed to raise at least half of the purchase price. The applicant's counsel was not even able to explain this miracle. What is also apparent is that the right of first refusal which the applicant referred to seems to have no foundation. A perusal of the lease agreement between the parties does not establish such right. Certainly, the meeting with Mr Chibayamombe could not have been intended to create this right. Mr Chibayamombe cannot be expected to rewrite this lease agreement.

The sudden turn of events coupled with the other discrepancies make the applicant's case highly incredible. These inconsistencies can only be a clear signal that the applicant is misleading the court by a wrong narration of events. Assuming that I may be wrong in my conclusion, the mere fact that the applicant failed to clear its outstanding rentals and utility bills is a sign that the applicant was not prepared to purchase the property but simply wanted to extend its stay at the property. Certainly, if it had resources to purchase the property, the applicant can be best described as the delinquent tenant which is not willing to settle its contractual obligations for rentals and utility bills. No seller would want to enter into a contractual arrangement with a tenant who had demonstrated failure to pay the paltry amounts arising from rentals and utility bills like what the applicant had displayed through its

conduct. The issue of outstanding rentals and utility bills was not opposed by the applicant. Adv *Moyo*, during the submissions, argued that even by the time of the hearing of this application, the applicant had not yet settled its accounts despite having tendered an apology by 23 February 2023. This fact was not disputed by the applicant's Adv *Zhuwarara*.

If indeed, a meeting for the sale of the property was convened, one wonders why the applicant did not insist on the keeping of proper minutes of such a gathering. A parastatal like the first respondent cannot certainly be expected to hold such a meeting without keeping of genteel minutes. In any event, the selling of public assets is regulated by the Public Procurement and Disposal of Public Assets Act [*Chapter 22:23*] (hereinafter called "the Public Procurement and Disposal of Public Assets"). In terms of this Act, verbal agreements, like what the applicant wants this court to believe, cannot be binding upon such public entities.

In terms of s 91 of the Public Procurement and Disposal of Public Assets Act, before selling the property, the first respondent is supposed to constitute a disposal committee which makes appropriate recommendations for the disposal of the asset concerned. The disposal committee's recommendations are then submitted to the first respondent's accounting officer in terms of s 92 of the Public Procurement and Disposal of Public Assets Act. It is apparent from the provisions of s 48(3)(d) of the Public Finance Management Act [*Chapter 22:19*] that, before a public entity engages in the disposal of its significant asset, the accounting authority of the public entity concerned must promptly notify the treasury and the appropriate Minister of the intended transaction. No evidence was placed before this court to suggest that the outlined procedures were complied with.

Thus, the first respondent is required to observe statutory steps before concluding the contract. Failure to comply with such *modus operandi* will make the transaction illegal. The effect of statutory measures was extensively discussed in the case of *Upset Investments (Pvt) Ltd* v *Chitungwiza Municipality*[2] where the Supreme Court observed that:

> "This case can easily be distinguished from the Turquand case on two grounds:
> (a) first, the respondent, being a municipality, was expressly prohibited by s 210 (4) of the Urban Councils Act from contracting without the necessary recommendations from the Procurement Board and approval from council. A statutory prohibition is mandatory and binding on the parties as everyone is presumed to know the law regardless of whether one has read and understood the law. No such statutory prohibition bound the respondent in the *Turquand* case (*supra*). The finding by the learned judge in the court *a quo* that the unsanctioned contract to provide

[2] SC110/21.

> refurbished machinery was a legal nullity as it was prohibited by law is beyond reproach.
>
> The argument that s 210 of the Act constitutes internal issues unbeknown to the appellant is therefore baseless and without any foundation at law. The respondent had therefore no capacity to transact in contravention of the law.
>
> Second, the letter written to the appellant by the town clerk G. Tanyanyiwa conveying the message that the appellant had won the tender to supply the machinery was false in fact and misleading. It was written without council authority fifteen days before the adjudication of the tender. The letter was fraudulently, calculated to prejudice other bidders and the respondent because it was meant to abort the whole purpose of the tender to identify the most suitable bidder for the supply of the advertised new machinery."

In casu, this court cannot protect the applicant who has no evidence other than the word of mouth for a critical transaction of this nature. If the first respondent had observed all the statutory steps, one wonders why the applicant did not have a paper trail of the transaction. Surely, the applicant's story is lacking in its credibility under such circumstances. According to the E-mail of 28 February 2023, the applicant alleged that it concluded a verbal contract for the sale of the property with the first respondent who was represented by Mr Chibayamombe. In its opposing affidavit, the first respondent correctly observed that Mr Chibayamombe had no authority to conclude a contract on behalf of the first respondent. Public entities like the first respondent cannot be expected to conclude such contract through one individual. If ever such contract was sealed, that is definitely illegal. This court, being the court of law, cannot validate the transgression.

Further, the E-mail of 28 February 2023 does not suggest that a contract was in existence. This communication is not consistent with the alleged circumstances. What can only be inferred from that E-mail is an expression of interest by the applicant. In the E-mail of 28 February 2023, the applicant requested the first respondent to make a formal offer in writing, a clear sign that there was no offer at this stage. In light of the 23 February E-mail where the applicant was apologetic to the first respondent for non-payment of rentals and utility bills, the only reasonable conclusion that one may be forced to arrive at is that the meeting of 27 February 2023 could have been convened primarily to discuss the applicant's failure to settle its outstanding rentals and utility bills. Certainly, that meeting cannot be construed to have been the meeting for discussing the terms of the sale. When one attempts to draw an extrapolation from the two E-mails authored by the applicant to the first respondent, it is difficult to imagine that the parties could have sealed a contract under such state of

affairs. I am failing to see the possibility of an offer and acceptance having been concluded under such an environment. Reference is made to the case of *Upset Investments (Pvt) Ltd* v *Chitungwiza Municipality*[3], where, in para 17, the Supreme Court opined as follows:

> "What the appellant said under cross-examination is ample proof that apart from his mere say so, he has no evidence of the existence of the offer he says he accepted for the provision of refurbished second hand machinery. It is trite that a valid contract is constituted by an offer and acceptance. The appellant by his own admission failed to establish the existence of the tender for the provision of refurbished second hand machinery. The onus was on the appellant to establish the existence of all the essential elements of a valid contract. Failure to establish the existence of such tender on the alleged terms and conditions was fatal to its case as there can be no acceptance without an offer."

In addition, there is no evidence that the minds of the two parties, the applicant and the first respondent, ever met for purposes of contracting. In the case of *Upset Investments (Pvt) Ltd* v *Chitungwiza Municipality* (*supra*) the Supreme Court, in relation to the concept of the meeting of minds for purposes of establishing an agreement, also commented as follows:

> "In this case no contract came into existence because there was no meeting of the minds regarding the object of the sale. The respondent intended to purchase brand new machinery whereas the appellant was bent on providing refurbished second hand machinery. It is clear that both parties did not intend to contract on the basis of each other's terms. Consensus being the essence of contract there can be no contract in the absence of agreement on all material terms of the contract. In the absence of agreement on the nature and quality of the object of the intended sale no binding obligations came into being. In the absence of a valid enforceable contract, the learned judge *a quo* cannot be faulted for dismissing the appellant's claim for payment of the balance of the purchase price of a non-existent contract."

In casu, the E-mail of 28 February 2023 addressed to the first respondent suggests that there was no meeting of the parties' minds. The applicant's narration of events starts with the call of 24 February 2023 where it alleges that it was invited to a meeting in order to discuss the sale of the property. The applicant, in its founding affidavit, deliberately avoided referring this court to its E-mail of 23 February 2023 in a bid to mislead the court. On the contrary, the first respondent's account begins with the E-mail of 23 February 2023 where the applicant expressed regret for its failure to settle its rentals and utility bills. In my view, under such circumstances where there are two diametrically opposite stories, the most probable version is that of the first respondent. On a balance of probability, the applicant failed to establish a *prima facie* right. Its *prima facie* right, according to para 33 of the applicant's founding affidavit, is based on the alleged valid contract which was purportedly finalised. It is apparent that the *prima facie* right may be open to doubt. Reference is made

[3] SC110/21.

to the case of *Setlogelo* v *Setlogelo* (*supra).* In my opinion, where the *prima facie* right is open to a doubt which is so significant or is of high magnitude, this court will not protect the applicant as the applicant would have failed to establish the requisite threshold for the *prima facie* right.

Consequently, the applicant would suffer no injury as there is no *prima facie* right that has been established. In terms of the improvements, it is apparent that the applicant was under obligation to seek the consent of the first respondent for all the improvements to be effected on the property. The applicant failed to prove that the applicant consented to the improvements. The first respondent, through its opposing affidavit, challenged the applicant to produce the consent and the applicant did not produce any evidence to that effect. On the contrary, the first respondent referred the court to Clause 8.5 of the lease agreement which provides as follows:

> "The lessee shall not make any additions or alterations to the premises without the prior written consent of the lessor and all such additions and alterations shall be carried out at the lessee's costs and expense by contractors approved by the lessor subject to the supervision of the lessor's architect whose fees shall be borne and paid by the lessee."

Thus, the injury that may be reasonably apprehended by the applicant lacks merits in light of the fact that the applicant ought to have sought the consent of the first respondent before erecting some improvements at the disputed property. By erecting some improvements without prior consent of the lessor, the applicant voluntarily assumed the risk of not being able to claim compensation from the lessor. The applicant alleged in its founding affidavit that its ejectment from the property will negatively affect its employees. This injury can be cured by the notice for the termination of the lease agreement like what the first respondent did through the correspondence of 28 February 2023. The applicant will have ample time to find alternative accommodation for its business within three months.

Further, the present application cannot definitely be the sole remedy for the applicant which has no *prima facie* right. Other remedies at its disposal may be available. The balance of convenience test favours the dismissal of the present application as this is an abuse of court process.

In terms of r 60(9) of the High Court Rules, 2021 published in Statutory Instrument 202 of 2021, the Judge must be satisfied that the applicant has managed to establish a *prima facie* case before granting the provisional order as prayed for or with such necessary consequential amendments. The sub rule provides as follows:

> "(9) Where in an application for a provisional order the judge is satisfied that the papers establish a *prima facie* case he or she shall grant a provisional order either in terms of the draft filed or as varied."

Given the level of inconsistencies highlighted before, I am not convinced that the applicant has established a *prima facie* case warranting the granting of the provisional order. This application, in my view, represents a chain of falsified events and can be best described as a fishing expedition. What did a serious blow to the applicant's case is its failure to file the answering affidavit responding to numerous issues raised by the first respondent in its opposing affidavit filed on 15 March 2023. The matter was postponed on two occasions following the request of the applicant's counsel. The matter was finally heard on 27 March 2023 which means that the applicant had up to twelve days to file its replying affidavit. Despite this, the applicant, for the reasons best known to itself, chose not to answer to serious allegations levelled against it by the first respondent some of which gravely weakened its case. During the oral submissions, the applicant's counsel did not adequately respond to the allegations raised in the first respondent's opposing affidavit. Adv *Zhuwarara* simply insisted that this court ought to grant the present application pending the return day. He further submitted that, at this stage, the court should not inquire whether the right to purchase the property exists at the time of the hearing of the urgent chamber application. I do not subscribe to his views. At the time of hearing the urgent chamber application, the court should be satisfied that the *prima facie* right to purchase the property exists. In my opinion, that right did not exist at the material time. It is also palpably clear that the applicant did not have the right of refusal to purchase the property as the right was not founded in terms of the lease agreement. Further, that right could not have been rewritten by Mr Chibayamombe at the meeting of 27 February 2023 since Mr Chibayamombe has no authority to revisit the terms of the lease agreement.

The applicant's conduct motivated the court to award costs against it. However, in future, it may be necessary to ensure that litigants like the applicant be visited with punitive costs to discourage abuse of court process.

In the circumstances, the reasons advanced motivated the court to dismiss the present application.

Chimwamurombe Legal Practitioners, applicant's legal practitioners
Kantor and Immerman Legal Practitioners, 1st respondent's legal practitioners