HOUSING CORPORATION OF ZIMBABWE (PRIVATE) LIMITED
versus
ZIMNAT LION INSURANCE COMPANY (PRIVATE) LIMITED
and
NATIONAL SOCIAL SECURITY AUTHORITY

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 21 August 2018 & 26 September 2018

Urgent Chamber Application

F Girach, for the Applicant
T Nyamasoka, for the first respondent
T Zhuwarara, for the second respondent

MUREMBA J: This is an application for a prohibitory interdict against the respondents. The salient facts of the matter are that the applicant entered into a written housing off-take agreement (the contract) with the second respondent, National Social Security Authority (NSSA) on 14 July 2017 in terms of which the applicant was the developer and the second respondent was the beneficiary. The applicant as the developer was to acquire land and construct 8000 housing units with the second respondent being an off-taker of all the housing units in question. Put differently, the applicant agreed to sell to NSSA and NSSA agreed to purchase all the completed housing units of the housing development project. The parties agreed on the terms and conditions governing their rights and obligations relating to the acquisition of land, construction and off-take of the housing units.

The rights and obligations of the parties under the agreement were subject to the fulfilment of certain conditions, one of them being that the developer (applicant) was to furnish NSSA (the second respondent) with an unconditional and irrevocable performance bond of US$16 million issued by an insurance company or a bank in the form acceptable to NSSA and valid for the duration of the project. This condition was inserted for the benefit of NSSA as it was guaranteeing the fulfillment of the contract. Apparently, NSSA was supposed to pay an off-take deposit of

US$16 million to the applicant. This money was to be applied towards the purchase price for the housing units. NSSA duly paid this deposit to the applicant. A performance bond also known as a contract bond is a surety bond or a written guarantee which is issued by a third party guarantor which can either be an insurance company or a bank to guarantee satisfactory completion of a project by a contractor. It ensures payment of a sum of money in case the contractor fails in the full performance of the contract. It usually covers 100 per cent of the contract price. It is not an insurance policy and if cashed by the principal (client/customer) in *casu*, NSSA, the payment amount is recovered by the guarantor from the contractor. In the present matter, the applicant then procured the required performance bond from the guarantor the first respondent, Zimnat Lion Insurance Company (Private) Ltd (Zimnat).

The housing development project was commenced sometime in 2017. However, alleging breach of the contact, NSSA on 25 July 2018 wrote a letter of demand to Zimnat demanding payment of US$16 million. It averred in the letter that it was demanding payment because the applicant had failed to fulfill its obligations in terms of the housing off-take agreement in that it had failed to deliver any completed housing units. The applicant was advised of the demand by Zimnat by way of a letter dated 6 August 2018. It was advised that NSSA had made a call on the performance bond. On 7 August 2018 the applicant wrote to Zimnat indicating that the call on the guarantee was fraudulent and constituted a false declaration because on 15 March 2018 it had delivered to NSSA 53 completed housing units. The applicant also stated that there were a number of disputes that had been referred to arbitration including the termination of the housing off-take agreement between the applicant and NSSA. The applicant asked for a written undertaking from Zimnat by not later than 10 August 2018 to the effect that it would not enforce the call by NSSA pending determination of the various disputes between itself and NSSA. However, Zimnat gave no undertaking thereby prompting the applicant to file the present application on 15 August 2018 soon after the Heroes and Defence forces holidays.

The purpose of the application is for the applicant to obtain an order restraining and interdicting Zimnat from making payment to NSSA and interdicting NSSA from executing on its letter of demand or receiving payment from Zimnat pursuant to the letter of demand it wrote to Zimnat and from presenting a further letter of demand to Zimnat pending finalization of the

arbitration proceedings currently pending between it and NSSA. Thus the order the applicant seeks is worded as follows.

"**FINAL RELIEF SOUGHT**

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

IT IS ORDERED THAT:

1. The letter of demand issued by the National Social Authority (NSSA) second respondent to Zimnat Insurance Company Limited (first respondent) calling on the performance Bond dated 25 July 2018 and received by Zimnat on 6 August 2018 was fraudulently issued and it is hereby set aside.
2. Second respondent (NSSA) shall pay the costs of suit on a legal practitioner and client scale.

INTERIM RELIEF GRANTED:

That, pending finalization of this matter and the finalization of the Arbitral proceedings between applicant and second respondent, an interim order is hereby granted in the following terms:

1. The guarantor (first respondent) be and is hereby interdicted and restrained from making any payment to the beneficiary (second respondent) under and in terms of the Performance Bond pursuant to the second respondent's letter of demand; and
2. The second respondent (beneficiary) be and is hereby interdicted and restrained from seeking to execute on its letter of demand in relation to the Performance Bond, or receiving any payment from the guarantor (first respondent) pursuant to the letter of demand; and
3. The second respondent (beneficiary) be and is hereby interdicted and restrained from presenting any further letter of demand in relation to the Performance Bond to the first respondent (guarantor) pending the finalisation of the arbitration proceedings currently pending between the applicant (developer) and the second respondent (beneficiary).
4. The second respondent shall pay the costs of this application"

Mr. *Nyamasoka* for Zimnat submitted that Zimnat was not filing any papers in response to the application, but would stand by the court's decision.

NSSA filed opposing papers to the application and raised quite a number of points *in limine*. However, at the hearing it abandoned some of them as they formed part of the merits of the matter. Below, I deal with those that were argued.

Application is defective for non- compliance with Rule 241 (1) of the High Court Rules 1971

NSSA averred that the applicant's application ought to have been in Form 29 as modified by Form 29B i.e. a hybrid of the two forms but it used neither of the forms yet the provisions of rule 241 (1) are peremptory. The application had to be served and indeed was served but was not in Form 29. Mr. *Girach* for the applicant submitted that in terms of Rule 241 (1) a chamber application must be in Form 29 B but in terms of the *proviso* where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications. He submitted that the form used by the applicant was form 29 with appropriate modifications. He further submitted that in terms of Rule 229 (c) the adoption of an incorrect form or application is not a ground for dismissal of an application unless there is prejudice to the other party of which the second respondent did not speak of having suffered any prejudice. It was Mr. *Girach's* further submission that the applicant had set out the respondents' rights including the right to file opposing papers and the grounds upon which the application was being made. He argued that in that regard there was compliance with rule 241 (1). He implored the court to employ r 4 (c) if the applicant was in error.

As was correctly put by Mr. *Girach,* in terms of the *proviso* to rule 241 (1) where a chamber application is to be served on an interested party it shall be in form 29 with appropriate modifications.

Form 29 is for use in ordinary court applications. It alerts the respondent of the court application, his right to oppose the application within the specified time and the consequences of failure to file opposing papers timeously. Form 29B is for chamber applications which do not require to be served on interested parties. It requires that the substantive grounds for the application

be stated in summary form on the face of the form. See *Marick Trading (Private) Limited* v *Old Mutual Assurance Company of Zimbabwe (Private) Limited & Anor* 2015 (2) ZLR 342 .

In *casu* the chamber application was to be served on the respondents and it was served. Therefore form 29 with appropriate modifications would be applicable. What constitutes appropriate modifications is not defined. In *Base Minerals Zimbabwe (Private) Limited & Anor* v *Chiroswa Minerals (Private) Limited & Ors* HH 559/14 MAFUSIRE J held that:

> "In my view, once the chamber application becomes one that must be served then the respondent is entitled to a period within which to file opposing papers. The "appropriate modifications" would include, in my view, a fushion of the contents of Form 29 and those of Form 29B. In other words, it becomes a hybrid containinng both "… the plethora of procedural rights …" of Form No. 29, including the *dies induciae*, and a summary of the grounds of application of Form No. 29B."

The form used in the present matter reads as follows.

> "Take notice that the applicant hereby files an urgent application seeking a prohibitary interdict against 1st and 2 respondents restraining and interdicting them jointly and severally …"

It goes on to outline the order being sought. Thereafter it gives a summary of the grounds of the application. It further states that the affidavit of Stephen Patrick Duggan together with the attachments attached thereto are tendered in support of the urgent chamber application for a Prohibitory Interdict. It further tells the respondents that if they wish to oppose the application they must file opposing papers and attend the urgent hearing in the Judge's chambers when the matter is set down.

The form is thus a hybrid of Form 29 and Form 29B as it alerted the respondents of their procedural rights if they wished to oppose the application. It also gave a summary of the grounds of the application. The form thus complies with r 241 (1). Other than saying that the application does not comply with r 241 (1) NSSA did not say in what way it does not comply. It is not enough for a respondent to say that the application does not comply with a certain provision and end there without stating in what way the application lacks compliance. It is not the duty of the court to establish on its own in what way the application lacks compliance. The litigant or party raising an issue should state clearly how the rule of the court has not been complied with.

In view of the foregoing the point *in limine* is dismissed.

The matter is not urgent

NSSA argued that the applicant ought to have delivered the first batch of 250 housing units to it by 4 February 2018 in terms of the agreement, but it failed. It contended that as such it was in breach. From that date onwards the applicant knew that the performance bond could be called anytime by NSSA. If there was any doubt about the breach, the letter dated 12 June 2018 which was written by NSSA to the applicant made it clear that the applicant was in breach, but the applicant at that time took no steps to stop NSSA from calling on the bond. The duty to act arose as at that time and since it took no action then, the matter cannot be urgent now.

Mr. *Girach* argued that the duty to act only arose when it came to the applicant's attention on 6 August 2018 that NSSA had written a letter to Zimnat on 25 July 2018 calling on the performance bond. He argued that the applicant could not have acted on the letter of 12 June 2018 by NSSA because the performance bond had not been called or demanded. He argued that the applicant could not have come to court to seek an interdict before the bond had been called.

I am in agreement with Mr *Girach*. The duty to act only arose after the performance bond had been called up. Before that the applicant had no basis to approach the court for an interdict. Besides, the letter of 12 June 2018 that NSSA wrote was written in response to a letter it had received from the applicant which was saying that the applicant had cancelled the off-take agreement because NSSA had breached the terms and conditions thereof. NSSA's letter of 12 June 2018 was refuting breach and was instead alleging breach by the applicant. NSSA stated that there were no grounds for termination of the agreement between the parties. It stated that it would ignore the purported termination and insist on its rights in terms of the agreement. There was no notice that NSSA was moving towards calling of the performance bond. As such there was no basis for the applicant to approach this court with an application for an interdict as at that time.

In the result, I dismiss this point *in limine*.

The draft order sought is defective

NSSA submitted that the order being sought for it to be interdicted from presenting a further letter of demand to the first respondent calling on the Performance Bond pending finalisation of the arbitration proceedings currently pending between the applicant and the second respondent is defective because there were no pending arbitration proceedings between the parties.

I will dismiss the point *in limine* because as at the time of the hearing of this matter on 21 August 2018, arbitration proceedings had commenced between the parties. On 10 August 2018 the applicant had written to the commercial Arbitration Centre for the appointment of an arbitrator. On 16 August 2018 the Commercial Arbitration Centre had written to the applicant giving it a list of arbitrators the parties could choose from. On 20 August 2018 the applicant served the second respondent, NSSA with arbitration papers signaling commencement of the proceedings. Therefore the order being sought is not defective.

The Affidavit is unnecessarily lengthy and argumentative

NSSA submitted that the application is argumentative and voluminous comprising a 62 paged founding affidavit and a total of 180 pages inclusive of annexures yet the only issues it raises are that the off-take agreement was varied and that NSSA committed fraud. NSSA contended that the intention of the applicant in filing such an application was to confuse the court by confusing issues in a bid to obtain a favourable result to it. Mr. *Zhuwarara* submitted that the Supreme Court has taken the position that such applications ought to be struck off or dismissed with costs *debonis propriiis* on the higher scale.

The applicant disputed that it tried to muddy the waters by the voluminous application. It averred that the matter in issue is complex and it was proper to refer to the contract extensively so as to set out the case in light of the serious allegation of fraud it makes against NSSA.

I am in agreement with NSSA that the application is voluminous. Whilst it was necessary for the applicant to go into the details of the contract at length in order to set out its case, it could have done so in summary form and without being unnecessarily repetitive. The purpose of the founding affidavit is to set out succinctly the facts that form the basis of the cause of action. It should not be replete with argumentative and irrelevant matters. See *Africa Resources Limited and 2 Ors* v *Gwaradzimba and Ors* 2011 (1) ZLR 105 (S). At p 116 CHIDYAUSIKU CJ (as he then was) said,

> "The litigant's legal practitioner should ensure that affidavits filed of record comply with the rules. It is irresponsible and unprofessional for the legal practitioner to simply reproduce as affidavits the statements the litigant makes to his legal practitioner. Persistence with this type of pleading may lead to the court awarding costs *de bonis propriis* against the offending legal practitioners."

I would like to echo the same sentiments in the present matter. The whole application was a pain to read. The founding affidavit was lengthy and repetitive. The applicant did the same thing

again in the answering affidavit. Instead of responding to the issues raised by NSSA in its opposing affidavit, it went on a frolic of its own, dealing with totally irrelevant matters. It failed to simply address the points *in limine* as raised by NSSA. It chose to come up with its own subheadings. It was frustrating to read the answering affidavit. At the hearing I even registered my displeasure to the applicant's counsel. Mr. *Girach* apologised. Whilst I am not impressed by the applicant's voluminous papers I do not think that justice will be served by striking off the matter from the roll. In *Africa Resources Limited and 2 Ors* v *Gwaradzimba and Ors supra* the Supreme Court did not strike off the matter. It said that the court may consider awarding costs *de bonis propriis* against the offending legal practitioner. I thus dismiss the point *in limine.*

Applicant adopted the wrong procedure

NSSA submitted that in terms clause 27 of the Off-take Agreement the parties agreed that any dispute arising between the parties would be referred to arbitration. The applicant has therefore adopted the wrong procedure by approaching this court. It should have instituted arbitration proceedings.

In response it was correctly argued on behalf of the applicant that the performance bond states in clause 3 (iv) that "this guarantee shall be governed by and construed in accordance with the Law of Zimbabwe and shall be subject to the jurisdiction of the Zimbabwean Courts." This clause entitles the applicant to approach the courts for a relief in the event of a dispute arising in respect of the performance bond. The primary relief being sought is to interdict Zimnat from making any payment to NSSA under the performance bond on the basis that NSSA's demand is fraudulent. ZIMNAT is not a party to the off-take agreement and as such it cannot be joined in any arbitration proceedings. With Zimnat not having given an undertaking that it would not make payment to NSSA, the applicant's only recourse in order to stop Zimnat from paying is to approach the court for an interdict. Besides, clause 27:11 of the off-take agreement allows either the applicant or NSSA to approach this court for an interim relief pending determination of arbitral proceedings. It states that:

> "Any party hereto shall have the right to approach the High Court of Zimbabwe for the purpose of obtaining an interim relief pending the determination of any dispute through arbitration."

Moreover, in terms of Article 9 (2) of the Model Law a party is entitled to apply to this court for an interdict or other interim relief pending determination of arbitral proceedings.

"(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the *High Court* an interim measure of protection and, *subject to paragraphs* (*2*) *and* (*3*) *of this article, for the High Court* to grant such measure.
(*2*) *Upon a request in terms of paragraph* (*1*) *of this article, the High Court may grant—*
(*a)*.....
(b)…..
(*c*) *an interdict or other interim order."*

Consequently, I dismiss this point *in limine*.

Mr. *Girach* referred to the case of *Telecel Zimbabwe* v *Potraz & Ors* 2015 (1) ZLR 651 (H) at 650 C-E where MATHONSI J bemoaned the practice by legal practitioners of raising points *in limine* that do not have the remotest chance of success at the expense of the substance of a dispute. He stated that a preliminary point should only be taken where it has merit and is likely to dispose of the matter. He said that it may be necessary to rein in the legal practitioners who abuse the court in that way by ordering them to pay costs *de bonis propriis.* This is exactly what the second respondent, NSSA did in the present matter. It raised 8 points *in limine*, it abandoned 4 because they were either a repeat of the other points *in limine* or they touched on the merits of the matter. All of them were without merit. I share the same sentiments with MATHONSI J that offending legal practitioners ought to be visited with costs *de bonis propriis*. However, in the present matter I will not do so because the applicant's counsel submitted that it was not asking for counsel for NSSA to be visited with such costs. Maybe he was afraid that NSSA's counsel would also make the same prayer against him for the lengthy and voluminous application. It is my hope though that NSSA's counsel will take heed and avoid raising unnecessary and unmerited points *in limine* in future.

Merits of the case

It is the applicant's contention that NSSA's letter of demand calling on the performance bond is fraudulent and is marred with falsehoods because it (the applicant) has delivered some housing units to NSSA. It averred that there was never correspondence or communication by NSSA saying that the applicant had failed to deliver in terms of the contract and that NSSA was resultantly cancelling the contract and that it was going to call on the bond. Now that the dispute has been referred to arbitration the balance of convenience favours the granting of the interdict because if it is not granted it means financial consequences to the applicant. The applicant averred

that it has interests to protect under the contract with NSSA and under the contract with Zimnat as well. The injury or harm to the applicant is that it will have to make good the loss the guarantor, Zimnat will suffer if it pays the sum demanded by NSSA. The applicant averred that there is no other remedy that is available to it to protect its interests. It contended that claiming damages after having made payment to Zimnat will be of little solace as it will be needlessly expensive and time consuming. The balance of convenience favours the maintenance of the status *quo ante* until the rights of the parties are determined at arbitration.

It is NSSA's contention that the applicant failed to deliver in terms of the contract. Delivery of immovable property is activated by transfer of title. No transfer documents were given to NSSA although it was invited to come and inspect the housing units that were completed. NSSA maintained that the applicant was in breach of the contract. Mr. *Zhuwarara* argued that the law relating to performance bonds is such that they are payable on demand. He argued that the courts will not interfere irrespective of the existence of a dispute between the parties. In *casu* the applicant failed to comply with the performance time lines. It failed to deliver the first batch of 250 housing units within 180 days from the commencement date of the agreement. The applicant admitted that it completed 50 housing units only. Even then the applicant did not deliver the title deeds for those housing units as required in terms of the agreement. It was argued that NSSA was therefore entitled to call on the performance bond as it did.

NSSA averred that in terms of clause B1 of the Performance Bond Zimnat is liable to pay the sum of US$16 million to it upon

> "receipt of the principal's [NSSA] demand in writing accompanied by their declaration that the amount claimed is due by reason of the contractor (applicant) having failed to fulfil their obligations as contained in the said agreement."

NSSA averred that the effect of the demand is set out in clause B2 of the Performance Bond. It reads as follows.

> "The demand and declaration <u>shall be accepted as conclusive evidence</u> that the amount claimed is due to the principal under this guarantee."

NSSA contended that once called on the only obligation that arises on the part of Zimnat is for it to make payment on the bond within 60 days from the date of receipt of the demand except where there is fraud. NSSA averred that the applicant is aware of this only exception and this is

perhaps why it has made bald and unsubstantiated allegations of fraud in its application. No fraud exists in this matter.

What is apparent is that there is a serious dispute between the applicant and NSSA. The pith of the dispute is that there was breach of the off-take agreement. Each party alleges breach by the other party. They cannot even agree on what was the commencement date of the contract. Whilst the applicant avers that there was a variation of the initial agreement, NSSA vehemently denies it. The failure by the parties to agree on what the commencement date of the contract was has caused them not to agree on the date on which the first batch of 250 housing units ought to be delivered or ought to have been delivered by the applicant. Whilst the applicant avers that it has until October 2018 to do so, NSSA avers that these ought to have been delivered by February 2018. It is not disputed that as far back as 29 May 2018 the applicant was already alleging breach of contract by NSSA. On 12 June 2018 NSSA wrote to the applicant disputing that it was in breach. NSSA was insisting on its rights in terms of the agreement.

In view of the foregoing and that the dispute between the parties has since been referred to arbitration, I am inclined to grant the interdict the applicant is seeking. It is alleging fraud on the part of NSSA. In the meantime the balance of convenience favours the granting of the interdict as it will ensure that the status *quo ante* is maintained until a determination is made on the issue. Allowing Zimnat to pay on the Performance Bond has financial consequences to the applicant which will be called on to make good the loss that will be suffered by Zimnat. There is therefore a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted. There is no other satisfactory remedy available to the applicant. If an injury which could give rise to a claim in law is apprehended, the person against whom an injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation. He can move the court to prevent any damage being done to him. See *Heilbron v Blignaut* 1932 WLD 167 @ 169.

I am not in agreement with Mr. *Zhuwarara* that once a performance bond is called on, payment should be made irrespective of the fact that the issue of breach is disputed between the contractor and the beneficiary. The performance bond is an accessory to the principal agreement and as such it subservient to that principal agreement. If there are issues that are centered on breach of the principal agreement, those issues should be resolved first before payment on the

performance bond can be made. If payment is allowed to be made in every case where a demand is made by the beneficiary irrespective of the fact that the other party is disputing that it is in breach, then the party disputing breach stands to be prejudiced without being given an opportunity to be heard. This is in contravention of s 69 of the Constitution of Zimbabwe Amendment (No.20) Act 2013 which provides that in the determination of civil rights and obligations, every person has a right to a fair hearing. If an opportunity to be heard is not granted, nothing will stop beneficiaries of performance bonds from simply alleging breach and calling on the performance bond if they just decide for no apparent reason to resile from agreements. It is my considered view that the demand that is made by the beneficiary is subject to there being no dispute on the issue of breach of the contract.

In the result**,** I will grant the provisional order being sought by the applicant. However, I will amend the draft order so that it reads well. The issue of costs will be dealt with by the parties on the return date.

It be and is hereby ordered that:

Pending determination of the matter on the return date, an interim order is hereby granted in the following terms:

5. The guarantor (first respondent) be and is hereby interdicted and restrained from making any payment to the beneficiary (second respondent) under and in terms of the Performance Bond pursuant to the second respondent's letter of demand.
6. The second respondent (beneficiary) be and is hereby interdicted and restrained from seeking to execute on its letter of demand in relation to the Performance Bond, or receiving any payment from the guarantor (first respondent) pursuant to the letter of demand.
7. The second respondent (beneficiary) be and is hereby interdicted and restrained from presenting to the first respondent any further letter of demand in relation to the Performance Bond.

Zigomo legal practitioners, Applicant's legal practitioners
Atherstone & Cook, first respondent's legal practitioners
Mawere Sibanda, second respondent's legal practitioners