MIRACLES OF HEAVEN HOUSING COOPERATIVE
and
ELLIOT PIKI
versus
WILLIAM DANGARANGA
and
NGWARAI MUTASA
and
COLLEN GUMBATO
and
BENNY NZONGA
and
SHELTER KADZVEDE
and
ABBA CHIDAGOMO
and
GODFREY CHIDZAMBWA
(And all those claiming occupation through
Respondents)

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 19 July & 1 December 2022

Opposed Matter - Interdict

H *Mawema,* for the applicant
E *Samundombe,* for the respondents

MAXWELL J: On 9 June 2020, applicants filed this application seeking the following order:-

> "IT IS ORDERED THAT:
> Judgement is hereby entered in favour of the Applicant and against the Respondents as follows:
> 1. The Respondents do (sic) and are hereby interdicted from selling land which belongs to the State in the name of Miracles of Heaven Housing Co-operative at retreat farm in waterfalls, Harare.
> 2. To return all Receipt Books, certificate of registration and by-laws of the 1st applicant.
> 3. The Respondents be and are hereby ordered to stop constructing or recommending construction of illegal structures in the name of first applicant at the state land situate at retreat farm in waterfalls, Harare.

4. Respondent do (sic) and is hereby ordered to pay costs on a legal practitioner and client scale."

The founding affidavit was deposed to by the second applicant. He stated that he is the chairperson of the supervisory committee of first applicant. He further stated that respondents do not have authority to act on behalf of first applicant concerning joining of members, receiving finances and recording them as well as allocating stands as first to fourth respondents were dismissed from the cooperative and fifth to seventh respondents were just handpicked. He also stated that the respondents have no mandate to act on behalf of the first applicant. He pointed out that the respondents have been selling and allocating stands to innocent citizens who do not know that such allocation is illegal. He accused respondents of acting fraudulently in receipting payments using two receipt books, one in the name of Brigadier General Charles Gumbo and another in the name of the first applicant. He stated that applicants are seeking that respondents be interdicted from selling State land in the name of the first applicant as they fear that irreparable harm to its name will result. Further that applicants have a *prima facie* right over the land by virtue of their custodianship since the year 2000. He further pointed out that applicants have no other remedy to protect their interests and prayed for an order in terms of the draft.

In response, Collen Gumbato, the third respondent, deposed to the opposing affidavit. He raised two points *in limine*, that applicant (second applicant) has no *locus standi* to institute these proceedings and that applicants have no *prima facie* right to protect as they are not the owners of the land in question. He stated that second applicant claims to be the chairperson of the Supervisory Committee of first applicant but fails to attach any resolution authorizing him to depose to the affidavit.

On the merits he stated that issues raised in the founding affidavit manifest a dispute and that resolution thereof is provided for in s 115 of the Cooperative Societies Act [*Chapter 24:05*] (The Act). He averred that domestic remedies have not been exhausted in this case. He further averred that the first to fourth respondents are the substantive members of first applicant and in terms of the Act they have authority to appoint members of the Supervisory Committee. He denied that any stands were sold but averred that allocations were done to members of first applicant as per the register that is in the custody of the Ministry of Small to Medium Enterprises. He submitted that at the inception of the cooperative, its name was General Gumbo

Housing Co-operative. The Ministry advised them to find another name when they approached it for registration which explains the existence of two receipt books with different names. He denies that the deponent to the founding affidavit has a *prima facie* right over the land, more so in light of his admission that the land is State land. He prayed for the dismissal of the application with costs on a higher scale.

In the answering affidavit, second applicant impugned the resolution filed by the respondents authorizing third respondent to depose to the opposing affidavit. He stated that the signature of the then chairperson of the Management Committee had been forged. An affidavit from Rhainos Chitute was filed in confirmation of that allegation. He submitted that there is no merit to the points raised *in limine*. He pointed out that respondents were dismissed from being the Management Committee but not from being members of first applicant. He further pointed out that the Supervisory Committee was appointed by the Society Members and there were no minutes to show that the proper procedure had been followed. As such the alleged appointments are a nullity, he argued.

In heads of argument, applicants stated that they seek to protect the name of first applicant from being abused and tarnished by the conduct of the respondents. They argued that documents had been produced to show that the respondents were effectively suspended and thereafter dismissed from first applicant and a new Management Committee was elected to replace them. The respondents therefore had no mandate to act on behalf of first applicant. On the other hand, they argued that second applicant, as the chairperson of the Supervisory Committee of first applicant has the right to act on behalf of the latter so as to ensure that the business affairs of first applicant are conducted in a proper manner in accordance with its by-laws and resolutions of its general meetings. They argued that respondents' actions could harm first applicant's reputation as they do not deny being in possession of two receipt books in two different names. They submitted that the facts herein clearly show that there is no alternative remedy. They pointed out that in HC 3718/21 respondents were ordered to release the first applicant's certificate of registration and other documents but they have not complied.

Respondents were served with applicants' heads of argument on 13 April 2022. In terms of r 59 (21) of SI 202/21, respondents were obliged to file their heads of argument within ten days after receiving applicants' heads of argument. They ought to have filed on or before 29

April 2022. They only filed on 12 July 2022. At the hearing of the matter, Mr *Mawema* submitted that the respondents are barred for filing their heads of argument late. Mr *Samundombe* argued that in terms of the rules, the heads of argument should be filed at least five days before the matter is heard. He applied for leave to make an oral application for upliftment of bar in the event that the heads of argument are ruled to have been filed out of time. I ruled that the heads of argument were filed out of time and granted leave for an oral application for upliftment of bar to be made.

Mr *Samundombe* outlined the considerations for upliftment of bar as whether or not there is a reasonable explanation for the delay, whether or not the other party would be prejudiced and whether or not there are prospects of success. He submitted that these issues are considered holistically. On the reason for delay, he submitted that the counsel who was handling the matter left the practice and the matter only came to light after receiving the notice of set down. He submitted that the main matter involves disputes of fact which cannot be resolved on the papers. To him, a leadership wrangle prompted the application. He further submitted that the dispute was prematurely brought to court as the provisions of s 116 (4) of the Act had to be exhausted first. He prayed that the sins of the legal practitioner should not be visited on the client and that no prejudice would result if the bar was lifted as applicants were served with the heads of argument on 13 July 2022.

Mr *Mawema* submitted that respondents had ample time to file for the upliftment of the bar. He pointed out that notices of set down were served on 6 July 2022 and respondents chose to sit back and do nothing until the hearing day.

I ruled that the respondents are barred and the matter proceeded as unopposed. The reasons for that decision follow hereunder. Counsel for Respondents did not dispute that notices of set down were served on 6 July 2022. Respondents' heads of argument were then filed on 12 July 2022, in flagrant disregard of the rules of this Court. In his explanation for the delay, Counsel for Respondents did not proffer a reason why condonation was not sought before the heads of argument were filed. Initially he sought to argue that the heads of argument were filed at least five days before the hearing date. Counsel chose to ignore what the relevant rule provides.

Rule 59 (21) (ii) clearly states:-

> "(ii) the respondent's heads of argument shall be filed at least five days before the hearing as long as the respondent shall not have been barred in terms of subrule (22)."

The five days before the hearing date are available to a respondent who has not been barred. Respondents are not in that category. To fail to observe the rules of the court and proceed to attempt to mislead it is totally unacceptable. For that reason the application for the upliftment of the bar was dismissed.

MAKARAU JA stated in *Lesley Faye Marsh (Pvt) Ltd* t/a *Premier Diamonds & Ors* v *African Banking Corporation of Zimbabwe (Pvt) Ltd* SC 4/19 that:-

> "…once a notice of opposition and opposing papers have been validly filed, the late filing of heads of argument cannot automatically have the effect of negating or nullifying such filing.…….. the application does not automatically become unopposed. The court or judge may, using their discretion, proceed to determine the matter on the merits or negate and nullify the respondent's defence by referring the matter to the unopposed roll. In other words, the court has to either dispose of the matter on the merits or declare it to be now unopposed by reason of the default."

I decided to hear the matter on the merits. Mr *Mawema* submitted that first, second, fourth, fifth, sixth and seventh respondents did not oppose the application as the deponent to the opposing affidavit did not state that he was acting on their behalf. Further that no supporting affidavits were filed. Indeed third respondent did not state that he was acting on behalf of the other respondents. For that reason, the others are taken to not have opposed the application. On the merits, Mr *Mawema* submitted that first applicant has a right to protect its name from being tarnished and abused. He stated that respondents were effectively suspended and dismissed and a new management was elected. He submitted that respondents were selling land to third parties in the name of the applicants. This was disputed in the opposing affidavit filed by third respondents. This seems to be the main basis of the application and is therefore material to the resolution of the matter.

In *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H) the headnote reads as follows:-

> "Where the facts are in dispute, the court has a discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate when an applicant should, when launching his application, have realised that a serious dispute of fact was inevitable."

In *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S), the Supreme Court stated as follows:-

> "It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust and common sense approach and not an over - fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and not merely an illusory dispute of fact."

Applicants alleged that respondents were selling stands and fraudulently receipting the transactions. That allegation was disputed in the opposing affidavit. I therefore find that there is a dispute of facts which cannot be resolved on the papers.

For that reason the application is struck off the roll with no order as to costs.

WOM Simango & Associates, applicants' legal practitioners
Messrs Samundombe & Partners, respondents' legal practitioners