MORGAN HAVIRE
versus
AROSUME PROPERTY DEVELOPMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 4 March 2021& 19 March, 2021

Urgent application

T. Rusinahama & s. Murondoti, for the applicant
S. M. Bwanya & G. Hoyi, for the respondent

MANGOTA J: I heard this application on 7 December, 2021. I delivered an *ex tempore* judgement in which I dismissed the same with costs.

The High Court registrar addressed a letter to me. He did so on 2 March, 2021. He requested reasons for my decision. He advised that the applicant intends to appeal my decision. These are they:-

The applicant applied for a stand at the Remainder of Carrick Creagh of s 4 of Borrowdale Estate, Carrick Creagh Township, Harare. He filed his application through Sally Mugabe Housing Co-operative ("Sally") on 27 March, 2007. He was/is a member of Sally.

Sally allocated to the applicant stand number 254 of the remainder of Carrick Creagh of s 4 of Borrowdale Estate, Carrick Township, Harare ("the property"). It did so on 8 December, 2007. The allocation was subject to him meeting conditions precedent which Sally spelt out in a document which it termed Final Stand Allocation.

The applicant attached to his founding papers the agreement which he concluded with Sally as well as the Final Stand Allocation. He marked them annexures A and B. The annexures appear at pages 16 and 18 of the record respectively.

Having been allocated Stand number 254 by Sally, the applicant commenced to occupy and possess the property as well as to construct a boundary wall around the same. Whilst he was about the stated work, the respondent which is a professional developer which entered into a tripartite contract with Sally and the Ministry of Local Government, Public Works and Urban Development ("the Ministry"), disrupted the applicant's work. The respondent, it is common

cause, had been contracted to develop Carrick Creagh Farm for, and on behalf of, the Ministry and Sally's beneficiaries who included the applicant.

The first disruption occurred in October 2020, according to the applicant. This ceased when the applicant's legal practitioners wrote, at his instance, requesting the respondent not to interfere with his work. The second disturbance occurred on 29 and 30 November, 2020. The respondent's agents and employees, it is agreed, moved the peg or beacon of Stand number 254 from its original position further into the stand. They, in the process, encroached onto the stand.

The respondent's alleged encroachment into the applicant's stand constitutes the latter's cause of action. He insists that the respondent should be interdicted from continuing to act in the manner that it did on 29 and 30 November, 2020. He couched his draft order in the following terms:

"TERMS OF FINAL ORDER SOUGHT

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

1. It is declared that Applicant is the lawful occupant of Stand number. 254 Carrick Creagh Estates, Borrowdale, Harare measuring 9175 square metres.
2. Respondent be and is hereby ordered to prepare and submit all documents necessary for Applicant's title to Stand number 254 Carrick Creagh and submit the same to the Ministry of Local Government, Public Works and Urban Development for processing of transfer.
3. Respondent be and is hereby ordered to pay costs of suit on an attorney-client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicants are (sic) granted the following relief:

1. That Respondent and anyone acting through it, be and is hereby interdicted from accessing any portion or part of Stand number 254 Carrick Creagh Estates, Borrowdale measuring 9175 square metres.
2. That Respondent and anyone acting through it be and is hereby ordered not to interfere in any manner with the applicant's employees and not to deny them access to the whole of Stand number 254 Carrick Creagh, Borrowdale measuring 9175 square metres [emphasis added]

The respondent opposed the application. It raised three *in limine* matters after which it addressed the substance of the application. Its preliminary issues centred on what it termed:

(i) material non-joinder of the Ministry, Sally and Carrick Creagh Residents Association.

(ii) illegality of the conduct of the applicant whose construction at the stand was/is not approved by the City of Harare - and

(iii) the efficacy, or otherwise, of the certificate of urgency which did not inquire into:

a. the lawfulness or otherwise of the applicant's occupation of the stand; and/or

b. what prompted the applicant to attach to the application a survey map of Stand number 3 when the application relates to Stand number 254- and/or

c. the lawfulness or otherwise of the construction work itself.

The respondent stated, on the merits, that it moved the beacon of the applicant's stand to where it lawfully should be positioned. It denied that its conduct was unlawful. It averred that its warning to the applicant's construction outside the boundaries of his stand was premised on a lawfully approved site plan for all Carrick Creagh land. It insisted that the applicant did not have the right to occupy State land without the authority of the State to do so. It denied that he paid any development costs for the stand. It insisted that Stand number 254 was not *9175 square metres in extent*. It moved me to dismiss the application with punitive costs.

The applicant bears the burden of proving his case on a balance of probabilities. He must prove that:

(a) stand number 254 was allocated to him – and

(b) the stand is 9175 square metres extent.

Where he is able to prove the above-mentioned two matters, in addition to others which are of an inconsequential nature, his day in court will be a well-rewarded one. Where, on the other hand, he fails to do so, the application will not stand.

That Sally allocated Stand number 254 to the applicant requires no debate at all. He states as much in his founding papers. Annexure B which he attached to the application substantiates his statement in the mentioned regard.

The memorandum of agreement, Annexure A, which appears at p 16 of the record defines the relationship of the applicant and Sally. It spells out the nature and terms of the contract which the two of them concluded on 7 April 2006.

Clause (1) of the contract stipulates the payment which the applicant, as a member of Sally, was enjoined to pay for administration fee, town planning and land survey, engineering design and bush clearance. He had to pay the total sum of ZW$275 000 for the stated work.

Clause (2) of the contract defined, among other things, the size of the stand which Sally would allocate to its member(s). Para (d) of the clause reads:

> "(d) A member shall/will be allocated a residential stand of 4000 m^2 sizes"

Pages 7 of the contract constitutes the applicant's application for a stand. Paragraph (A) of the same reads:

> "A I/We hereby make an application for a 4000 m^2 stand subject to conditions stated in this memorandum of agreement..."

It is evident, from a reading of Annexure A, that the applicant applied for a stand which was/is 4000 square metres in extent. It is also clear that Sally offered to the applicant a stand which was/is 4000 square metres in size. The applicant and Sally were/are, therefore, *ad idem* as regards the size of the stand which was to be, and was eventually, allocated to the applicant. They, as parties, remained *in sync* with clause 2 (d) of Annexure A.

The Standing Allocation Contract, Annexure B, only states that Sally allocated to the applicant stand number 254. It does not mention the size or extent of the stand. All it does is to spell out the conditions which the applicant had to meet before he commenced construction on the stand.

The size of the stand which Sally allocated to the applicant is, in my view, taken as given. It is spelt out in the contract, Annexure A, which the applicant concluded with Sally. It is 4000 square metres in extent. It cannot be anything other than the stated figure.

The applicant does not explain how the stand which he successfully applied for expanded in size from 4000 square metres which Sally allocated to him to 9175 square metres which he makes mention of in his application. He states, in para 6 of his founding affidavit, that:

> "On or about 27 February 2009, I signed the Stand Allocation Contract concerning stand number 254 of the Remainder of Carrick Creagh of section 4 of Borrowdale Estate, Carrick Township. I attach hereto as Annexure C a copy of the stand allocation agreement with a survey attached thereto" (emphasis added)

The applicant appears to have confused issues. The stand allocation agreement does not fall under Annexure C. It falls under Annexure B. No survey is attached to Annexure B. Nor is any survey attached to Annexure C which, in fact, is a partnership agreement for the development of residential stands of varying sizes at Carrick Creagh Farm, Borrowdale. The parties to the agreement comprise the Ministry, Sally and the respondent.

It is a mis-statement for the applicant to refer to a non-existent survey. *A fortiori* when he does not attach the survey to either Annexure B or Annexure C. He, as it were, leaves the issue of the survey to conjecture.

I observe and mention, in passing, that what the applicant refers to as the survey is attached to his agreement with Sally. The survey appears at p 21 of the record. It is 9175 square metres in size. It was conducted in April 2006.

It does not require any effort for anyone to realise that the survey which appears at p 21 does not refer to stand number 254 which Sally allocated to the applicant. It refers to stand number 3 of Carrick Creagh Township. It goes without saying that stand number 3 of Carrick Creagh Township is separate and different from stand number 254 which Sally allocated to the applicant.

The applicant, it is evident, cannot premise his application on stand number 3. He has no rights at all on that stand. His rights are for stand number 254 and not for stand number 3. He cannot sustain his application for a stand which Sally did not allocate to him. *A fortiori* when he does not explain, as he should, that stand number 3 is the same as stand number 254 of Carrick Creagh Township. He cannot, for instance, state that Sally which allocated to him a stand which is 4000 square metres in size re-allocated to him another stand which is 9175 square metres in extent. He, at any rate, did not plead such a statement in his papers.

Given that the applicant does not have any right *prima facie* or absolute-to stand number 3 upon which his application is premised, the application cannot succeed. It cannot do so because it does not meet the basic requirement(s) for an interdict or a declaratur which the applicant is moving me to grant to him in the final order. The requirements of an interdict are stated in such cases as *Bulawayo Trialogue Institute* v *Matyatya N.O and Ors*, 2002 (2) ZLR 490 (H) *Chairman Blasting and Earth moving Svcs (Pvt) Ltd* v *Najinjai & Ors*, 2000 (1) ZLR, 85 (S).

The applicant does not have a direct and substantial interest to stand number 3 the survey of which he attached to his application in substantiation of the allegation that the stand

which Sally allocated to him is 9175 square metres in size. His motion for a declaratur cannot, therefore, succeed.

The statement of the applicant as read with that of the respondent constitutes a material dispute of fact which cannot be resolved on the papers. He alleges, without proof, that the stand which was allocated to him was/is 9175 square metres in extent. The respondent's statement, on the same, is that it is not 9175 square metres in size. It insists that he encroached onto other persons' stands as a result of which the respondent removed the beacon of his stand and placed it where it should have remained positioned.

Given the observation that stand number 254 was, at some point in time, baptized and given the name stand number 3, the conduct of the respondent in removing the beacon further into the stand of the applicant cannot be said to be unlawful. It must have realized that he was making every effort to unlawfully extend the area of the stand. It, accordingly, estopped him from acting outside the law.

Annexure B which the applicant signed contains conditions precedent which he was to meet before he commenced any construction on the stand. He had to ensure that title survey had been conducted, building plans were submitted to Sally's experts to ensure compliance with Sally's set standards and money had been paid towards infrastructural development.

The applicant does not plead any compliance with the above stated conditions precedent. He, infact, states that he proceeded with construction subject to him complying with the law/regularising his conduct whilst the construction was in progress or had been completed.

The respondent did not quote the applicant out of context when it questioned the efficacy or otherwise of the certificate of urgency which failed to inquire into:

(a) the lawfulness of the applicant's occupation of the stand.

(b) his attempt to mislead the court by attaching to the application a survey map of stand number 3 which had nothing to do with stand number 254 - and

(c) the lawfulness of the applicant's construction at the stand.

It is evident, from the foregoing, that the certificate which Sandra Dizwani prepared in support of the application left a lot to be desired. She took a mechanical approach to the application. She did not, therefore, realize that the approach which she took would work against the case of the applicant more than it would do so in his favour.

The applicant's statement which is to the effect that he decided to carry out the construction on the stand in the hope that he would regularize his work at a later stage speaks volumes of the illegality of his work. He broke the law left, right and centre. He, in the same

breadth, is moving me to sanction his unlawful conduct. He is not a serious litigant when the stated circumstances are taken account of.

An application for an interdict/a declaratur can only succeed where the applicant is able to show that he acted or is acting within the law. Where, as *in casu,* he acts outside the law and even confirms, as the applicant does, that he acted unlawfully subject to him regularizing his conduct, the application cannot succeed. There is sufficient authority for the stated proposition. See *Airfiel Investments (Pvt) Ltd* v *Minister of Lands and Ors*, 2004 (1) ZLR 511 (S) which stresses the need on the part of the applicant to act lawfully. It follows, from the stated matter, that an interdict cannot be granted to protect an unlawful activity.

It is evident, from a reading of the foregoing part of this judgment, that the applicant cannot be said to have proved his case on a balance of probabilities. He allowed the application to hope, skip and jump, as it were. It suffered fundamental flaws which could not be cured by evidence. I failed to make any head or tail of what he was driving home to. It was premised on a matter which was not relevant to the case of the applicant. The application is, in the result, dismissed with costs.

Brentwood Chambers, applicant's legal practitioners
Mutuso Taruvinga & Mhiribidi, respondent's legal practitioners