

MABHODHO IRRIGATION GROUP

Versus

MARON KADYE

And

DAVID NYABVURE

And

DZIDZAI MUSARI

And

DAVID MATETE

And

NATIONAL BREWERIES

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 31 OCTOBER 2002 & 23 JANUARY 2003

J Maupa for the applicant

T C Masawi for 1st, 2nd, 3rd, and 4th respondents

J Moyo for 5th respondent

Urgent Application

NDOU J: The applicant seeks a provisional order in the following terms:

“Terms of the Final Order sought

That you show cause to this court why a declaratory order should not be made in the following terms:

- 1.(a) That the net proceeds due to the applicant for the barley already delivered by the applicant to the 5th respondent be and is hereby declared to be jointly and severally owned by the applicants' 12 members and same to be equitably distributed among them.
- (b) The first four respondents pay the costs of this application.

Interim Relief Granted

1. That pending the confirmation and or discharge of the above order the 5th respondent is hereby interdicted from releasing the cheques of the net proceeds to the 1st, 2nd, 3rd and 4th respondents.
2. The Deputy Sheriff be and is hereby empowered to serve this provisional order and interim relief on the respondents.”

The legal requirements for interdicts are admirably set out in *Knox D Archy Ltd and Ors v Jamieson and Ors* 1995 (2) SA 579 (W) and *Harnischfeger Corporation v Appleton and Ano* 1993(4) SA 479(W). It was held in these decisions that the legal requirements for an interdict *pendente lite* are no different from the legal requirements for any other interlocutory interdicts. Firstly, the applicant must establish existence of a clear right. Thereafter, he must show –

- (a) an infringement of his right by the respondent or at least a well grounded apprehension of such an infringement, and
- (b) the absence of any other satisfactory remedy, and
- (c) that the balance of convenience favours the granting of an interlocutory interdict (though where he can establish a clear right together with (a) and (b) he would normally claim a final interdict). *In casu*, the most critical issue to be decided upon is whether the applicant has established a clear right. However, this issue will only be relevant if I rule the preliminary issue in favour of the applicant.

In order to determine these two issues it is necessary to set out the salient facts of this case. The applicants, as the citation shows, is an “irrigation group”. Mabhodo Irrigation Group is not a universitas. It is not registered as a co-operative in terms of the appropriate legislation applicable to co-operatives. There is no evidence in the papers before me showing that the applicant is a legal persona. It seems beyond dispute that Mabhodo Irrigation Group is a mere trade name. Individuals had only come together for the purposes of enquiring operational services and inputs.

Once such equipment or inputs are acquired they are distributed to individual members and not owned jointly. Each member then becomes personally responsible for the payment of his/her share. The applicant has not shown that there is a legal entity operating under the style of Mabhodo Irrigation Group which is legally capable of suing or being sued. The banking account of the group was opened with First Banking Corporation Ltd. The latter bank granted the group over-draft facilities guaranteed by each of the first four respondents. The approach to the fifth respondent, Kwekwe Maltings, was signed by the first four respondents. All in all it seems that benefit from the group's activities depended on the individual's contribution. It is not disputed that the first four respondents provided the fifth respondent with barley forming subject matter of this case. The applicant did not establish that the six individuals responsible for this application contributed any barley at all to the fifth respondent. The basis of their claim is, at most, that the first four respondents used the name Mabhodo Irrigation Group in their dealings with fifth respondent. They want to be rewarded for the mere use of the trade name. The founding affidavit is characterised by use of ambiguous language. It lacks a simply allegation on how they contributed to the barley delivered to the fifth respondent bearing in mind that each individual member was cultivating his/her own plot separately. The founding affidavit has a lot of detail on irrelevant issues on how these individuals were allocated their respective plots by the land committee. It shies away from the details around the cultivation and supply of the barley winter crop to the Kwekwe Malting. The emphasis seems to be on how the first four respondents "hijacked" the scheme or project.

It seems to me that the applicants are using the name to try and reap where they did not sow. In all the circumstances I find that the applicant failed to establish existence of a clear right. In the absence of such a clear or prima facie right the claim should fail.

I, accordingly, dismiss the claim with costs.

Mkushi, Foroma & Partners, applicant's legal practitioners
Makonese & Partners, 1st, 2nd, 3rd & 4th respondents' legal practitioners
Calderwood, Bryce & Hendrie fifth respondent's legal practitioners