

BIGGIE MWOYOWESHUMBA
and
PHILLIP GARDNER
versus
NATIONAL SOCIAL SECURITY AUTHORITY
and
CITY OF HARARE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 19 June & 17 July 2024

Urgent Chamber Application

B Maruva, for the applicants
No appearance for the 1st respondent
C M Mushayi, for the 2nd respondent

WAMAMBO J: This matter came before me as an urgent chamber application wherein the applicants seek urgent relief as couched below:

“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 are hereby interdicted from proceeding with any form of construction work at Glaudina and Kuwadzana Extension junction using a draft plan TPY/WR/1/24 until General Plan CT 2670 [SR 28532] is set aside.
- 2) The Draft layout plan TPY/WR/1/24 be and is hereby declared to be in direct conflict with General Plan 2670/ [SR 28532] as such invalid.
- 3) First and second respondents be and are hereby ordered to pay costs of suit jointly and severally one paying the other to be absolved.

INTERIM RELIEF GRANTED

Pending determination of this matter on the return date, the applicant is granted the following relief:

- 1) The first and second respondents and their workers, subordinates, nominees and agents be and are hereby interdicted and barred from constructing the Glaudina and Kuwadzana Extension junction in breach of plan CT 2670 [SR 28532].
- 2) The first, second, third and fourth respondents, their workers, subordinates, nominees and agents be and are hereby barred from interfering in any manner with the applicant's rights and possession of Stands 2224 to 2296 Glaudina Township.
- 3) The first and second respondents jointly and severally one paying the other to be absolved be and are hereby ordered to pay costs of this application on a higher scale of attorney and client scale.

SERVICE OF THIS ORDER

Without derogation from the normal powers of the Sheriff to serve court process, the applicants or their legal practitioners or any attested member of the Zimbabwe Republic Police is hereby authorized to serve this order on the respondents.”

In the founding affidavit deposed to by the first applicant the following is averred:

On 18 March 2014 Gillingham Pay Scheme though its members applied for a piece of land for stands in Glandina Township. Second respondent responded to the application on 26 April 2024 and indicated that stands would be made available after a consideration by the City Valuer.

On 14 November 2014, second respondent allocated applicants and others a pay scheme for Stands 2224 to 2296 Glandina Township under a block allocation. Applicants and others occupied the said stands and started the servicing of roads and water reticulation systems. A number of obligations have been completed and approved by second respondent.

In December 2022 second respondent issued a notice in terms of s 152 of the Urban Councils Act [*Chapter 29:15*] to the effect that they intended to lease stands in Glandina. The said stands are on the same block allocated to the pay scheme referred to earlier. An objection was raised.

On 5 April 2023 the applicants furnished second respondent with approved water diagrams.

On 24 September second respondent confirmed the allocations as per see Annexure ‘H’.

On 5 March 2024 second respondent wrote to first respondent directing first respondent to start constructing the junction identified as NSSA/Glandina and Kuwadzana Extension Junction, Bulawayo Road, Harare using draft plan TPY/WR/1/24.

On 22 March 2024 applicants instructed their legal practitioners to institute legal proceedings under HCH 1538/24 which matter is still pending.

After the filing of HCH 1538/24 first respondent stopped the construction. On 19 March 2024 first respondent had mobilised earth moving equipment in preparation for construction works.

On 23 May 2024 first respondent again brought its equipment to start construction notwithstanding the pending legal processes.

The draft layout plan TPY/WR/1/24 interferes with the applicants’ rights and interests as depicted on General Plan CT 2670 [SR 28532]. The land on which the construction is being done has been allocated to Gillingham Pay Scheme which has approved water reticulation plans. If the

construction continues the road will encroach onto applicants' stands and destroy pegs and water pipes.

The founding affidavit also traverses the requirements of an interdict as applied to the circumstances of this case and the issue of urgency.

The first respondent was served with the application but did not respond.

The second respondent is opposed to the application and raised two points *in limine*, namely lack of urgency and lack of *locus standi* on the part of the applicants.

According to the second respondent applicant filed a declaratur first instead of an urgent chamber application. Further that she did not act swiftly and failed to act when the need to do so arose when construction started.

The applicants aver that although there were attempts at construction those were stopped after the filing of papers in HCH 1538/24. Construction only started again on 23 May 2024 and that is the construction directly related to this application. I did not find second respondent seriously objecting to this narrative.

Second respondent averred that the need to act arose on 22 March 2024 and applicant filed an ordinary application under HC 1538/24. Having traversed the founding affidavit under HC 1538/24 the applicants therein seek relief on two rungs – an order interdicting the respondents therein from proceeding with construction of the Glaudina Kuwadzana Extension Junction and an order declaring Stands 2224 to 2296 Glaudina Township duly allocated to applicants as members of Gillingham Pay Scheme.

It stands to reason that after the filing of HC 1538/24 and the stopping of construction, an urgent chamber application only became desirable because construction had commenced afresh. It appears to me that the explanation by the applicants makes more sense than that of the second respondent in the circumstances.

The response to the construction on 23 May 2024 leading to the filing of this application appears to have been with haste. I find that the application was filed when the need arose.

In *Kuvarega v Registrar General & Anor* 1998(1) ZLR 188 at p 193 CHATIKOBO J said:

“What constitutes urgency is not only the imminent arrival of this days of reckoning, a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated in the rules. It necessarily follows that the certificate of urgency or supporting affidavit always contain an explanation of the non-business action if there has been any delay.”

In the instant case when applicants observed that construction had commenced once again they acted urgently by filing this application within a short space of time.

To that end I find that urgency has been established and dismiss this point *in limine*.

The next point *in limine* raised by second respondent is that the applicants lack *locus standi*. I do not agree. The applicants have proven a direct and substantial interest in the matter at hand. They are members of the Gillingham Pay Scheme. The Pay Scheme is not a phantom of their imagination. At p 27 of the application is an application for stands in Gaudina Township to first respondent through the Director of Housing and Corporate Service. There is a response at p 28 of the application. At p 29 is an allocation of stands letter. In the answering affidavit are attached certificates of acceptance as members of Gillingham Housing Pay Scheme for the applicants. See Annexures “A” and “B” of the answering affidavits.

The said certificates of acceptance as members of Gillingham Housing Pay Scheme also reflect that the applicants have been allocated Stands 2258 and 2228 respectively. I note here that these stands fall within the stands reflected in the draft order as potential stands to be affected by the construction of the junction, as averred by the applicants.

I find therefore that applicants have *locus standi* and dismiss this point *in limine*. The applicants also raised a point *in limine*. They aver that the deponent to second respondent has not attached a resolution to represent the second respondent.

They further averred that in the circumstances there is no opposition before the court.

The second respondent cited s 136 of the Urban Councils Act [*Chapter 29:15*] in support of the contention that the town clerk who deposed to the opposing affidavit was clothed with *locus standi* to represent second respondent.

A reading of s 136 of the Urban Councils Act [*Chapter 29:15*] does not assist second respondent’s case as it merely defines the functions of the town clerk.

The second respondent is a legal entity. There was need for the representative of the legal entity to show that she is authorised to represent that entity. There was need for the representative of the legal entity to show that she is authorised to protect that entity. In *Home of Angels Housing Cooperative Society & 5 Ors v City of Harare* MANGOTA J at p 2 said:

“The respondent however insisted in its Heads, that there was no need on its part to prove that the deponent to its opposing affidavit has its authority to so depose to the affidavit. It in the mentioned regard placed reliance on *Dube v PSMAS & Anor* SC 73/19 in which the Court stated that:

‘A person who represents that a legal entity, when challenged, must show that he is duly authorised to represent the entity. That the respondent is a legal entity requires little if any debate.’”

I note here that the legal entity being referred to was the City of Harare, which is the same as second respondent in this case. In this case MANGOTA J was satisfied that the defendant to the founding affidavit was duly authorised. The circumstances obtaining in that case are similar to this case. By party of reasoning I find that the town clerk is duly authorised to represent the second respondent.

I find in the circumstances that the point *in limine* raised by applicants that the deponent to second respondent’s founding affidavit is not duly authorised has no merit and I dismiss it. On the merits I will consider requirements of an interdict and examine whether or not applicants have satisfied same.

In *Equity Properties (Private) Limited v Alshams Global BVI Limited & Anor* SC 101/21 KUDYA AJA (as he then was) pronounced the requirements of an interim interdict as follows at p 13:

“The requirements and purpose of an interim interdict are so well settled in this jurisdiction. It seeks to protect an existing right from unlawful infringements that is either continuing or reasonably anticipated. See *Major Logistics (Pvt) Ltd v Zimbabwe Revenue Authority* CCZ 7/14; Setlogelo 1914 AD 221 at 227 and *Tribac Pvt Ltd v Tobacco Marketing Company* 1996 (2) ZLR 52 (S). In the latter case this court stated at 56 B–D that:

‘An application for *mandamus* or mandatory interdict as it is often termed, can only be granted if all the prerequisites of a prohibitory interdict are established. See *Lipschitz v Watrus* 1980 (1) SA 662 (T) at 673 C–D; *Kaputuruza & Anor v Executive Committee of the Administration for the Hereros & Ors* 1984 (4) SA 295 SWA at 317 E.’

These are:

1. A clear or definite right – this is a matter of substantive law.
2. An injury actually committed or reasonably apprehended – an infringement of the right established and resultant prejudice.
3. The absence of a similar protection by any other ordinary remedy. The alternative remedy must (a) be adequate in the circumstances (b) be ordinary and reasonable (c) be a legal remedy and (d) grant similar protection.

In respect of an interim interdict, where the right sought to be protected is not clear, a right which “though *prima facie* established is open to some doubt” suffices. See *Eriksen Motors Welkom v Warrenton & Anor* 1973 (3) SA 685 (A) at 691D.”

I will proceed to consider the application as guided by the above requirements. Applicants have managed to establish their membership of Gillingham Pay Scheme as adverted to earlier. There is paper trail on record reflecting the following.

That Gillingham Housing Scheme applied to second respondent for residential stands in Glaudina Township – see p 27 of the application. Second respondent through its Director of Corporate Services Housing acknowledged Gillingham Housing Pay Scheme’s application in a letter dated 26 April 2014 at p 28 of the application and informed Gillingham Housing Pay Scheme *inter alia* as follows:

“Please be advised that your application has since been forwarded to the City Valuer for consideration and if indeed stands are created and or made available on the chosen site or any other alternative your Housing Scheme will be considered allocation of the same.”

In a letter dated 14 November 2014 second respondent allocated residential Stands 2224 to 2296 in Glaudina Township to Gillingham Pay Scheme and laid down various conditions among them that the Pay Scheme shall contribute towards development of the stands, that the Pay Scheme shall engage a reputable engineer and that the allocation of the stands would be made to *bona fide* members of the Pay Scheme.

At p 31 of the application is an approved proposed road and storm water layout. At p 32 is a document under the banner “City of Harare Water and Sewerage Branch” which reflects among other developments that the water reticulation of the Pay Scheme was completed, valves fitted, connections and hydrants installed. This document has on it appended the signatures of a superintendent (Sup) and a plumber.

At p 33 of the application is a document emanating from second respondent’s department of water and sanitation supportive of the document at p 32.

At p 34 is a letter from second respondent’s Director of Corporate Services and Housing advising the Chairperson of Gillingham Housing Pay Scheme of an offer for the payment of US\$6 per square metre under the block allocation letter on condition 30 percent of the total price is paid within 30 days from the date of the receipt of the letter and payment of the remaining 70 percent within three months.

According to the communication trail things came to a head-on on 5 March 2024 when the second respondent wrote to the first respondent raising no objection to the construction of a junction based on draft layout plan TPY/WR/1/24. This letter is at p 35 of the application.

Pages 36 to 40 reflect construction work in progress. Applicants aver that the construction of the junction will affect already built structures, roads and water reticulation to their prejudice.

On the face of it I am satisfied that applicants have not only proved a *prima facie* right but also that there is a reasonable apprehension of irreparable harm if the construction of the junction continues.

It is not lost on me that the second respondent is the very authority that allocated stands to the applicants and other members of what I interchangeably referred to as Gillingham Pay Scheme or Gillingham Housing Pay Scheme or simply as the Pay Scheme.

In an about turn the second respondent has approved the construction of a junction that will encroach onto Gillingham Pay Scheme infrastructure.

There is a pending case between the parties namely HCH 1538/24. For the sake of clarity the above findings are only on a *prima facie* basis for purposes of this interim application.

I also find that the balance of convenience favours the applicants. They *prima facie* appear to face more prejudice if the application is not granted. Their infrastructure would be decimated and a permanent junction established if the interim order is not granted. On the other hand second respondent faces less prejudice in the circumstances. They are on the face of it the creators of the predicament that they now face.

Applicants have filed an application under HC 1538/24 that will hopefully resolve the main dispute between parties in a substantial manner.

As for the interim relief in this case I am of the considered view that applicants also have no other alternative remedy in the circumstances where construction of the junction is already in progress.

I find in the circumstances that applicants deserve the relief they seek in terms of the draft order as amended.

The amendment relates to the order of costs included in the interim order. I queried the insertion of this portion of the interim draft order to which counsel for the applicants conceded that it was improperly inserted and that it should be excised. I agree.

I make an order in terms of the draft order as amended by the total removal of para 3 of the

interim order.

Zuze Law Chamber, applicant's legal practitioners
Gambe Law Group, first respondent's legal practitioners