

TAWANDA MAPANGA
versus
E.B. MAGAISA
(In his capacity as the executor dative of the
Estate Late McCloud Zvavovaviri Maparanga)
and
SOUL COMFORTERS EXECUTORS COMPANY (PRIVATE) LIMITED
and
DR. A. KURAUONE ACUTE PROPERTIES (PRIVATE) LIMITED
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 15 August and 21 September 2022

Urgent Chamber Application

R T Mutero, for the applicant
M H Chitsanga, for applicant 1st, 2nd and 3rd respondents

TAGU J: This is an urgent chamber application where the Applicant is seeking an order in the interim to the effect that the first to the third respondents be interdicted from advertising and disposing Stand 357 of Willowvale Township of Stand 460 of Willowvale Township situate in the District of Salisbury by private bid auction or any other means pending the finalization of this application. On the return date, the applicant will be seeking an order declaring that the first to third respondents are bound by the contract the applicant entered into with them the effect of which would be that the applicant would pay US\$300 000.00 or in local currency at the prevailing rate against transfer of Stand 357 of Willowvale Township of Stand 480 of Willowvale Township situate in the district of Salisbury and consequential reliefs.

The circumstances are that the applicant and twelve (12) other siblings are beneficiaries of the estate of Mr. McCloud Zvavovaviri Mapanga who passed away on the 14th of May 2018. His estate was registered and the first respondent was appointed the executor dative. The first respondent through a letter dated 10th May 2022, granted the applicant and all other beneficiaries of the Estate Late McCloud Zvavovaviri Mapanga the right of first refusal to purchase property

constituting the estate. Following such grant, the Applicant accepted the grant and opted to buy Stand 357 of Willowvale Township of Stand 460 Willowvale Township situate in the District of Salisbury through a letter dated 17th June 2022. However, on the 3rd August 2022, the Applicant became aware of an advertisement in the local newspaper of the 27th July 2022 inviting potential bidders for viewing the property which constitutes the estate through potential buyers who had attended to view Stand 357 Willowvale Township, to which the applicant communicated his intention to exercise his right of first refusal. The viewing was to take place from 3rd to the 12th August 2022 despite that the applicant had offered to purchase this particular property. The applicant had offered to purchase such property in a bid to exercise his right of first refusal and meeting the purchase price which the first respondent attached to the property and was accepted by the fourth respondent.

The first, second and third respondents opposed the application and raised a preliminary objection to the effect that the application is not urgent. They submitted that in determining whether or not a matter is urgent, the court takes a look at, inter alia, the relief being sought both in the interim and the final order. *In casu*, they said the interim relief is incompetent as the applicant seek to interdict lawful act, and that there is a non-existent agreement, hence the application should be struck off the roll of urgent matters with costs. Reference was made to the case of *Document Support Centre (Private) Limited v T.E. Mapuvire* HH 117/06.

The Applicant maintained that the application is urgent, and by relying on the same case of *Document Support Centre supra*, submitted that the circumstances of case deserve that it be determined on an urgent basis.

Having noted the sentiments of MAKARAU JP (as she then was) in the case of *Document Support Centre supra*, at p 4 of the cyclostyled judgement I found that the point *in limine* lacks merit and I dismiss it. Equally, I found the second point that there was no contract and Applicant cannot interdict lawful conduct to be baseless. I say so because on the 10th May 2022, the first respondent granted the applicant and other beneficiaries of the Estate Late McCloud Zvavovaviri Mapanga the right of first refusal to purchase property constituting the estate. Following such grant, the applicant accepted the grant and opted to buy Stand 357 of Willowvale Township of Stand 460 Willowvale Township situate in the District of Salisbury through a letter dated 17th June 2022. Clearly, there was *prima facie* an offer and acceptance.

In this case the first respondent E. B. MAGAISA, who is the appointed executor dative for the Estate Late McCloud Zvavovaviri Mapanga, offered to all beneficiaries the right of first refusal to purchase the assets of the estate.

The applicant accepted the grant to purchase Stand 357 for US\$300 000.00 a figure that had been accepted by the fourth respondent. The applicant has the money and is willing to pay per the agreement. Rest of the beneficiaries did not accept the grant of first refusal. Despite the acceptance, by the Applicant, first and second respondents by letter dated 10 May 2022, informed all beneficiaries of the late applicant's father's estate that they had been authorized by the fourth respondent to dispose of all the property constituting the estate including Stand 357. The applicant contacted the first and second respondents concerning his query but first and second respondents remained adamant that the property was being put up for sale by private bid auction through the third respondent. Hence an application for interim interdict was filed.

In an application of this nature certain requirements have to be met. These are:

1. A *prima facie* right, though open to doubt;
2. Imminent harm/risk to be suffered if relief is not granted;
3. Balance of convenience favours grant of interdict;
4. Lack of alternative remedy.

In the present application the applicant at the very least has a *prima facie* right to the relief sought. It is not disputed that the applicant is a beneficiary of the estate and was given the right of first refusal to purchase the property by the first and second respondents. His acceptance entailing his intention to exercise the right of first refusal was not refused. He is desirous of exercising his right of first refusal to purchase Stand 357 Willowvale Township of Stand 460 Willowvale Township situate in the District of Salisbury.

As to the risk of imminent harm/injury this is imminent. As at the time the applicant was deposing to the founding affidavit, the viewing of the property was ongoing as per the advertisement. If this is not stopped the property risk being put on auction before the applicant's right to first refusal is not dealt with. The balance of convenience favours the granting of the application because should this application not granted, it would mean the first to the third respondents can proceed can proceed with the auction and subsequent selling of the property despite the fact that the applicant had the right of first refusal which he had openly intended to

exercise. In the event this happens, applicant's application will be rendered academic and his father's legacy will be permanently eroded. There is therefore, no alternative remedy other than an interdict.

The applicant has established all the requisites for a temporary interdict. The application succeeds.

IT IS ORDERED THAT:

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. It is declared that the Applicant and the 1st - 2nd Respondents entered into valid and enforceable agreement for the purchase and sale of Stand 357 of Willowvale Township of Stand 460 of Willowvale Township situate in the District of Salisbury when the Applicant exercises the right of first refusal accorded to him by the 1st and 2nd respondents.
2. Consequently, the 1st and 2nd Respondents be and are hereby directed to comply with the agreement between themselves and the applicant and give effect to the agreement of sale and purchase of Stand 357 of Willowvale Township of Stand 460 of Willowvale Township situate in the district of Salisbury in favour of the applicant.
3. Consequently, it is also ordered that the applicant is entitled to purchase of the Stand 357 of Willowvale Township of Stand 460 of Willowvale Township situate in the district of Salisbury upon payment of the purchase price in the sum of USD\$300 000.00 or local currency equivalent at the prevailing bank rate in accordance with a valuation done by Preferred Properties (Pvt) Ltd.
4. The 1st and 2nd respondents shall, jointly and severally, the one paying, the other to be absolved, costs of this application on an attorney client scale.

INTERIM RELIEF GRANTED

Pending the confirmation or discharge of the order, Applicant is granted the following interim relief:

1. The 1st - 3rd Respondents or their agents or assignees be and are hereby interdicted from inviting viewers, auctioning and/or disposing Stand 357 of Willowvale Township of

Stand 460 Willowvale Township situate in the District of Salisbury pending the finalization of this matter.

SERVICE OF PROVISIONAL ORDER

The Provisional Order together with all supporting documents shall be served on the respondents or their legal practitioners by the Sheriff or applicant's legal practitioners.

Farai and Associates Law Chambers, applicant's legal practitioners

Mutandiro, Chitsanga & Chitima, first, second and third respondents' legal practitioners