

LLOYD SESA

MUSARURWAKAPENA

COSMAS NCUBE

LAWRENCE DZINGO

INNOCENT MASHU

CEASAR & NQOBANI SICINGILE MWADAINÉ

BISHOP NCUBE

ELISHA MUPAIKWA

VUSUMUZI & NOBUHLE MPOFU

ABEL JULIUS NDLOVU

DUMISANI KHUMALO

JUSTINE NTULI

SILINDILE ANGELA NYONI

PATRICIANCUBE

MARGARET NYONI

NKOSANA MOYO

NOLWAZIDONGA

THOMSEN DUBE

PATRICIANKOMO

THOKO NDEBELE

TENDAYIMTAMBO

TADIOUSS. NSINGO

SITHOBEKILE TSHUMA

PHILIP & LOVEJOY CHAWATAMA

OTILIA DUBE

ESAU & TAMARA BANDA

SIMANGALISO NCUBE

ROANNY MAPHOSA

PRISCA MOYO

LOVENESS DUBE

DOUBT & SIBONGINKOSI MPOFU

NOBUHLE DUBE

JULIUS RWAFA

SIBUSISIWE MATHE

DUMISANI NDLOVU

MEJURY CHINODA

CAROLINE MTHEMBO

CHENAI SIBIYA

TRUSTWORTHY MAFU

JETHRO MATHUTHU

DUMISO D. NDLOVU

SPIWE DUBE

PROMISE MOYO

KAIZER SIBANDA

DUMISILE DUNGENI

NOBUKHOSI MUKANDLA

versus

HAWKFLIGHT CONSTRUCTION

UMGUZA RURAL DISTRICT COUNCIL

IN THE HIGH COURT OF ZIMBABWE

MOYO J

BULAWAYO 13 NOVEMBER AND 11 DECEMBER 2014

Mrs N. Dube Tachiona for the applicants

Mr T. Moyo-Masiye for the 1st respondent

Urgent application

MOYO J: This is an application wherein the Applicants seek an interdict couched in the following manner

- “1. 1st Respondent and any of its proxies, representatives and agents be interdicted from locking any of the housing units belonging to the Applicants in any attempt to compel them to make any payment to them.
2. 1st Respondent and any of its proxies, representatives and agents are interdicted from entering any of the housing units belonging to Applicants in the absence of Applicants and without Applicants’ written consent.”

The background of the matter is that Applicants and the 1st Respondent entered into an agreement of sale of residential stands in which the seller would develop and construct a dwelling house at a specific cost with the purchaser meeting its obligation of payment of the requisite sum over an agreed period. The Applicants contend that the houses that were supplied by the 1st Respondent in pursuance of the agreement are substandard and the work is shoddy. These houses were delivered to the Applicants at different times from 2012 to 2013. They reside in these houses to date. From the facts it can also be gleaned that there have been issues over the payment of the requisite instalments by the Applicants. Some of the Applicants have defaulted in their payment terms prompting the parties to meet and try to resolve that issue. It is at these meetings that the issue of substandard structures was canvassed and failing resolution, the Applicants then resolved that they would not make any payments to the 1st Respondent in terms of their agreement with it.

On the other hand, the contract between the parties provides for arbitration and the

Applicants have already initiated the process of taking the matter on arbitration.

The basis of this application is contained in paragraph 56 of the founding affidavit whose contents all the other 45 Applicants have associated themselves with, paragraph 56 of the founding affidavit is as follows:-

“In order to make good its position, 1st Respondent then decided to send messengers to all the Applicants on the 1st and 2nd of November 2014 advising them that anyone who does not continue to pay for the structures in question as per the agreement would be evicted during the first week of November 2014. I personally take that threat seriously because 1st Respondent has in fact over the past 3 years been locking out everyone who defaults in his or her payments”

This paragraph is the one that forms the basis for the urgency of the application. From the facts, it is clear that the parties have an agreement and that there are issues now with that agreement. The parties have agreed to refer the matter to arbitration and the process has been initiated. Whilst there is no problem with the pending arbitration, the current problem in my view emanates from the Applicants' failure to pay the instalments in terms of their agreement with the 1st Respondent. The 1st Respondent has asserted its right to payment by the Applicants in terms of the agreement pending arbitration. The 1st Respondent's stance is, pending arbitration the Applicants should make payment in terms of the agreement. The 1st Respondent also threatened Applicants with eviction if they did not pay their instalments in terms of the deal. It is not clear how 1st Respondent's threat would be carried out, but on the face of it if it were to be lawfully carried out perhaps there would be nothing wrong with it. On the other hand if 1st Respondent would take the law into its own hands to carry out the evictions then they would be unlawful. However, it is the question of whether Applicants have a *prima facie* right in this matter considering all the facts that should first be answered. 1st Respondent threatened to evict those that would not pay the requisite instalments. Applicants on one hand want the matter referred to arbitration, due to the poor workmanship on the structures by the 1st Respondent. On the other hand they do not want to pay the instalments required in terms of the agreement. They nonetheless want to remain in occupation of the structures until when the matter is dealt with on arbitration. The position of the Applicants is not clear and is therefore untenable. There is a problem of substandard construction work by the 1st Respondent so they allege, they want that issue resolved on arbitration. On the other hand they want to stop payments but remain in occupation of the structures until when the matter is finalised.

It is my view that if Applicants are to succeed in this application, they should allow the *status quo* to prevail. They pay their requisite instalments, and on the other hand remain in occupation of the structures (if that is what they wish to do pending arbitration). It is my view that whilst they want to stop the 1st Respondent from taking the law into its own hands, they in fact are the ones who have started this whole illegal circus by flatly refusing to pay the instalments in terms of their agreement with 1st Respondent. This is also tantamount to taking the law into their own hands. This can not be allowed, as it would amount to legitimising a wrongful act by a party to a contract which this court can not do.

It is thus my considered view, that the Applicants have approached this court with unclean hands hence they can not win the sympathy of this court. The Applicants can not plan to breach an agreement which they have referred to arbitration and then ask this court to come in and support them in their breach pending arbitration. This is unlawful and this court can not allow itself to be used in that manner. If the matter is to be taken for arbitration, then the Applicants must allow the *status quo* to prevail, that is, they remain in occupation whilst making the requisite payments or they resile from the contracts, surrender the units, stop payments and demand a refund at arbitration. They can not refrain from paying, but remain in occupation, that is unheard of. Its either they cancel the contract and wait for arbitration to ratify the cancellation or otherwise, or they remain in occupation, making the requisite payments and await their fate on arbitration. A litigant can not wantonly breach a term of a contract and then when the other party reacts, they then seek recourse to the courts to enforce unlawful conduct. It is for this sole reason that I find that no foundation has been made for a *prima facie* right by the Applicants in this matter. The Applicants should desist from unlawful conduct of not paying the instalments and the threat by the 1st Respondent would fall away. A litigant can only expect this court to come to his/her rescue if they approach the court with clean hands.

Refer to the case of *Rigid Group Transport Pvt Ltd vs Remington Gold Pvt Ltd and 4 others* HH 110/11.

It is for the foregoing reasons that this application can not succeed, it is accordingly dismissed with costs.

Dube-Tachiona & Tsvangirai, applicants' legal practitioners
Hwalima, Moyo and Associates, 1st respondent's legal practitioners

