

MEMORY GAHADZIKWA  
versus  
EVERSON ZHOU  
and  
GODFREY MAGWAZA  
and  
SALTANA ENTERPRISES (PVT) LTD  
and  
BELVEDERE WEST/WARREN PARK HOUSING DEVELOPMENT ASSOCIATION  
and  
DAVIE FUKWA MUTINGWENDE  
and  
ANTHONY ENERST PAHWARINGIRA  
and  
CITY OF HARARE

HIGH COURT OF ZIMBABWE  
MUREMBA J  
HARARE, 5 & 14 June 2017

**Urgent chamber application**

*T E Mudambanuki*, for the applicant  
*N Mahori*, for the 1<sup>st</sup> respondent  
5<sup>th</sup> respondent in person  
*D Kanokanga*, for the 7<sup>th</sup> respondent

MUREMBA J: Despite being served with the application, the second and sixth respondents did not appear for the hearing. The third respondent's director, Mr S.T. Rusike attended the hearing and indicated that the third respondent was not opposed to the application. So was the fifth respondent who appeared in person.

Having read all the papers in the present matter, I can summarise the background facts of this case as follows. This is a case where there was a triple sale of one stand, being Stand No. 7895 Belvedere West, Harare by the third respondent, Saltana Enterprises (Pvt) Ltd (Saltana Enterprises) a land developer to the applicant, the first respondent and the second respondent in 2015, 2006 and 2002 respectively. Upon hearing of the occupation of the stand by the applicant, the first respondent Everson Zhou in November 2015 successfully applied

for a provisional order in this court interdicting the other buyers (applicant and the second respondent) from interfering with the property. Subsequent to that, he obtained a final order in November 2016 declaring him the owner of the property. Both the applicant and the second respondent, Godfrey Magwaza have since appealed to the Supreme Court against the judgment of this court declaring the first respondent, Everson Zhou the owner of the stand. Although the two appellants had initially filed two separate appeals, the two appeals have since been consolidated under SC 697/16. The appeal is yet to be determined.

Apparently, Saltana Enterprises and the seventh respondent, the City of Harare had entered into an agreement in 2002 in respect of which the City of Harare availed land to Saltana Enterprises for servicing and thereafter selling of stands to individuals. Thereafter, Saltana Enterprises had struggled to service the land resulting in the fourth respondent, Belvedere West/Warren Park Housing Development Association (the Association) as the beneficiary of the stands commencing legal action against Saltana Enterprises and the City of Harare for compelling orders. This resulted in Saltana Enterprises and the Association negotiating and agreeing to enter into a Joint Project Management agreement on 15 February 2012 for purposes of servicing the land. The two parties were to come up with a single and legitimate list of all the beneficiaries. Unfortunately, a dispute then ensued between Saltana Enterprises and the City of Harare pursuant to their agreement and they referred their dispute for arbitration. On 9 February 2017, the dispute was resolved in favour of the City of Harare entitling it to take over the project and entering into contracts for the sale of the stands. Dissatisfied with this arbitral award, Saltana Enterprises filed a court application in this court under HC 1701/17 for its setting aside. Again, this matter is still pending.

What prompted the applicant to make the present application on 26 May 2017 is that she believes that the first and seventh respondents are about to sign a contract in respect of Stand 7895 Belvedere West, Harare despite the fact that the appeal in SC697/16 is yet to be determined. In the provisional order, firstly, she wants that transaction stayed pending the finalisation of the appeal. Secondly, the applicant wants the fourth respondent, the Association and the City Of Harare interdicted from mobilizing beneficiaries and the City of Harare to be interdicted from contracting with beneficiaries of Belvedere West /Warren Park Housing Project pending the finalisation of HC1701/17. The first respondent is a member of the fourth respondent

In response the first respondent, Everson Zhou raised two points *in limine*: the matter is not urgent and that the matter is *res judicata*. The seventh respondent raised several points

*in limine*: conflict of interest by the applicant's counsel, Mr *Mudambanuki* who also represents the third respondent, Saltana Enterprises in HC1701/17; the application does not comply with r 241 of the High Court Rules, the matter is not urgent, lack of *locus standi* by the applicant to seek the second relief she is seeking in the provisional order, an issue involving Saltana Enterprises and the City of Harare in HC 1701/17 a case which she is not party to and that this relief the applicant is seeking is the same relief which the third respondent, Saltana Enterprises once attempted to get against the seventh respondent, City of Harare in HC 3804/17 through an urgent chamber application, but MUSAKWA J held that it was not urgent on 11 May 2017.

Looking at all the points *in limine* which were raised, I decided that the issue of urgency disposes of the matter. The appeals that are pending in SC 697/16 were filed on 18 November 2016. What prompted the applicant to believe that the first and seventh respondents were about to sign a contract in respect of Stand 7895 Belvedere West, Harare is that on 24 May 2017 she says she saw a notice instructing the first respondent, Everson Zhou and other beneficiaries to go and sign contracts with the seventh respondent. She said that the said notice had emanated from Mrs Manenji the treasurer of the fourth respondent. The applicant said that she got in touch with Mrs Manenji who advised her to get an alternative stand from the fifth respondent, Davie Fukwa Mutingwende. Apparently, the fifth respondent was the representative of Saltana Enterprises when the applicant entered into the sale agreement with Saltana Enterprises in respect of the stand in dispute. The applicant said that it then became apparent to her that the fourth respondent and the seventh respondent were determined to proceed with their intention to contract regardless of her pending suit.

In arguing this point *in limine* Mr *Mahori* argued that when the final order was granted in HC 10536/15 which is now the subject matter of the appeal, the applicant had not opposed the matter when the Provisional Order was granted so the matter cannot be urgent now. He argued that the applicant was now trying to bring back the same matter through the back door hence the raising of the point *in limine* of *res judicata*. With all due respect, I agree with Mr *Mudambanuki* that Mr *Mahori* missed the point. The present application is for a request for an interdict to interdict the first respondent and the seventh respondent from contracting in respect of the stand which is still in dispute until the appeal is heard in the Supreme Court. It has nothing to do with bringing back the same application that was made in 2015 by the first respondent requesting for an interdict to interdict the other buyers from interfering with the stand pending a determination of who was the owner of the stand. For

this reason the point *in limine* about the matter being *res judicata* is dismissed. What is pertinent though is that the first respondent in his opposing affidavit stated that since the appeal in SC 697/16 is still pending, the fate of the property can only be known after the decision of the Supreme Court. He said that he is aware of the notice that the applicant is referring to, but after obtaining advice from his legal practitioners, he did not sign any contract with the seventh respondent as the matter is still pending in the Supreme Court.

Although the fourth respondent which was represented by Mr *Katsamudanga* did not raise any points *in limine*, it averred that the notice in issue did not emanate from itself, but from the seventh respondent. It said that all it did as the Association was to notify and encourage its members to go and sign new contracts with the seventh respondent, the City of Harare now that the City of Harare is now free to enter into new agreements with individual stand owners since its contract with the third respondent, Saltana Enterprises was cancelled.

Mr *Kanokanga* submitted on behalf of the seventh respondent, the City of Harare that in respect of the second relief the applicant is seeking, the matter was not urgent because on 2 May 2017, the third respondent, Saltana Enterprises had filed an urgent chamber application in this court seeking the same relief against the seventh respondent (for the seventh respondent to be interdicted from entering into contracts with the beneficiaries of Belvedere West/Warren Park Housing Project) and MUSAKWA J held that the matter was not urgent. It was his argument that the same matter cannot be urgent now. Furthermore, Mr *Kanokanga* submitted that the applicant has no *locus standi* to seek this relief on behalf of the beneficiaries of Belvedere West/Warren Park Housing Project as she has no legal right to represent them. I totally agree with Mr. *Kanokanga* that the applicant has no *locus standi* to represent the beneficiaries of Belvedere West/Warren Park Housing Project. As such, she cannot seek the second relief that she is seeking. In that regard, the issue of urgency does not even arise. The applicant has no mandate to seek an order that will affect all members of the fourth respondent. This is a case which involves Saltana Enterprises and the City of Harare and not her.

Mr *Kanokanga* further submitted that the alleged notice did not emanate from the seventh respondent and to make matters worse, that notice was not even attached to the applicant's application. He further submitted that there was nothing on the papers to show that the seventh respondent was about to conclude a sale agreement with anyone in respect of the stand in dispute.

In response Mr *Mudambanuki* submitted that the notice had been by way of a WhatsApp message calling the beneficiaries to come and sign contracts with the seventh respondent, the City of Harare. He said that the notice was launched by the fourth respondent's treasurer, Mrs Manenji.

The notice that the applicant saw on 24 May 2017 is pertinent to this application since it is the one which prompted the making or filing of the application on 26 May 2017. The notice is the foundation of this application. It is common cause that, the notice was not attached to the application. It was only when Mr *Mudambanuki* was responding to the points *in limine* during the hearing that he made known that the notice was in the form of a WhatsApp message. It remains unknown as to who emanated the notice since the applicant says it is the fourth respondent, the fourth respondent says it is the seventh respondent and the seventh respondent denies it. It being a WhatsApp message it is possible that anyone could have generated it, anyone, meaning even a person who is not a party to these proceedings. The applicant did not show on a balance of probabilities that the WhatsApp message emanated from the fourth respondent as she averred in her founding affidavit. It also was not shown to have emanated from the seventh respondent. Can this matter be said to be urgent then when the notice which gives rise to it was not produced and when its author is not even known?

What further worsens the case is that the applicant did not show that the notice in question was asking the first respondent specifically to go and sign a contract with the seventh respondent in respect of stand number 7895 Belvedere West, Harare. From the submissions that were made, the notice was notifying and encouraging members of the fourth respondent, the Association in general without specific reference to the first respondent to go and sign a contract with the seventh respondent. I do not believe that it was warranted for the applicant to file this application on the basis of a general notice to members of the fourth respondent. Surely, that general notice alone cannot be a ground for the applicant to believe that the seventh respondent and the first respondent were about to conclude a sale agreement in respect of stand number 7895 Belvedere West, Harare. Further to that, the applicant did not adduce any evidence in her papers to show that pursuant to that general notice of 24 May 2017, the first respondent and the seventh respondent took any steps to show that they were about to conclude a sale agreement in respect of stand number 7895 Belvedere West, Harare.

In light of all these shortcomings in the applicant's application, I am not convinced that there is any urgency in the matter. The matter cannot be urgent on the basis of a notice

which is not before the court, whose exact contents the court has not seen, whose author has not been established and in the absence of any evidence to show that the first and seventh respondent are about to sign a contract in respect of stand number 7895 Belvedere West, Harare. This is moreso considering that the first respondent said that when he saw the notice in question he enquired from his legal practitioners who advised him not to go and sign the contract with the seventh respondent since the appeal is still pending and the Supreme Court is yet to determine the fate of the property in dispute. The first respondent has demonstrated that he is alive to the fact he does not need to do anything in respect of this stand until the Supreme Court makes a determination in the matter. On the other hand, the seventh respondent denied that it was about to enter into any agreement with anyone in respect of the stand in dispute. The applicant was therefore unnecessarily hasty in filing this application which as I have demonstrated above is not urgent at all.

In the result, it be and is hereby ordered that:

1. The matter is struck off the roll.
2. The applicant pays the costs of suit.

*Jarvis Palframan*, applicant's legal practitioners  
*Machinga & Partners*, 1<sup>st</sup> respondent's legal practitioners  
*Kanokanga & partners*, 7<sup>th</sup> respondent's legal practitioners