

TECHNOIMPEX JSC
versus
RAJENDRAKUMAR JOGI
and
SARAH HWINGWIRI
and
MUSTAK GIRACH
and
REGISTRAR OF DEEDS (N.O)
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE (N.O)
and
G MAPAYA
(Practising law and trading as Mapaya & Partners Legal Practitioners)
and
TECHNOIMPEX JC (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 2 September 2019 & 9 October 2019

Urgent Chamber Application

Adv Magwaliba with *G Dzitiro* and *S Dhlomo*, for the applicant
D Sanhanga, for the 1st respondent
U.S.A. Y. Saunyama with *F Nyamayaro*, for the 2nd, 3rd, 4th & 7th respondents

TAGU J: This is an urgent chamber application to interdict the transfer of the Bath Mansions Flats to third respondent and further to interdict first respondent and any persons deriving any rights from him from exercising any rights over the said property.

The facts of this matter are complex. According to the applicant's founding affidavit applicant is a Bulgarian registered company and a subsidiary of a Bulgarian entity called Chimimport. Chimimport has another registered subsidiary called Bulchimex GMBH Import Export Chemikalien Und Produkte (herein referred to as Bulchimex Germany). Applicant and Bulchimex Germany own immovable properties in Zimbabwe being Lot 12 of Lot 15 Block C of

Avondale commonly referred to as Bath Mansions Flats at 32 Bath Road, Avondale, Harare held under Deed of Transfer number 1657/89. They also own Stand 295 Northwood Township 2 of Sumben (hereinafter referred to as Mount Pleasant Property) previously held under Deed of transfer number 5022/08 currently held under Deed of Transfer number 4766/17 in favour of first respondent. This Honourable Court in Case Number HC 2011/18 ordered the cancellation of Deed of Transfer Number 4766/17 and revived Deed of Transfer Number 5022/2008 in favour of Bulchimex GMBH Chemikalien und Produkte.

In 2013 second respondent who was a property broker was mandated to sell an immovable property in the Grange owned by Bulchimex Germany. After selling the property second respondent converted the funds to her own use. Bulchimex Germany has since submitted a criminal complaint against her.

Because of her involvement in selling the Grange property, the second respondent got to know of applicant's and Bulchimex Germany's properties. She devised a scheme to steal those properties. She then registered Zimbabwean entities with similar names to that of applicant and Bulchimex Germany. She registered a company called Bulchimex GMBH Import Export Chemikalien Und Produkte (Private) (Limited and Technoimpex JC (Private) Limited (hereinafter referred to as Technoimpex Zimbabwe.) First respondent in her capacity as director of the formed company filed proceedings in the Magistrates Court claiming ownership of the Mount Pleasant property as well as the eviction of Bulchimex Germany's employee from the said property. Realizing the threat applicant and Bulchimex Germany filed an urgent chamber application for interdict against second respondent Sarah Hwingwiri and her company Bulchimex Zimbabwe in case HC 12074/16. A provisional order was granted against second respondent and her Zimbabwean Company Bulchimex Zimbabwe. The provisional order was subsequently confirmed on the 25th April 2018 by this Court.

While parties were still awaiting judgment in HC 12074/16 Bulchimex Germany's employee was evicted from the Mount Pleasant property without notice. It was then discovered that a man by the name Rajendrakumar Jogi (the first respondent herein) and a known associate of second respondent had filed a summons matter and obtained default judgment for an order compelling transfer against Bulchimex Germany in case number HC 2972/17 wherein he falsely claimed to have bought the Mount Pleasant property from Bulchimex Germany. Apparently first

respondent and second respondent had connived with officials in the fifth respondent's office to file false returns of service misrepresenting that they had served summons on employees of Bulchimex Germany, a none existent persons hence managed to get a default judgment'

Applicant and Bulchimex Germany filed an application for rescission of the default judgment in terms of Rule 449 in case number HC 2011/18 as well as an urgent chamber application for restoration of possession and interdict in HC 2012/18 against 1st, 2nd 4th and 5th respondents as well as Bulchimex Zimbabwe. Both applications were granted in favour of the applicant.

Since then the applicant has been at all material times the registered owner of the Bath Mansions Flats. The deponent to the founding affidavit Borislav Boynov has been continuously living on the property for the past 21 years and when not present his employees work and live on the property. What jolted the applicant to file the present application for an interdict is that on 14 August 2019 the applicant received bills for water and rates from the City of Harare for the property in the name of second respondent Sarah Hwingwiri. Further searches with the City Treasurer's Department on 15 August 2019 showed that there was an application for rates Clearance Certificate indicating that second respondent was in the process of transferring title of the property to the third respondent.

At the hearing of the application some points *in limine* were taken. The first one was that the application was not urgent. The second was that of misjoinder of second and sixth respondents. The third was the filing of a supplementary affidavit by the applicant.

AD URGENCY

The contention was that the applicant became aware of the summons to compel transfer of the Bath Mansions Flats at the very least one and half years ago. It was further submitted that the deponent to the applicant's founding affidavit was aware of cases HC 2012/18 and HC 2011/18 but no action was taken since then. It was submitted that the discovery of the bill which was dated some months or days before could not have triggered the urgency in this case. As I briefly stated above indeed the deponent to the founding affidavit was aware of the applications to compel transfer of the Bath Mansions Flats about one and half years earlier. My view is that the applicant did not sit on its laurels as evidenced by cases HC 2011/18 and HC 2012/18 which were all ruled in favour of the applicant. It was the discovery of the bill as well as an application by second

respondent for a rates clearance certificate for purposes of transferring the said property to a third party that triggered the application. The need to act therefor arose on or about the 14th and 15th of August 2019. I therefore dismiss the first point *in limine*.

MISJOINDER OF SECOND AND SIXTH RESPONDENTS.

I was submitted that the second and sixth respondents were not parties to the default judgment and should not have been joined in these proceedings. While that may be so, it is trite that misjoinder or non-joinder of a party does not defeat the application. The court can still deal with the parties before it. Order 13 r 87 of the rules of this Honourable Court is clear. It reads as follows-

“87. Misjoinder or non-joinder of parties

- (1) No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

In my view the mere fact that the other parties should not have been joined in these proceedings do not per se defeat the application. The second point *in limine* is dismissed.

AD SUPPLEMENTARY FOUNDING AFFIDAVIT

It is trite that an application stands or falls on its founding affidavit. The supplementary affidavit was availed to the parties before the hearing. In my view a party may lawfully file a supplementary affidavit if certain things which were not known at the time of filing the application crop up. It is only prejudicial to the other party if the supplementary affidavit was not given to the other party before the hearing of the matter and the other party feels it has been ambushed. In *casu* the aggrieved party had the opportunity if they wanted to respond to the supplementary affidavit. It is therefore accepted and the last point *in limine* is dismissed.

AD MERITS

This is an application to interdict the transfer of the Bath Mansions Flats to the third respondent and further to interdict first respondent and any persons deriving any rights from him from exercising any rights over the said property.

It is trite that for an applicant in an application of this nature to succeed the applicant has to establish the following-

- i) A clear right, which must be on a balance of probabilities.
- ii) Irreparable harm/injury actually committed or reasonably apprehended.

- iii) The absence of similar protection through any other remedy, and
- iv) Balance of convenience.

From the History of the matter that I outline above the applicant has always been the lawful owner of the Bath Mansions Flats. The judgment I referred to showed he was successful in wading of the efforts of first and second respondent to steal the property. For that reason, the applicant has a real right in the property. Once the property has been transferred to a third party the applicant is likely to suffer irreparable harm. In this case the second respondent has applied for a rates clearance certificate to enable her to transfer title of the property to third respondent. Such harm is apprehended. In my view the balance of convenience favors the granting of the relief sought until a lasting solution to the saga is found. There is therefore no other effective alternative remedy other than granting the reliefs sought. The application will succeed and I grant the following order.

IT IS ORDERED THAT

TERMS OF FINAL ORDER SOUGHT

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

1. The transfer of title from Applicant to 1st Respondent in respect of Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare and recorded under Deed of transfer No. 1080/19 and certificate of registered title No. 1081/19 be and are hereby deleted and expunged from the record of title held with the Registrar of Deeds.
2. The Registrar of Deeds be and is hereby ordered not to transfer Stand Number Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare, under Deed of Transfer Number 1637/89, in terms of any order or judgment obtained by any person in respect of the property after 14 September 2016 without leave of the High Court of Zimbabwe sitting at Harare.
3. That the application for leave of Court in terms of paragraph 2 of this Order shall be on notice to the Applicant at Applicant's legal practitioner's address Mutumbwa Mugabe & Partners, 151 Kwame Nkrumah Ave, Harare.
4. That the Sheriff shall not carry out any evictions at Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held

in favour of Technoimpex JSC under deed of transfer no. 1657/89 until all the High Court matters pending between Applicant and any litigant claiming ownership of the said property including 1st and 2nd Respondents herein has been finalized.

5. For the purposes of paragraph 4 of this order the Sheriff of the High Court shall request written confirmation from Applicant's Legal Practitioners confirming whether there is still pending litigation in which any party in any Court within Zimbabwe is claiming ownership of Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare.
6. The party opposing the granting of the final order in this matter shall pay Applicant's costs of suit on a legal practitioner and client scale.

TERMS OF INTERIM RELIEF SOUGHT

Pending the determination of this matter on the return date the applicant is granted the following reliefs:

1. That the 1st Respondent be and is hereby interdicted from transferring Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under deed of transfer No. 1657/89 and currently held in favour of 1st Respondent under deed of transfer No. 1080/2019 and certificate of registered title No. 1081/2019 to 3rd Respondent or any other persons.
2. That 1st, 3rd, 4th and 5th Respondents be and are hereby interdicted from transacting on and /or facilitating any process for the transfer of Lot 12 of Lot 15 Block C of Avondale commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare previously held in favour of Technoimpex JSC under deed of transfer no. 1657/89 and previously held in favour of 1st Respondent under deed of transfer No. 1657/89 and currently held in favour of 1st Respondent under deed of transfer No. 1080/2019 and certificate of registered title No. 1081/2019 unless with specific leave of the Court hearing this matter.
3. That the application for leave of Court in terms of paragraphs 2 and 9 of this Order, shall be on notice to the Applicant at Applicant's legal practitioner's address Mutumbwa Mugabe & Partners, 151 Kwame Nkrumah Ave, Harare.

4. That the Registrar of Deeds and all the Respondents cited herein be and are hereby interdicted from facilitating or passing further transfer of Lot 12 of Lot 15 Block C of Avondale Harare, previously held under Deed of Transfer Number 1637/89 and currently held in favour of 1st Respondent under deed of transfer No. 1080/2019 and certificate of registered title No. 1081/2019, commonly known as Bath Mansions Flats, 32 Bath Road Avondale, Harare.
5. That the 1st, 2nd and 3rd Respondents be and are hereby interdicted from advertising, selling, pledging, ceding, mortgaging, donating or in any way encumbering or alienating Lot 12 of Lot 15 Block C of Avondale Harare.
6. That pending the determination of this matter and High Court Case No. 2012/18, whichever is the later, the Sheriff of the High Court be and is hereby directed to serve notices, court process, pleadings, orders issued by any person or litigant be served on Applicant's legal practitioners mentioned in para 3 above.
7. That pending the determination in High Court Case Number HC 12074/16 or the application for rescission of default judgment granted in High Court matters HC 2972/17 and HC 11246/17 whichever will be the later, the Sheriff of Zimbabwe be and is hereby ordered not to carry out any eviction at 32 Bath Road Avondale Harare in terms of any litigation commenced after 13 September 2016 by any person without the leave of the Court hearing the present matter.

SERVICE OF THIS ORDER

The Applicant's legal Practitioner or Deputy Sheriff are hereby authorized to serve a copy of this Court Order on the respondents.

Mutumbwa Mugabe & Partners, applicant's legal practitioners
Mazhetese and Partners, 1st respondent's legal practitioners
Farai Nyamayaro Law Chambers, 2nd, 3rd, 4th & 7th, respondents' legal practitioners
Mapaya & Partners, 6th respondent's legal practitioners