MARGARET MAZANI
versus
SCHOLASTIC MATIYENGA
and
HAPPYMORE MUCHAYI
and
MINISTER OF NATIONAL HOUSING AND SOCIAL AMMENITIES

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 September 2021 & 24 August 2022

Opposed Matter

Mr *Mudhara,* for the applicant
Mr *I Norest,* for 1st & 2nd respondent

MANGOTA J: I heard this application on 7 September 2021. I delivered an *ex tempore* judgement in which I granted the applicant's application for interim relief.

On 15 June 2022 the second respondent wrote to the Judge President raising concern on my delay in furnishing the first respondent and him with written reasons for my decision. I state, for the avoidance of doubt, that the letter which the second respondent wrote to the Judge President is the only correspondence which is filed of record in regard to his concern. He wrote no letter other than the one which drew my attention to the need on my part to furnish the first respondent and him with reasons for the decision which I made. Neither the first respondent nor him had written earlier than 15 June 2022 requesting me to give him or her a fully dressed judgment.

When the record, HC 4155/21, was referred to me for my attention following the second respondent's letter, I went through it. I realized that the applicant attached to her application the application for a declaratur which she filed at about the time that she filed this application. That application has its draft order which is at p 39 of the record. I observed also that the order which relates to the current application appears at p 42 of the record. I realized further that, in granting the application, I erroneously signed the order which is at p 39 instead of the one which is at page

42 which is *in sync* with the application. The one which is at p 39 of the record is not in any way related to the application which the applicant placed before me. It is foreign to the same. It relates to the applicant's application for a declaratur.

It is in view of the above-observed matter that I act in terms of r 29(1)(a) of the High Court Rules, 2021 and rescind the erroneously typed out order which I substitute with the interim order which the applicant moved me to grant to her on 7 September, 2021. For the avoidance of doubt, the interim order which I granted to the applicant reads:

> "TERMS OF THE INTERIM RELIEF GRANTED
> 1. The 1st and 2nd Respondents and all their agents or representatives be and are hereby interdicted forthwith from carrying out construction on Stand 9030 Raheen, Garikayi, Phase 2, Mutare pending the return date of this provisional order".

This application was filed through the urgent chamber book. It moved me to interdict the first and second respondents from carrying on construction work on Stand Number 9030, Raheen, Garikayi , Phase 2, Mutare ('the property"). The applicant's statement is that the third respondent who is the Minister of National Housing and Social Amenities allocated the property to her in 2010. She alleges that she contributed towards payment of the property through FBC Building Society after she joined what she terms Access to Home Ownership Scheme in 2006. She claims that in 2012 she went to pay her instalments to the Scheme's Committee which, according to her, refused to accept her subscription stating that the property had been re-allocated to someone else as had been the case, at the time, with properties of other persons who fell into her unfortunate set of circumstances. Those persons and her, she avers, challenged the decision of the Committee with the result that a Ministerial Committee was established and charged with the responsibility of resolving the issue of re-allocation of the properties of persons who were in her category, her case included. The Ministerial Committee, she claims, resolved that all re-allocations were to be disregarded and all those who benefitted from such re-allocations were to be refunded their money or given properties elsewhere. The first and second respondents, she alleges, fall under the group which benefitted from the re-allocation exercise and did not, therefore, have the right to occupy her property. She insists that the third respondent did not cancel the offer which he made to her when he allocated the property to her. Her offer, she avers, still stands. She states that, on 14 February 2021, she found the first and second respondents at her property making every effort to carry out construction work on the same. She alleges that she told the respondents that they were

not the lawful occupants of the property, that the same was allocated to her and that they should desist from continuing with construction on her property. These, she claims, did not desist compelling her to file this application on the basis of urgency.

The current is an application for the relief of a temporary interdict. The law which relates to the remedy of an interdict was clearly spelt out in a number of case authorities. Notable amongst those is that of *Setlogelo* v *Setlogelo*, 1913 AD 221 at 227. This lays down the requirements which an applicant for an interdict must satisfy for him to succeed. The requirements comprise:

i) a clear right or a right which is open to some doubt;
ii) actual or reasonably apprehended injury or harm;
iii) absence of any other remedy – and
iv) balance of convenience which favours the applicant.

For the applicant to succeed in her application for a temporary interdict, she must show that she has a *prima facie* right to the property. A *prima facie* right is one which is open to doubt but which, on the return date, will be shown to have ripened into a clear right. It is more often than not available to an applicant who seeks the remedy of an interim interdict which may either be confirmed or discharged on the return date. It will be confirmed if the applicant establishes that her *prima facie* right is, in fact, a clear right. Where she fails to do so on the return date, the interim order which would have been entered in her favour will naturally be discharged.

Whether or not the applicant established a prima facie right *in casu* does, in a large measure, depend on the evidence which she placed before me. Annexures 'A', 'B' and 'C' which she attached to her application are relevant. The first one, 'A', is the offer letter which the third respondent addressed to the applicant on 28 October, 2010. It appears at p 17 of the record. It offers the property to her. Annexure 'B' is the original Access to Home Ownership List wherein the applicant's name appears in the first column, her identification certificate number appears in the second column and the number of the property which the third respondent allocated to her appears in the third column. The annexure is at page 18 of the record. The last annexure, 'C', contains names of beneficiaries of properties who paid for the same through FBC Building Society account. Her name appears at p 21 of the record.

Annexures 'D' and 'E' constitute further evidence which support the claim of the applicant. The first is a memorandum which the Acting Chief Housing and Social Amenities Officer wrote

to the third respondent on 15 April 2014. Its contents relate to work which the Ministerial Committee conducted. It investigated operations at Garikayi Phase 2. Its aim and object were to amend irregularities which related to the project, come up with a *bona fide* list of beneficiaries as well as make recommendations to the Minister. Its recommendations which appear in para(s) 3.1 and 3.2 are relevant. These are at p 24 of the record. They read:

> " 3.1 …….it is recommended that:
> 3.2 All original beneficiaries on the list from the FBC Bank and Folio 90 must be restored back on their stands. Double allottees must be evicted and be refunded their contributions."

The abovementioned view was echoed in the letter which the third respondent's Ministry wrote to the Provincial Administrator on 25 April 2014. Paragraphs 1, 2 and 3 of the recommendations are relevant. They appear at p 30 of the record. They read:

> "RECOMMENDATIONS
> I. To adopt the list of beneficiaries from the bank and folio 90 as a *bona fide* true copy of the original as the basis of allocation of stands and for future reference (see attached folio 90)
> II. All original beneficiaries on the list from the bank and folio 90 must be restored back on their stands. Second beneficiaries must be evicted and be refunded their contributions from the fund to be established by the Inter-Ministerial Committee.
> III. If the original beneficiaries decide to withdraw from the project, the resignation should be in writing and due process of declaring and allocation to another person should be followed."

The above-mentioned matters show, in a clear and cogent manner, that the applicant has a *prima facie* right to the property which is the subject of these proceedings. The first and second respondents state, in para 3 of their opposing affidavit that the first respondent received her offer from the third respondent in 2017. She is, therefore, the second allottee who, according to Annexures 'D' and 'E' of the applicant's founding papers, must be evicted from the property and be refunded her contributions. That she is the second allottee is evident from a reading of the applicant's statement which is contained in para 7 of her founding affidavit as read with Annexure 'A' which is at p 17 of the record.

The third respondent's notice of opposition appears to be speaking in tongues. The deponent to his affidavit states, as a preamble to his notice of opposition, that where he states facts which are not personally known to him, he would have satisfied himself through diligent search and inquiry as to the veracity of such facts. He does not appear to have made the diligent search and inquiry which he alleges he made. If he had, the contents of Annexures 'D' and 'E' would not have escaped his attention. His contradiction of the contents of the annexures betrays his

disposition to the case. This fact becomes evident when he contradicts himself as he is doing in para 7 as read with para 11 of his opposing affidavit. He states, in para 7, that the applicant paid a meagre $34 000 which was way less than 50% of the purchase price. He states, in para 11 that the applicant never paid anything from the date of the allocation of the property to her.

One is left to wonder as to what the deponent to the third respondent's opposing affidavit means to convey to the reader of his statements which have been made mention of in the foregoing paragraph. What comes out of his affidavit is that either he was misinformed on the issue which relates to the payments which the applicant made for the property, or he did not make a diligent search and inquiry as he should have done or he made up his mind to sing in the corner of the first and second respondents and, in the process, tell a lie. No weight can be placed on the third respondent's opposing affidavit which is approbating and reprobating at every turn of the case.

In applying as she did, all the applicant intends is to put a stop to the construction work which the first and second respondents had embarked upon pending the hearing of her application for a declaratur. The hearing and determination of that application will clear the air as well as the dispute between the applicant, on the one hand, and the first and second respondents, on the other. It will decide on who, between them, is the lawful occupier of the property.

That the applicant would suffer irreparable harm if the respondents are allowed to continue with their construction work at the property requires little, if any, debate. She states, and I agree, that she would lose her right to control the property and would, in the final analysis, lose her ownership of the same. She states further, and I also agree, that she may not be able to recover the property or the money which she paid as purchase price for the property.

The applicant's assertion is that she has no other remedy which remain available to her other than to interdict the respondents from continuing to construct on the property. None of the respondents, it is observed, challenged her statement in the mentioned regard. It is trite that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 (2) ZLR 121 (SC); D.D. *Transport* v *Abbot*, 1988 (2) ZLR 92.

It follows, from a reading of the above-cited case authorities, that the applicant has no remedy which is available to her other than this application. She states as much and her statement remains unchallenged.

The balance of convenience, no doubt, favours the position wherein the case of the applicant and the first respondent should be considered in terms of the rules of fairness and justice. That will occur at the determination of the application for a declaratur. The court will decide who between the two protagonists is the lawful occupant of the property. The decision of the court will therefore resolve their dispute and put finality to the same for the convenience of the court and the parties.

The applicant found the first and second respondents at the property on 14 August 2021. She filed this application on 18 August 2021. She, accordingly, treated her case with the urgency which the same deserved. She acted only four days after the cause of action arose. She moved with the requisite speed to protect her right.

The applicant proved her case on a preponderance of probabilities. The application is, in the result, granted as prayed.

Mundia & Mudhara Legal Practitioners, applicant's legal practitioners
Legal Aid Directorate, for first and second respondent's legal practitioners