

JEREMIAH CHIVENGA  
versus  
MANENJI PIUS CHIDYAMAKONO  
and  
CLEVERHILL INVESTMENTS (PVT) LTD  
and  
THE SHERIFF OF HIGH COURT N.O

HIGH COURT OF ZIMBABWE  
CHILIMBE J  
HARARE, 26 January 2022 & 6 July 2022

### **Urgent Chamber Application**

Mr.*L.T. Musekiwa* for applicant.  
Mr. *T.E. Gumbo* first respondent.  
No appearance by second and third respondents.

CHILIMBE J

### **BACKGROUND**

[ 1] This matter came before me as an urgent chamber application. Having established its urgency, counsel proceeded to argue the matter on the merits. The basis of the dispute is that applicant and first respondent both lay claim to a piece of land known as 4517 of Lot J of Borrowdale Estate in the District of Salisbury. This is yet another case of double allocation of stands. Unsurprisingly, it carries all the challenges, including heartache, that have come to characterise cases involving the double allocations of stands.

[ 2] First respondent, instituted legal proceedings [ case number HC 5806/21] and obtained an order against one Jeffery Chivenga. Jeffery being apparently, the applicant`s brother. The order, dated 17<sup>th</sup> November 2021 directed that Jeffery and all those claiming through him, to vacate the piece of land in question and authorised the Sheriff of the High Court to do the needful.

### **THE RELIEF CLAIMED**

[ 3] It is this order, (which the applicant claims was issued not against him but his brother, and in default of appearance,) that the applicant now seeks to have stayed. The applicant seeks the following interim relief:

(c) That the first and 3<sup>rd</sup> respondents be and are hereby interdicted from carrying on with the execution of the court order under case number HC 5806/21 pending finalisation of this matter.”

[ 4] The application was resisted by first respondent. Whilst the parties delved to some detail, in the history of the matter with each trying to demonstrate his priority over the other in as far as rights and entitlement to the stand was concerned, I will confine myself to the requirements of an interdict. The final relief sought read; -

- a) That a court order obtained under case number HC 5806/21 shall not be enforceable against the applicant.
- b) The 2<sup>nd</sup> Respondent should stand and address the issue within 30 days of the order.
- c) The respondents to pay costs of suit.

[ 5] I may state though, as an initial observation, that applicant seeks to resist, stay and eventually upset a court order to which he was not a party. He elected to seek an interdict as opposed to a stay of execution and rescission of judgment. The party in respect of whom the judgment was obtained in default was not a party to the present proceedings.

[ 6] I also recognise that as at the time of the launch and argument of these proceedings, no attempt had been made to apply for a rescission of the judgment which gave rise to the execution which the present applicant seeks to stay.

[ 8] As part of the final relief, applicant prayed that “The 2<sup>nd</sup> Respondent should stand and address the issue within 30 days of the order”. The competency of the relief sought was challenged by Mr. *Gumbo* appearing for first respondent. Which relief is not enforceable as it is vague. Mr. *Musekiwa* for the applicant urged me to recognise that the order was, for the time, a mere draft which could be further adjusted to suit purpose.

[ 9] In support of this argument, Mr. *Musekiwa* referred me to the case of *Diamond Bird Services [Private] Limited and Another v Massbreed Investments [Private] Limited And City Of Harare HH 413-21*. In that matter, MAFUSIRE J, took the decision to condone an applicant whose draft order the Judge had ruled substandard. The learned Judge expressed himself with clarity as to why he granted the applicant a reprieve in that matter. On no account therefore, must legal practitioners or litigants mistake the court’s magnanimity in *Diamond Bird* as assurance that all instances of breach of standard will be treated with clemency.

[ 10] The above notwithstanding, does this application, in any event, meet the requirements of an interim interdict? KABASA J set out the requirements in *Methuseli Nyoka v Mluleki*

*Ncube HB 16-20*. Citing the case of *Magarita v Munyuki and 2 others HMA-44-18*, KABASA J stated as follows [ at page 4]; -

“The requirements for an interim interdict are well settled. In *Magarita v Munyuki (supra)*, MAFUSIRE J enumerated them thus;

- “A *prima facie* right, even if it be open to some doubt
- A well-grounded apprehension of irreparable harm if the relief is not granted
- The balance of convenience
- The prospects of success in the main matter
- No other satisfactory remedy.”

[ 11] ZHOU J set out the background and law on interdicts *pedente lite* in *Ethel Tsitsi Mpezeni v Zimbabwe Electoral Commission and 13b Others HH 475-18* and held, at page 4 of that judgment that; -

“What must be determined in the present case is whether the applicant has established the requirements for the interdict which is being sought. What is being sought in the present case is an interim interdict. An interim interdict, which is also referred to as an interlocutory or a temporary interdict or an interdict *pendente lite* is one that is sought pending the outcome of proceedings between the parties, Cilliers *et al*, Herbstein & van Winsen *The Civil Practice of the High Courts of South Africa* 5 ed, Vol. 2, p. 1455. Its primary purpose is normally to preserve or restore the *status quo* pending the final determination of the rights of the parties. It does not impact upon or entail the final determination of such rights, see *Radurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd* 1997 (1) SA 646(C). In the case of *Winkelbauer & Winkelbauer v Minister of Economic Affairs* 1995 (2) SA 570 (T) at 574 BOTHA J said:

“The purpose of interim relief *pendente lite* is to obviate an injustice to a party who *prima facie* has been (or believes on reasonable grounds that he is about to be) wronged, but who needs time to obtain redress through the due process of law.”

[ 12] Before deploying the above tests, some further detail regarding this matter; -applicant`s founding affidavit confirms that there is considerable doubt regarding the accuracy of second respondent`s allocations. That aspect forms a fundamental aspect of this dispute. Applicant may very well have taken a risk to develop “a cottage” and commenced “working on the main house” on a piece of land that belongs to another. (In passing, nothing further was furnished to give an indication of the value or extent of these developments. First respondent alleges that he discovered “temporary structures on the stand”). Nonetheless, given the doubt expressed over allocations, applicant`s claim may very well lie against second respondent. It is second respondent who may owe applicant a duty of redress. That of course is a matter for

the court that may be seized with the duty to make a definitive finding on the matter, to resolve.

[ 13] The above facts suggest that whilst there may exist a *prima facie* right vested in applicant, it cannot be said that he faces irreparable harm if he were to be ordered off the stand. Flowing from this, it cannot be said as well, that the balance of convenience favours applicant. The nature of the conflicting claims over the piece of land is such that the parties can pursue enforcement of their respective rights. No averment has been made by either party that the immovable property in question was at risk of loss or dissipation. Additionally, applicant is not faced with the loss of an abode. He does not occupy the stand as a residence. The extant order of eviction which applicant seeks to stay is merely barring him from accessing the stand.

[ 14] I also take note, (in examining whether there is a *prima facie* right, a likelihood of irreparable harm occurring, balance of convenience or alternative remedy) of the role, purpose and relevance of second respondent in the entire matter. This brings me to the last requirement; -that of an alternative effective remedy. Applicant does enjoy a viable remedy. He may apply to rescind the judgment in question and seek a stay of execution.

#### DISPOSITION

In the circumstances it is my conclusion that applicant has not made out a case for the interim relief sought.

It is accordingly ordered as follows; -

The application is dismissed with costs.

*Musekiwa and Associates*-applicant`s legal practitioners.

*Chinawa Law Chambers*-first respondent`s legal practitioners.