

MARTSMART PRIVATE LIMITED
and
BRAINCHILD PROPERTIES PRIVATE LIMITED
versus
BRENNAN JAMES MICHAEL DE BRYUN
and
ADVANCE AFRICA HOLDINGS PRIVATE LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 13 November, 2019

Urgent Chamber Application

Ms M Matshiya, for the applicants
L Mashanyare, for the 1st respondent
D Mujaya, for the 2nd respondent

ZHOU J: This is an urgent application for a provisional order. The interim relief sought is for an order interdicting the respondents, their agents, assignees, associates, employees or anyone acting under their control or direction from entering, staying at or carrying out any construction or any activity of whatever nature at Stand 712 Kwekwe Township.

The basis of the application is the agreement for the sale of shares in the second applicant which was entered into between the first applicant and first respondent. It is common cause that the first respondent now takes the attitude that he is no longer bound by the agreement because subsequent to the conclusion of the agreement of sale of shares the first respondent entered into an agreement with the City of Kwekwe in terms of which second respondent was substituted as the purchaser of rights in the property from the City of Kwekwe. A fresh agreement was concluded recording second respondent as the purchaser of the rights. There is also the submission that the agreement between the respondents and the city of Kwekwe prohibited the respondents from alienating the property without the authority of the former. This provision in that agreement does not invalidate the agreement with the applicants which remained binding *inter partes*.

For the purpose of the relief sought this court only needs to be satisfied that the requirements for an interim interdict are proved. These are:

- (a) a *prima facie* right though open to some doubt, or a clear right;
- (b) reasonable apprehension of irreparable harm if the right is only *prima facie* established;
- (c) the absence of another remedy; and
- (d) the balance of convenience favours the granting of the interim relief.

Whether or not a right exists is a question of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. In the instant case, the agreements for the sale of shares in the first applicant establishes the right to the property at the very least *prima facie*. But there are other facts which are common cause which are relevant to the proof of the existence of the right. The respondents do not dispute that money was paid in respect of or in connection with the property and, more significantly by that the applicants are in occupation of the property pursuant to an agreement by which the first respondent agreed to divest himself of any interest in the property. The question of whether the applicant will ultimately succeed in the main case is for determination in that matter.

Reasonable apprehension of irreparable harm arises from the development which the respondents are seeking to carry on at the property. It is common cause that the respondents have set in motion the process for approval of drawings for structures to be constructed on the disputed property. Most significantly the respondents have already declared an intention not to be bound by the agreements in terms of which the applicants acquired rights and interest in the property.

I do not believe that there is an alternative remedy that would protect the rights of the applicant pending determination of case No. HC 8934/19. Refund of what has been paid is not the relief that is being sought in that matter. It is therefore not an alternative remedy in the circumstances of this case.

The balance of convenience favours the grant of the interim relief. No prejudice would be suffered by the respondents if the interim relief is granted. On the other hand, the applicants would be irreparably prejudiced if the interim relief is not granted and they ultimately succeed in the main case.

In all the circumstances, the application must succeed.

In the result the provisional order is granted in terms of the draft order.

Wilmot & Bennett, applicants' legal practitioners
Mavhiringidze & Mashanyare, 1st respondent's legal practitioners
Mawadze & Mujaya, 2nd respondent's legal practitioners