

MONTANA PROPERTIES (PRIVATE) LIMITED

VERSUS

UMGUZA RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE

MAKONESE J

BULAWAYO 11 JUNE 2013 AND 13 JUNE 2013

Mr *J. Tshuma* for the applicant

Mr *S. Chamunorwa* for the respondent

Opposed Application

MAKONESE J: The Applicant in this matter, Montana Properties (Pvt) Ltd is a company duly incorporated and registered in accordance with the laws of Zimbabwe. The Respondent is Umguzo Rural District Council, a statutory body created with legal capacity under the Rural District Councils Act [Chapter 29:13]. The Applicant is the registered owner of immovable property known as “the remaining extent of Douglasdale Township 3 of subdivision 1 of Douglasdale. This property is held by the Applicant jointly with another property known as “the remaining extent of subdivision 1 of Douglasdale” under Deed of Transfer Number 1830/96 registered on 20th May 1996. The two properties are situated in the District of Bulawayo. The piece of land known as the remaining extent of Douglasdale Township 3 of subdivision 1 of Douglasdale

was subdivided into various stands. The Applicant is in the business of breeding and rearing pedigree cattle and uses the properties for this purpose.

On the 2nd day of March 2012, the Applicant obtained a Provisional order against the Respondent in the following terms:

“TERMS OF FINAL ORDER SOUGHT

THAT you show cause to this Honourable Court why a final Order should not be made in terms of the following terms:

- 1. The purported repossession of the immovable properties known as “the remaining extent of Douglasdale Township 3 of subdivision 1 of Douglasdale” and “the remaining extent of subdivision 1 of Douglasdale” situate in the district of Bulawayo, or any portions of such properties by the Respondent be and is hereby declared unlawful, and null and void .*
- 2. The Respondent shall, at its cost, remove, or cause the removal of, all such persons occupying the above-mentioned properties at its invitation, suffering and/or behest as may remain of the properties, from the properties within 14 days of the date of this order. Failing such removal, the Deputy Sheriff is hereby authorised and directed to evict all such persons from the properties.*
- 3. The Respondent is interdicted and barred from continuing to sell, allocated or apportion any portion of the above-mentioned properties to third parties.*
- 4. The Respondent shall pay the costs of this application on the legal practitioner and client scale.*

INTERIM RELIEF

Pending the return date, the following relief is granted:

1. *The Respondent is hereby barred and interdicted from selling, allocating or apportioning to any person whatsoever, any portion of the properties known as "the remaining extent of Douglasdale Township 3 of subdivision 1 of Douglasdale" and "the remaining extent of subdivision 1 of Douglasdale" situate in the district of Bulawayo.*
2. *The Respondent is, further interdicted and barred from inviting or suffering any person to take occupation of any portion whatsoever of the above-mentioned properties.*

The Respondent opposes the confirmation of the Provisional Order. This court therefore, has to determine whether the Provisional order should be confirmed or discharged.

Background

The background to this matter is that sometime in December 2011, Applicant became aware that certain persons were settling upon some of the sub-divided stands on the property known as "the remaining extent of Douglasdale Township 3 of subdivision of Douglasdale "(hereinafter referred to as "the property"). The Applicant had no legal relationship with these people. The Applicant's enquiries revealed that Respondent had purported to repossess a number of the subdivided stands in the remaining extent of Douglasdale Township 3 of subdivision 1 of Douglasdale, and that the settled persons were on the property upon the invitation of the Respondent. The Applicant was alerted to an advertisement that had been placed

in the Government Gazette of the 16th September 2011 by the Respondent. The main features of the advertisement were as follows:

1. It notified of re-possession and allocation of unclaimed stands.
2. The unclaimed stands at issue were within Douglasdale Township 3.
3. The affected stands were numbered 101; 102; 103; 104; 105; 106; 107; 108; 109; 110; 111; 112; 133; 117; 118;119; 120; 121; 122; 123; 124 and 125.
4. The stands were to not registered in Respondent's Rates Payer's List and had not paid rates to Respondent
5. The stands were to be repossessed and allocated to recover a debt that had accumulated for 31 years, if no one expressed interest by the 30th September 2011.

It is not in dispute that the Applicant had never been billed by the Respondent for rates in respect of the stands in issue. On realizing that the Respondent had purported to re-possess the stands, the Applicant wrote to the Respondent on 19 December 2011 requesting an account for rates. No such account was produced. On the 6th January 2012, the Applicant's Legal Practitioners further addressed a letter to the Respondent. The Respondent did not respond to the requests, which resulted in the Applicant filing an Application for a Provisional Order. The Provisional order was granted. The Respondent filed a Notice of opposition opposing the confirmation of the Provisional Order.

Applicant's Argument

The final order sought by the Applicant in this matter is interdictory in nature. Essentially three different types of relief are being sought; declaratory, mandatory, and prohibitory. The main argument advanced by the Applicant is that the requirements for the confirmation of the Provisional order have been met and that Respondent has failed to profer any grounds for the non-confirmation of the Provisional order. The Applicant contends that it has satisfied all requirements for an interdict. The Applicant further contends that an Applicant seeking an interdict to succeed, such applicant has to show a clear right; an injury committed or reasonably apprehended; and the absence of any other effective remedy.

Respondent's Argument

The Respondent contends, on the other hand that when perusing the Applicants Founding Affidavit and answering affidavit, it is not clear what land has been occupied. The Respondent avers that the Applicant has failed to identify its land, and that it is inadequate to simply refer to the remaining extent of Douglasdale Township 3 of subdivision 1 of Douglasdale because all the land referred to has been subdivided. Respondent further avers that the Applicant ought to refer to specific stands numbers and to state in clear and specific terms which stand was occupied, when and by whom. The Respondent states that the Applicant falls short of establishing a clear right in respect of the land because of lack of certainty as to the land that it claims because part of the land that it claims belongs to other third parties.

The Respondent argues that the application ought to fail, alternatively the matter ought to be referred to trial to establish the exact land that is claimed by the Applicant, the land claimed to have been occupied and the identity of the persons occupying such land.

WHETHER APPLICANT HAS ESTABLISHED A CLEAR RIGHT

The law on this subject is now well traversed in our jurisdiction. It is now settled law that where a final interdict is sought, the applicant has to establish and prove a clear right on a balance of probabilities. It is only in respect of an interim interdict that a *prima facie* right, even one open to some doubt, has to be established. Further, an applicant for a final interdict does not have to prove that the balance of convenience favours the applicant.

The nature of the right to be proved in cases involving interdicts was discussed in the case of: *Melvin Van Wyk v Elizabeth Cornelia Gowases and another* HAHC 119/10. The court stated as follows:

"What is the nature of a "right" referred to in the contest of interim and final interdicts? In my opinion, the right may be a legal right or a basic human right. It has been said that most legal rights (in contradistinction to basic human rights) come to people because they have acquired the in the course of some lawful transaction ---.

In sum, a right is an entitlement, protected by law, to something or concepts like justice and due process. These rights include contractual and delictual rights (legal rights), and basic human, inalienable rights like those protected by the Namibian Constitution."

I am persuaded that the above authority applies by parity of reasoning. Property rights are rights protected both at common law and by the Constitution of Zimbabwe and proof of clear property rights amounts for the purposes of a final interdict, to proof a clear right. It is beyond dispute that the Applicant has clearly demonstrated that it is the owner of the property in question. The property is clearly described in the Deed of Transfer. The title deed has a diagram deed which reflects the extent of the property described in such Title Deed.

In my view, the Applicant has established a clear right in the property. The right comprises applicant's right of ownership, possession and full use and enjoyment of the immovable property. The Respondent has not challenged the Applicant's ownership of the property. The Respondent has not challenged the Applicant's right to occupy and use profitably the property. I am not inclined to accept the Respondent's assertions that the Applicant has failed to identify its land. The Respondent has not denied that it placed the Applicant's property in the Government Gazette, advertising that specific stands would be re-allocated if no one came forward to claim ownership of such stands. It is instructive to note that part of the notice in the Government Gazette reads as follows:

"Please be advised that Umguzu Rural District Council will re-possess and allocate these stands to recover lost revenue in rates if no-one comes forward to claim ownership and clear the debt that has accrued over the past 31 years."

In paragraph 9 of its Opposing Affidavit the Respondent's Chief Executive Officer, Collen Moyo states as follows:

"9(a) I am now advised by the Respondent's legal practitioners which advice I accept that it was incompetent for the Respondent to purport to acquire it in the manner that it did the pieces of land advertised in the Government Gazette.

(b) The Respondent upon the advice of its legal practitioners now accepts that it is limited to making a claim for the recovery of the arrear rates due to it by the holder or owner of the gazetted property."

I am satisfied that the Applicant and Respondent are referring to the same property. The property gazetted by the Respondent is the same property that has been occupied by unnamed persons. It is unconceivable that the Respondent would take all the trouble to oppose the confirmation of the Provisional

order if the land in question was some other property. It is clear that there is no confusion regarding the extent and description of property that belongs to the Applicant. For the purposes of the confirmation or discharge of the Provisional Order there is no need for the Applicant to identify the persons who have occupied the property in question. These people do not have only lawful right of occupation as they were wrongfully settled by the Respondent. I find that there is no need to hear any further evidence as the evidence on the papers is clear and reliable. I therefore conclude that the Applicant has proved a clear right in this matter on a balance of probabilities. (See the leading case on the subject) *Setlogo v Setlogo* 1914 AD 221.

INJURY ACTUALLY COMMITTED OR REASONABLY APPREHENDED

It is now settled law that in order to satisfy this requirement the applicant must show that the Respondent is acting in a manner which interferes with the exercise of the applicant's rights. Alternatively, the applicant must show that it has a reasonable and well-grounded apprehension that the Respondent will conduct itself in such a manner. The Applicant must show, further, that the injury committed will cause prejudice. On what constitutes injury for the purposes of granting an interdict, Mr *J Tshuma*, Counsel for the Applicant has referred me to the case of: *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter and Marine Services (Pty) Ltd and others* (392/2004) [2005] ZASCA 87 [2006] 3 ALL SA 523 (SCA).

In the cited case the court dealt with the meaning of injury in the "injury" requirements of interdicts.

The court stated as follows:

“Of course it is hard to imagine that a rights invasion will not be affected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded. The fact that physical means were employed or physical consequences sustained is incidental.”

In *casu*, the Applicant has in my view demonstrated that the Respondent has invaded his rights. The Respondent took positive steps to re-possess Applicant's land and proceeded to parcel out the land to individuals unknown to the Applicant. The allocation of stands to third parties outside the law is a clear invasion of Applicant's rights of occupation and possession of the land. The Applicant has sufficiently shown that there has been settlement by third parties on its property, and that such third parties are there upon the instigation of the Respondent. To that extent, Applicant has shown, an injury actually committed to it by the Respondent. The Respondent concedes in its Opposing Affidavit that it had no right to acquire the land and that it was not competent for it to acquire the land as it did. This admission seems to me to have sealed the fate of the Respondent's case. The admission is an admission of injury to the Applicant, caused by the purported acquisition of the properties advertised in the Gazette. There has been no dispute that some, if not all the properties advertised belong to the Applicant. The allocation to, and settlement on Applicant's land to third parties undoubtedly causes actual prejudice to the Applicant. The use and enjoyment to its property is limited by the illegal allocations of the pieces of land to third parties.

ABSENCE OF ANY OTHER REMEDY

The Applicant contends that no other remedy is available other than the relief sought in the terms of final order sought. Mr *S Chamunorwa*, Counsel for the Respondent did not deal with this aspect either in his

Heads of Argument or in his oral submissions in court. He was content to argue that the requirements of an interdict had not been satisfied and that the Provisional order should be discharged. No suggestion was therefore made by the Respondent that there were other effective remedies available to the Applicant. It is my firm view that no other remedy would address the situation adequately. See the case of: *Ministry of Local Government v Mudzuri and Another* 2004 (1) ZLR 223 (H) at page 231.

In the circumstances, the interdict prayed for by the Applicant is the only protection which the Applicant can obtain in this matter.

WHETHER THERE IS A DISPUTE OF FACT

The respondent has asserted that there are material disputes of fact and that the matter should be referred to trial to resolve such disputes by leading oral testimony from the parties. The apparent dispute of fact relates to the allegation by the Respondent that the Applicant has not identified its land, and further that there are boundary disputes. I have no hesitation in stating that there is no dispute of any material fact in this matter. The Respondent's perceived disputes of fact were raised simply to cloud the issues for determination. The Respondent admits in the opposing Affidavit that it erred when it purported to re-possess land belonging to Applicant and re-allocating it to third parties. The Respondent ought to have resolved the matter by removing the illegal occupiers when it became apparent that the land had been acquired improperly and without due process. This is indeed a case where the facts averred by the Applicant, when taken into conjunction with the facts admitted by the Respondent, as well as the facts

denied by the Respondent, but which it clearly ought to have admitted, entitle the Applicant to the relief sought..

I will not venture to deal with the submission in the Respondent's Heads of Argument that the Applicant should have cited and joined the occupiers to these proceedings. This argument was not strenuously persisted with and none of the occupiers have shown any interest in being joined to the proceedings. This seems to be a case where the Respondent is in fact opposing the matter on behalf of the unnamed third parties. The Respondent cannot have any other interest beyond the protection of the interests of the persons it settled on the Applicant's property.

In the result, the application succeeds and the Provisional order granted by this Honourable Court of the 2nd of February 2012 is hereby confirmed, and a final order is issued in terms of the Final Order Sought.

Webb, Low & Barry incorporating Ben Baron & partners, applicant's legal practitioners

Calderwood, Bryce Hendrie and partners' respondent's legal practitioners