

WARREN HILLS GOLF CLUB
versus
SUNSHINE DEVELOPMENT (PVT) LTD
and
CITY OF HARARE
and
THE REGISTRAR OF DEEDS NO

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 3 & 15 November 2023

Urgent Chamber Application

T S Majungwa, for the applicant
Ms A Mapanzure & D Malikhwa, for the first respondent

MUREMBA J: The applicant is seeking an interdict against the first and second respondents in respect of Stands 8112, and 8114 Warren Park Township of Warren Park, Harare. It wants the two respondents to be ordered to cease any construction operations, remove all construction equipment and not to interfere with its operations on these stands pending the finalisation of the legal proceedings in HCH 7008/23. The order the applicant is seeking is couched as follows.

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms –

1. The first and second respondents be and are hereby interdicted from occupying and undertaking any construction works on Stands 8112, and 8114 Warren Park Township of Warren Park, Harare.
2. The First and Second Respondents shall pay costs of suit.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is granted the following relief –

1. The first and second respondents are hereby ordered to cease any construction operations, to remove all construction machinery and equipment from Stands 8112, and 8114 Warren Park

Township of Warren Park, Harare and not to interfere with the operations of the applicant, pending the finalisation of the legal proceedings under HCH.7008/23.”

It is the applicant’s averment that it is in occupation of stands 8112 and 8114 Warren Park Township of Warren Park, Harare, by virtue of a 60-year lease agreement it entered into with the second respondent, the city of Harare which lease commenced on 1 May 1959 and ended on 30 April 2019. The lease agreement was for land falling under Stands 8112, 8113 and 8114 Warren Park Township of Warren Park, Harare and the applicant was to operate a golf club on that land. In 2019, the same parties executed an addendum to the lease agreement extending the applicant’s tenancy for an additional twenty years; commencing on 1 May 2019 to 30 April 2039.

The applicant averred that it was in peaceful and undisturbed possession of the golf club until March 2020 when the first respondent sought to evict it from the from the said land. By way of letter dated 22 July 2020, the second respondent communicated to the applicant that the said land had been bought by the first respondent and title thereof had been transferred in 2008 and that therefore, the extension of the applicant’s lease from 1 May 2019 to 30 April 2039 had been made in error and was thus a nullity as the second respondent was no longer the owner of the property. The first respondent then went on to institute eviction proceedings against the applicant in HC 6212/20 and obtained an eviction order by consent in respect of Stand 8113. On the basis of this order, the second respondent sought to evict the applicant from Stands 8112 and 8114 as well, but it was unsuccessful as the sheriff of the High Court indicated that she was going to enforce the eviction order in respect of Stand 8113 only as reflected on the court order.

The applicant averred that it has since instituted legal proceedings under HCH 7008/23 where it is seeking that its lease agreement with the second respondent be declared valid and extant and that the purported cancellation by the second respondent is unlawful and invalid. The said legal proceedings are still pending before this court. However, on 20 October 2023, the first respondent moved into Stand 8112 with excavators and construction equipment. The first respondent has now proceeded to excavate and commence construction work on this stand despite the applicant’s extant tenancy. The applicant averred that it is in the interests of justice that the matter under HCH 7008/23 be heard and determined before and without the first respondent interfering with its tenancy. The applicant averred that it is still in occupation of the land in issue and is still operating the golf club in terms of the lease agreement. The actions of

the first respondent are destroying the golf course. If the first respondent is allowed to proceed with construction, the proceedings under HCH 7008/23 will be rendered moot and nugatory.

The applicant averred that it has a clear right to remain in occupation of the stands in issue because of the lease agreement which it signed with the second respondent. It further averred that the said lease agreement has not been set aside or declared invalid by the courts and remains valid and extant. It averred that the matter is urgent as it stands to suffer irreparable harm if the interim relief it is seeking is not granted. The golf course is facing total and permanent destruction. There is need to preserve the subject matter of the dispute under HCH 7008/23 until the dispute is determined.

The applicant averred that it treated the matter with urgency and immediately brought the present application with haste upon the commencement of the first respondent's insalubrious activity. Furthermore, the balance of convenience favours the granting of the relief it is seeking as it has always been in occupation of the land in issue. The applicant further averred that there is no other satisfactory remedy available to it other than the interdict it is seeking in order to have construction operations suspended pending the finalisation of the dispute.

The points in limine

In opposing the application, the first respondent raised three points *in limine* which in my considered view had no merit at all. At the hearing of this application, I indicated to the first respondent's legal practitioner that I was dismissing them. My reasons for dismissing them are as follows. It looks like it is fashionable for litigants through their legal practitioners to raise points *in limine* even in cases where it should be apparent to the legal practitioners that the points *in limine* they are raising have no merit. Points *in limine* are technical legal points that are raised before the merits of the case are discussed. It is my considered view that sometimes legal practitioners raise points *in limine* just to use them as a tactical manoeuvre to delay the proceedings or to gain an advantage over the opposing party. Sometimes the impression given is that points *in limine* are used to test the waters and see how the judge is likely to rule on certain issues. In some cases, points *in limine* are raised by litigants who are afraid of going to the merits of the case and legal practitioners who have no confidence in their client's defence.¹

¹ *Telecel Zimbabwe (Pvt) Ltd v Potraz and others* HH 446-15.

However, it is important for legal practitioners to know that raising points in *limine* without merit can be seen by the courts as an abuse of process and can lead to costs orders against the parties who raise them.² Abuse of process is the act of using the legal process to harass another party to the suit; to intentionally incur costs with the intent that the other party will be ordered to pay those costs; or to delay the court action.³

It is high time litigants through their legal practitioners desisted from filing a large number of points in *limine* that are not meritorious as this can be seen by the courts as a waste of time and money. This can even harm the litigant's case. Only the critical points in *limine* should be raised. It is therefore important for legal practitioners to ensure that the points raised are meritorious, relevant and have a reasonable chance of success.⁴ This means that points in *limine* should be based on sound legal arguments. In *Telecel Zimbabwe (Pvt) Ltd v Potraz and others* HH 446-15 MATHONSI J (as he then was) had this to say:

“Legal practitioners should be reminded that it is an exercise in futility to raise points in *limine* simply as a matter of fashion. A preliminary point should only be taken where firstly it is meritable and secondly it is likely to dispose of the matter.”

In *casu* the first point in *limine* that the first respondent raised is that the matter is not urgent. The averment was that the applicant said it observed the movement of excavators onto the premises on the 20th of October 2023. The applicant delayed in bringing these proceedings to court and only did so seven days later. It did not explain why it did not act from the 20th of October 2023 to 27th of October 2023. Nothing prevented it from filing and serving the application on it on 23rd or 24th of October 2023. It was argued that the urgency was self-created. In the *Telecel* case *supra* MATHONSI J said that, “as points in *limine* are usually raised on points of law and procedure, they are the product of the ingenuity of legal practitioners.” I

² “Understanding “Point in *limine*” in South African Civil Litigation.”
<https://www.bartermakellar.law/litigation-explained/understanding-litigation-in-south-africa>.
Accessed on 13 November 2023.

³ Abuse of Process – Definition, Examples, Cases, Process – <https://legaldictionary.net/abuse-of-process/>
Accessed on 13 November 2023.

⁴ Motions in *limine*: An update on Uses, Abuses and Pitfalls
<https://www.carltonfields.com/insights/publications/2023/motions-in-limine-uses-abuses-and-pitfalls>.
Accessed on 13 November 2023.

am in agreement with him. It is therefore important and necessary for legal practitioners to do thorough research on the points *in limine* they intend to raise before they raise them. In *casu* if the first respondent's legal practitioner had done research on the issue of urgency, she would have come across several cases which would have made her realise that a delay of 7 days in filing an urgent chamber application is generally not inordinate. She would have realised that the issue of urgency she intended to raise was non-meritorious and had no reasonable chance of success. In the *Telecel* case *supra*, the first respondent's counsel submitted that the matter was not urgent because the applicant was aware of the intention to cancel its licence as at 5 March 2015 when the first respondent advised it of that intention by letter of that date. It was submitted that the applicant should have taken remedial action then instead of waiting until 30 April 2015 to file the application. MATHONSI J said that there was no merit whatsoever in that point *in limine*. He went on to say that he was finding himself having to repeat what he stated in *The National Prosecuting Authority v Busangabanye & Anor* HH 427/15 at p 3. He said,

“In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency. Quite often in recent history we are subjected to endless points *in limine* centered on urgency which should not be made at all. Courts appreciate that litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time, they should be accorded audience. It is no good to expect a litigant to drop everything and rush to court even when the subject matter is clearly not a holocaust.” (My underlining for emphasis)

I could not have put it any better than MATHONSI J did. If a delay of 22 days and more cannot be said to be inordinate, what more a delay of 7 days? I will reiterate what MATHONSI J said. Litigants do not eat, move and have their being in filing court process. There are other issues they attend to and where they have managed to bring their matters within a reasonable time, they should be accorded audience. 7 days cannot be said to be an unreasonable time and an inordinate delay. I believe that the first respondent's counsel is one of those legal practitioners who believe that the issue of urgency should be raised in any urgent chamber application as a matter of routine. I say this because any right-thinking legal practitioner would know that there is no way a delay of 7 days can be said to be inordinate unless the relief the applicant is seeking has been overtaken by events or if the matter is extremely urgent. I am convinced that when the legal practitioner for the first respondent raised this point *in limine* on urgency she knew that it was not meritorious, it did not have a reasonable chance of success and was a sheer waste of time. In the *Telecel* case it was held that, “*in future, it may be necessary*

to rein in the legal practitioners who abuse the court in that way, by ordering them to pay costs de bonis propriis.” Legal practitioners must take heed of this warning.

Be that as it may, the foregoing are the reasons why I dismissed the point *in limine* on urgency.

The second point *in limine* raised was that the applicant has no cause of action in the present matter. The first respondent averred that the lease agreement the applicant seeks to rely upon was revoked and cancelled by the second respondent because it had been renewed in error. The submission by the first respondent was that the applicant is in unlawful occupation of Stands 8112 and 8114 which are its stands. What the first respondent’s counsel failed to appreciate is that it is that cancellation of the lease agreement which caused the applicant to file the court application under HCH 7008/23 challenging the cancellation. As far as the applicant is concerned it is in lawful occupation of Stands 8112 and 8114. According to its founding affidavit, what caused it to file the present application is the fact that the first respondent brought excavation equipment to Stand 8112 and has started construction work yet case HCH 7008/23 has not yet been determined. Put differently, the applicant is saying that it is in lawful occupation of Stands 8112 and 8114 on the basis of the lease agreement which was wrongly cancelled by the second respondent. It has since sued the second respondent challenging the cancellation of the lease agreement and that matter is yet to be determined under HCH 7008/23. The first respondent in the present matter is also a party to those proceedings as the second respondent. The applicant wants the first respondent interdicted from doing any form of construction work on the stands in issue pending determination of that pending matter. The applicant’s cause of action is very clear from its papers. However, as to whether or not the applicant will succeed in obtaining the relief it is seeking is another issue.

The third point *in limine* raised was that this court is now *functus officio*. The averment was that the applicant was issued with an eviction order in HC 6212/20 and that it has no legal basis to occupy stands 8112, 8113 and 8114 (which is now stand 8118 under a consolidated title). It was averred that this court cannot revisit the same subject matter and revisit the decision it made in HC 6212/20. It is clear that in *casu* the applicant is seeking an interdict and not an eviction order. The eviction order that was granted in HC 6212/20 makes it clear that it related to Stand 8113. On the other hand, the interdict that the applicant is seeking in the present case is in relation to Stands 8112 and 8114. The application for an interdict does not seek to revisit the eviction order that was granted in HC 6212/20. The doctrine of *functus officio* holds

that once the court renders a decision regarding the issues submitted, it has no power to re-examine that decision. An eviction order that was granted for stand 8113 and an interdict order that is being sought for Stands 8112 and 8114 are orders that are not related at all. Clearly the doctrine of *functus officio* is not applicable. It is for these reasons that I dismissed the point *in limine* as having no merit.

The Merits

It was the first respondent's averment that the applicant cannot seek to interdict excavation and construction on Stands 8112 and 8114 pending the finalisation of proceedings under HCH 7008/23 because these stands belong to it and the applicant does not hold any lease agreement for those stands. The addendum to the lease agreement which the applicant is relying on relates to Stand 8113 (measuring 80.5039 hectares) only. In any case that lease agreement was cancelled by the second respondent when it realised that it had issued it in error. The first respondent averred that this clearly shows that the applicant has no right to claim occupation of any of its stands, be it Stand 8113 or 8112 and 8114 in respect of which it is in unlawful occupation. The applicant is not a tenant of the first respondent and its occupation has not been authorised by the first respondent. The first respondent is the registered owner of Stands 8112, 8113 and 8114 (which was consolidated with stand 19606 to form stand 8118). The first respondent averred that since it has real rights over these stands, it is entitled to use them as it deems fit including carrying out any excavation and construction works.

The first respondent further averred that it is however not carrying out any construction work on Stands 8112 and 8114 for which the applicant is seeking an interdict but on the golf course which is on Stand 8113 which measures 80, 5039 hectares and this is the land for which it obtained an eviction order. The first respondent further averred that the first lease agreement which existed between the applicant and the second respondent was entered into before it (the first respondent) purchased and acquired title over the property in 2008. The lease agreement was allowed to run its course until 30 April 2019 after which it took over. The first respondent averred that it is a joint venture company which was formed by Augur Investments OU and the second respondent with 70 % and 30 % shares respectively. The first respondent averred that the second respondent made an oversight at the expiration of the lease agreement in 2019 and erroneously extended it under the addendum to the lease agreement. The second respondent subsequently corrected the error on 22 July 2023 by writing a letter of cancellation. There is therefore no valid lease agreement between the applicant and the second respondent. The first

respondent further averred that the expired lease agreement which ran for 60 years only related to Stand 8113 hence the purported extension of the lease only related to Stand 8113. There was never a lease agreement between the applicant and the second respondent in respect of Stands 8112 and 8114. The first respondent averred that it has since issued summons for the eviction of the applicant from its two stands: 8112 and 8114 under HCC 7079/23. It was averred that the applicant neither owns nor leases the two stands from it and as such an interdict cannot be granted against it. The first respondent averred that whilst it is correct that the sheriff refused to evict the applicant from Stands 8112 and 8114 on the strength of the eviction order it obtained under case number 6212/20, this is not a basis for the applicant to be granted an interdict it is seeking as it holds no lease agreement with either of the two respondents. The first respondent averred that the applicant has not established the requirements of an interdict as it is not a tenant. The first respondent averred that the applicant consented to its eviction under HC 6212/20 because it had realised that it had no valid defence to the eviction. It was contended that in HC 8007/23 the applicant is seeking to introduce the same issues it raised in HC 6212/20.

From the averments made by both parties what is common cause is that when the first respondent bought land from the second respondent in 2008, the applicant was already in occupation of that land. The history of the case shows that the applicant took occupation of this land on the basis of the lease agreement which it signed with the second respondent for a period of 60 years from 1959. The problem with this lease agreement is that it only gave a description of the boundaries of the land under lease but it did not give a description of the stands which constituted it. There is no explanation as to why that was so. However, for the 60-year duration of the lease, there was never a problem between the parties as to the land the applicant as the lessee was occupying. The applicant averred that this is where the golf club and golf course were and are still sitting and this is the land that is made up of Stands 8112, 8113 and 8114. The first respondent did not present any evidence to the contrary. In fact, what Ms *Mapanzure* for the first respondent submitted orally confirms the applicant's averments. Ms *Mapanzure* submitted that the City of Harare must have been mistaken to think that the whole area which was under lease to the applicant was one property falling under Stand 8113. She further submitted that the golf course is on Stand 8113, the club house is on Stand 8112 and on Stand 8114 there is a strip of land and some employees of the applicant are housed there. This submission by the first respondent's legal practitioner clearly shows that the applicant did not unlawfully occupy Stands 8112 and 8114. It occupied the stands on the basis of the lease

agreement which was in force for 60 years. It could not have been in occupation of that land for that very long period without the second respondent evicting it. The applicant was in lawful occupation of the land in issue.

From my analysis of the lease agreement and the addendum to the lease agreement what then caused confusion was the signing of the addendum extending the lease agreement. In the addendum, instead of the parties sticking to the description it had given to the land under lease initially, the parties made specific mention of Stand 8113 thereby giving the impression that the lease agreement was being renewed or extended only in respect of this stand and not in respect of Stands 8112 and 8114. It is the specific mention of stand 8112 and the exclusion of Stands 8113 and 8114 which has resulted in the mess the parties find themselves in now. Firstly, in cancelling the renewal of the lease agreement, the second respondent has had to specifically refer to cancellation of lease in respect of Stand 8113. Secondly, the eviction order that the first respondent obtained against the applicant made specific mention of Stand 8113. Thirdly, when the sheriff enforced the eviction order against the applicant, she did so only in respect of Stand 8113 yet the first respondent had wanted the applicant to be evicted from Stands 8112 and 8114 as well on the basis of the eviction order for Stand 8113. The sheriff correctly refused to do so because the eviction order does not speak to Stands 8112 and 8114. As a result of all of this, the applicant remains in occupation of Stands 8113 and 8114.

My interpretation of the addendum which renewed the lease agreement is that since it made mention of Stand 8113 only, without mentioning Stands 8112 and 8114 (whatever the reasons were), it had the effect of renewing or extending only the portion of the land covered by Stand 81123. It did not have the effect of renewing the lease agreement in respect of the land covered under Stands 8112 and 8114. However, that does not, in my view, mean that the lease agreement in respect of the land covered under the two stands came to an end at the expiration of the 60-year lease agreement in 2019. I say this because the parties i.e., the applicant and the second respondent continued to carry out their obligations towards each other as landlord and tenant. The applicant remained in occupation of the property whilst the first respondent continued to collect rent it. However, the rent had been revised and was now being paid in terms of the revision that had been made in the addendum. The conduct of the parties certainly showed that there was a lease agreement between them in respect of Stands 8112 and 8114. It is also clear to me that the terms of this lease agreement were the same terms of the lease agreement in respect of Stand 8113. In fact, rent was being paid for the whole land under

Stands 8112, 8113 and 8114. To both parties, the lease agreement just continued as before, after the addendum had been signed. It is my considered view that when the parties signed the addendum and made specific mention of Stand 8113, leaving out Stands 8112 and 8114, they genuinely believed that the whole land covered under Stands 8112, 8113 and 8114 fell under one stand, Stand 8113. It must have been a genuine mistake to believe that the whole area fell under Stand 8113. This is why under Clause D of the addendum the parties said,

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This can only mean that the parties believed that they were extending the whole lease agreement for another 20 years. What then compounded the situation is that the second respondent then decided to cancel the renewal of the lease on 22 July 2020 saying that it had erroneously renewed the lease when it was no longer the owner. This is what resulted in the applicant being sued for eviction from Stand 8113. It appears that the belief was that the eviction order would result in the applicant being evicted from the whole piece of land. This is why the first respondent sought to have the applicant evicted from Stands 8112 and 8114 as well. The first respondent then hit a brick wall as the applicant resisted eviction arguing that the court order specifically mentions Stand 8113 only. So, the addendum created a mess for the parties. The cancellation letter specifically refers to 8113 and its hecfrage of,,,,. . since the cancellation letter does not refer to Stands 8112 and 8114, it means there is still an extant lease agreement in respect of these two stands. This is despite the fact that the first respondent is now the new owner of the said properties, having bought the properties from the second respondent in 2008 and obtained title to the property.

The first respondent repeatedly said that it is the registered owner of the stands and is thus entitled to do as it pleases on these stands. That is quite correct, but in the circumstances of the present case, the enjoyment of its rights is not absolute because of the existing lease agreement between the applicant and the second respondent in respect of Stands 8112 and 8114. At law the renewal of the lease agreement between the applicant and the second respondent in 2019 was valid even if ownership of the said property had changed from the second respondent to the first respondent. I say this because a lease agreement is not dependent on ownership. In other words, a person other than the owner of the property can enter into a lease agreement with a tenant and a tenant cannot dispute the title of his landlord – *see Robin v Green*. The landlord does not have to be the owner of the property that he or she is leasing out. It is not an essential of a lease that the landlord be the owner of the property. That is why estate agents

lease out properties that are not theirs. In view of the foregoing discussion, I come to the conclusion that since the applicant's lease agreement in respect of Stands 8112 and 8114 was not cancelled by the second respondent, it actually has a clear right in respect of these two stands. In *LF Bashof Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) 3A 256 (C) at 267 A-F, Lorbett J (as he then was) said an application for a temporary interdict must show:

- '(a) that the right which is the subject matter of the main action which he seeks to protect by means of an interim relief is clear or if not clear, is *prima facie* established though open to some doubt,
- (b) that, if the right is only *prima facie* established there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right,
- (c) that the balance of convenience favour the granting of the interim relief, and
- (d) that the applicant has no other satisfactory remedy”.

Since the facts of the matter show that the applicant has a clear right in respect of the two stands, it meets the requirements of a temporary interdict. I am inclined to grant it so as maintain the *status quo ante* until the proceedings in HH 7008/23 are finalised.

It appears to me that the first respondent is failing to appreciate that the applicant's argument is that although it is not the owner of Stands 8112 and 8114, it is claiming occupation thereof on the basis of the addendum to the lease agreement which it says was later wrongfully cancelled by the second respondent. It is the wrongful cancellation that it is challenging under HCH 7008/23/. Its argument is that it has a *prima facie* right on the basis of the wrongfully cancelled lease agreement. What the applicant ought to realise is that the owner of a property can be interdicted from doing as they please with the property if the action they are taking infringes on the rights of others. The right to use and enjoy one's property is not absolute and is subject to certain limitations that are imposed by law. If a person has a lease agreement, they may be able to interdict the owner of the property from doing as they please with the property if the action they are taking is illegal or if it infringes on the rights of the tenant. If the owner is planning to engage in activities that interfere with the tenant's quiet enjoyment of the property, the tenant may be able to interdict them. *In casu* the applicant is saying that although the first respondent's is the owner of stands 8112 and 8114, there is an existing and valid/extant lease agreement it entered into with the second respondent in respect of those stands and that

as such the first respondent should not do any construction work until the validity of the cancellation of the lease agreement has been determined by the courts. The argument by the applicant is sound because as I have already stated elsewhere above, the right to use and enjoy one's property is not absolute. A person cannot use or enjoy their property if their use or enjoyment infringes on the rights of others. The owner of a property cannot enjoy or use their property if doing so infringes on the rights of the tenant. Under the circumstances the owner of the property can be interdicted as they will be causing harm to the tenant. For an interdict to be granted against a respondent, the harm must be caused by the respondent, alternatively the prevention of the harm must be within the respondent's power. See *Herbstein and Van Winsel The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa* 5th edition Juta at p1466. In the circumstances of the present case the applicant can therefore obtain an interdict against the first respondent pending determination of the validity of the cancellation of the lease agreement which was made by the second respondent. This is so because the harm that the applicant is complaining about is being caused by the first respondent and it is within the first respondent's power to prevent that harm pending determination of HCH 7008/23.