RYDALE RIDGE PARK (PRIVATE) LIMITED
versus
ZVIMBA RURAL DISTRICT COUNCIL
and
THE REGISTRAR OF DEEDS

HIGH OF ZIMBABWE
TAGU J
HARARE, 15 and 20 September 2017

URGENT CHAMBER APPLICATION

K Gama, for applicant
C Tinarwo with *P Mahembe*, for 1st respondent
T Mutomba, for 2nd respondent

TAGU J: The applicant approached this court on an urgent basis seeking the following relief:

"**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:

(a) 2nd Respondent be and is hereby barred from impounding Applicant's title deeds.
(b) 2nd Respondent be and is hereby barred from refusing to register the transfer of Applicant's stands at 1st Respondent's instance excerpt in accordance with a Court order.
(c) 1st Respondent shall not apply to any Court in Zimbabwe for an order barring 2nd Respondent from registering the transfer of Applicant's stands without the leave of a judge of this Court.
(d) 1st Respondent shall pay the costs of suit on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicant is hereby granted the following relief:

(a) Applicant be and is hereby joined as a party to Case NO. HC 8136/17.
(b) 1st Respondent be and is hereby ordered to forthwith serve the applicant with the Court Application filed in Case No. HC 8136/17.
(c) 2nd Respondent shall act in accordance with his notice of **6th September 2017, Annexure F** to the founding affidavit.

(d) 2nd respondent shall act in accordance with the said notice notwithstanding any application filed by the 1st respondent for an order barring the transfer of Applicant's Stands.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served upon the respondent by the applicant, the applicant's legal practitioners, the Sheriff or the Sheriff's Deputy/assistant."

The facts of the case as stated in the founding affidavit of the applicant can be summarised as follows- that the first respondent is Zvimba Rural District Council a council established and incorporated in terms of s 12 of the Rural District Councils Act [*Chapter 29.13*]. The second respondent is The Registrar of Deeds, Harare. That this Honourable court has already found the first respondent Zvimba Rural District Council guilty of deceit and abuse of court process in that on 4 August 2017 the first respondent filed an urgent chamber application for interdict in case HC 7265/17. The chamber application was heard on 10 August 2017 and adjudicated on 30 August 2017 by CHATUKUTA J in case HH 572/17 and was found not to be urgent. The first respondent then filed another court application for an interdict in case HC 8136 17 on 1 September 2017 and the relief sought is a doppelganger of the relief sought in the ill-fated urgent chamber application for an interdict because the averments relied upon by Zvimba Rural District Council in both founding affidavits are the same. This was despite the fact that on 2 August 2017 his Lordship Honourable TAGU J had ordered the first respondent to pay Rydale Ridge Park costs on the higher scale in HC 4049/17. The applicant contends that the relief sought in the application in case HC 8136/17 directly affects the applicant's constitution property rights as well as the constitutional property rights of persons who purchased property from the applicant. Despite the deleterious effect of the order sought upon the rights of the applicant and many other persons, only the Registrar of Deeds is cited as a party to the application in HC 8136/17. The applicant therefore views this as a gross abuse of court process. What places applicant in an extremely invidious position is the fact that the first respondent's game-plan is to ensure that the second respondent the Registrar of Deeds does not oppose the application. If the application is not opposed, the first respondent may obtain, by default and by deceit, an order which it was denied by her Ladyship the Honourable CHATUKUTA J in case HC 7265/17. This is so because in case HC 8136/17 the first respondent is seeking the following order which it failed to obtain by way of urgent chamber application before CHATUKUTA J.

"IT IS ORDERED THAT

a) Respondent **(THE REGISTRAR OF DEEDS**) be and is hereby interdicted from processing transfers of properties created in an area known as Rydale Ridge Park without a valid certificate of compliance issued by Zvimba Rural District Council in terms of condition 10 of the subdivision permit.
b) Respondent shall pay costs on a legal practitioner and client scale if he opposes this application." (***the insertion and underlining is mine for emphasis***)

Hence in para (8) of its founding affidavit the applicant stated that this is an urgent chamber application for an order joining Rydale Ridge Park (Private) Limited as a party to the court application filed by the first respondent in case no. HC 8136/17, an order directing the first respondent to serve the applicant with the court application, an order directing the second respondent to proceed in terms of the notice given by him on 6 September 2017 in spite of the application filed by first respondent in HC 8136/17, an order directing the second respondent to proceed in terms of the said notice of 6 September 2017 despite any further applications to be filed by first respondent in this matter, an order directing the first respondent to seek leave from a judge of this Honourable Court to file any further application concerning the same matter discussed in HC 8136/17, and an order of costs on the higher scale against Peter Hlohla.

However, it is pertinent to mention that on the cover of this application the applicant headed this application as an urgent chamber application for an interdict. This prompted the first respondent at the commencement of the hearing to take a preliminary point that the interim relief (a) is incompetent and untenable because what is before the court is an application for an interdict but the applicant now wants to be joined to the case HC 8136/17 a totally different case. In its view this is fatal and the applicant should have made an application for joinder in terms of r 87 of the Rules of this Honourable Court. It disputed the assertion by the applicant that that heading was inserted for the purpose of meeting the requirements of the Registrar of the High Court. It therefore asked the court to dismiss the application on this point alone.

The applicant however, maintained that despite what is stated on the face of the application the application is in reality an application for joinder. The reason why it headed it application for interdict was to meet the requirements of the Registrar. Be that it may it said the basis of the application is fully captured in its para (8) of the founding affidavit. The reason why it did not file this application in terms of r 87, but as an urgent chamber application was the fear that if it had done so, the case would take long to be heard and in the meantime the second respondent may not oppose the application in HC 8136/17 with the result that a default

judgment may be granted in favour of the first respondent as early as next week and this will be prejudicial to the proprietary interest of the applicant.

While I did not really understand what the applicant meant by saying the application was headed as an application for an interdict to meet the requirements of the Registrar, I was however, convinced that this is an urgent chamber application to be joined as a party in HC 8136/17 as elaborated in para (8) of the applicant's founding affidavit. Further, while it was desirable for an application for joinder to be made in terms of Rule 87, the circumstances and history of this matter make it prudent for the applicant to bring this application as an urgent chamber application. I say so because even by the time of the hearing of this matter the second respondent has not filed any opposition to the application in HC 8136/17 and there is a real risk that a default judgment may be entered in favour of the first respondent as early as next week. The counsel for the second respondent even confirmed before this court that the second respondent has not yet opposed the application and that he has not received instructions from the second respondent to oppose the application. For this reason I condone that mistake of heading the application as an application for an interdict instead of an application for joinder. The relief in para (a) of the provisional order is in my view competent.

I therefore dismiss the first respondent's point *in limine*.

The second respondent also took a point *in limine*. Its point *in limine* was that the application did not comply with r 241 of the Rules of the High Court, 1971 in that the application was served on them and ought to have been in Form 29. The second respondent submitted that they have been deprived of the right to oppose the application. For that reason the application is fatally defective and is a nullity and the matter should be dismissed on that basis. Reference was made to the case of *Marick Trading (Private) Limited* v *Old Mutual Life Assurance Company of Zimbabwe (Private) Limited and The Sheriff for Zimbabwe* HH 667-15.

Rule 241 says:

"241. Form of chamber applications

(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, excerpt as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies.

Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications".

In the present matter the Form used by the applicant reads as follows:

> "Application is hereby made for an order in terms of the draft provisional order annexed to this application on the grounds that:
>
> 1. ….
> 2. …..
> 3. ….
> 4. ……
> 5. …..
> 6. ….."

The counsel for the applicant opposed the second point *in limine* on the basis that this being an urgent chamber application there was no need for filing an opposing affidavit. In any case the second respondent still has an opportunity to file its opposition after service of the provisional order in terms of the provisions in Form 29C. In the present case counsel for the applicant submitted that Form 29B with appropriate modifications has been used. He said the leading case on Forms is *ZOU* v *Mazombwe*…… and in all decisions of the court, the court has never non-suited an applicant who relied on either Form 29 or Form 29B. He distinguished the cases cited by the counsel for the second respondent on the ground that in those cases neither Form 29 nor Form 29B were used.

However, counsel for the second respondent further argued that the mere fact the form used by applicant did not mention the fact that some "affidavits" would be used in support of the application makes the application fatal. This was shot down by the counsel for the applicant who said such an argument is sterile because r 4 says Forms may be used with such alterations as circumstances require.

Indeed I found that the argument by Mr *Mutomba* on Forms is a sterile one. The applicant used Form 29B with appropriate modifications. In any case it being an agent chamber application it is not a requirement that the respondent must file written opposition for it to be heard. That is why the respondents were allowed to argue their case without submitting written notices of opposition. A respondent who has time to file written opposition can still do so, and where he has not done so it cannot be argued that his rights have been infringed.

In the result I dismiss the second respondent's point *in limine*.

ON THE MERITS

The applicant submitted that it is entitled to be joined and be heard because the order being sought by the first respondent in HC 8136/17 belongs to the applicant. The applicant is the owner of property whose urgent chamber application was struck off by CHATUKUTA J. The order being sought by the first respondent against the second respondent reads as follows-

> "Respondent be and is hereby interdicted from processing transfers of properties created in an area known as Rydale Ridge Park without a valid certificate of compliance issued by Zvimba Rural District Council in terms of condition 10 of the subdivision."

Rydale Ridge Park (Private) Limited is the applicant in this case for joinder and it was not joined in case HC 8136/17 by the first respondent when it sued the second respondent The Registrar of Deeds. The applicant submitted that it is entitled to be heard in terms of s 69 of the Constitution of Zimbabwe. It argued that the conduct of the first respondent in failing to cite it borders on deceit and an abuse of court process. If it is not heard and the second respondent decides not to oppose the first respondent's application a default judgment may be made and the applicant would suffer irreparable harm since it has a substantial interest in the property at the centre of the application.

The first respondent indicated that it opposed the application by the current applicant on the basis that the requirements of an application for an interdict had not been satisfied. The counsel for the second respondent indicated that had the heading on the cover of the application been that it was an application for joinder the first respondent in principle would not have opposed the application. First respondent further submitted that the whole dispute emanated from the fact that the applicant was unwilling to cooperate with it. It said the reason why it had instituted an application for an interdict in case HC 8136/17 without citing the applicant was that it was asking the second respondent to do what it was required to do by the law. It was its further contention that if this court grants the provisional interim relief sought by the applicant especially para (c) of the application all what this would mean is that provisions of the Regional, Town Planning Act would be rendered useless because the applicant will continue to transfer properties and the first respondent would be prejudiced. It therefore asked the court to dismiss the application because the relief being sought would affect public order and urban planning.

On the merits the second respondent did not submit much save to say that the last day for the second respondent to oppose the application for an interdict was the day this application was being heard and they were not aware of the correct position since they had not yet opposed the application. It was also their view that the reason why the second respondent was refusing to transfer property was because the certificate of compliance is alleged to be fake.

In my view it is not in dispute that the property at the centre of the application in case HC 8136/17 belongs to the applicant. For that reason it was reasonable that the applicant be joined in the proceedings and be heard as well. To decide the case without hearing the side of

the applicant whose property was to be affected would be against the letter and spirit of section 69 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. In any case had the applicant not made an error of labelling this application as an application for an interdict, in principle the first respondent would not have opposed the application for a joinder of the applicant in case HC 8136/17.

I am not persuaded that if the court grants this provisional order the first respondent would suffer irreparable harm. In fact it is the applicant who would suffer irreparable harm if the application is not granted. I find comfort in the words of CHATUKUTA J in *Zvimba Rural District Council* v *The Registrar of Deeds and Rydale Ridge Park (Private) Limited* HH 572/17 at p 5 of the cyclostyled judgment where the learned judge in dismissing any sentiments that the first respondent would suffer irreparable harm had this to say:

> "The mere fact that the applicant did not see any cause to bring this application in the past ten years is an indication that it has not felt any harm at all. It is therefore difficult to fathom the irreparable harm that the applicant will now suffer following the realisation that the second respondent is in possession of an alleged fraudulent certificate of compliance."

The judgment of CHATUKUTA J is still extant and it has not been appealed against. This brings me to the point raised by the counsel for the second respondent that it is not transferring the properties because the certificate of compliance is a fake one. I do not agree with that because if that was the position and then the second respondent would not have written a letter dated 6th September 2017 in which the second respondent wrote to the legal practitioners of the applicant Gama & Partners worded as follows:

> **"REF: TRANSFER OF RYDALE RIDGE PARK STANDS.**
>
> The above matter refers.
>
> Kindly note that the XN Caveat which had been noted on the above –mentioned property is now being uplifted on the basis of the judgment of the High Court HH572-17, HC 7265/17, which states that the matter was struck off the roll. The said judgment was served on this office on the 4th of September 2017.
>
> Our interpretation of the order "struck off the roll" has been done in accordance with Practice Direction 3/2013 which states that "the effect of such an order is that it is no longer before the court".
>
> Further note that all transfers lodged with this office hence forth be processed."

For the second respondent to now turn around and allege that the certificate of compliance is a fake one and that they would not comply with whatever was done in terms of

that certificate of compliance in my view amounts to nothing else other that colluding with the first respondent in this case.

In the result the provision relief is granted as prayed for by the applicant.

Gama & Partners, applicant's legal practitioners
Mangwana & Partners, 1st respondent's legal practitioners
Civil Division of the Attorney General's Office, 2nd respondent's legal practitioners