

KNIGHT FRANK

Versus

SAM NCUBE

And

AFFIRMATIVE ACTION GROUP

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 4, 6 AND 12 AUGUST & 16 SEPTEMBER 2004

S Mazibisa & Ncube for the applicant

G Nyoni for the respondents

Urgent Chamber Application

NDOU J: The applicant seeks an interdict against the respondents to protect its corporate status and its partners and employees from threats and assaults. The salient facts are that the applicant is an estate agency in the business of managing immovable properties on behalf of landlords or property owners. This entails facilitating the raising of rentals, their collections and liaising with the tenants on increases. They also deal with errant or defaulting tenants by implementing credit control mechanisms which include suing for rent arrears and eviction of defaulting tenants. Essentially they are mandated to manage the buildings or properties professionally and profitably. The first respondent is vice-president of the second respondent. The second respondent as its name suggests, is a pressure group which has as some of its goals, “to protect indigenous business and this includes defaulting tenants”. In *casu*, the objective of their action was to protect their defaulting members “especially where the default is a result of rents which are exorbitant, extortionist and have no realistic relationship to economic fundamentals”. In pursuit of these goals,

the first respondent, in the company of thirty or so people (alleged to be members of the second respondent aggrieved by rent increases) went to applicant's premises. They were escorted by the Zimbabwe Republic Police details. It is common cause that the group made denouncing remarks. There is a dispute as to who or what the group was denouncing. According to the applicant, on the one hand, they were directed at its partner, the applicant and all estate agents. On the other hand, the respondents' case is that they were directed at exploitative tendencies of estate agents. It is the latter's case that they had been in dialogue with other estate agents but applicant was not co-operative to the extent that they resolved to a peaceful protest in the presence of the police. There is a dispute as to exact nature of the demonstration, in particular whether it resulted in mayhem. In short the respondents submit that the order sought by the applicant constitutes an infringement of their freedom of assembly and association and freedom of movement (as enshrined in section 21(1) and 22(2) of the Constitution of Zimbabwe).

According to section 21(1)-

“Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade union or other associations for the protection of his interest.”

The relief sought by the applicant does not seek to do any of the above so this comment is not sustainable. All the interdict seeks is non-interference with applicant's business and a peace order. It does not seek to prevent the second respondent's members from being its members. It acknowledges the second respondent but seeks to interdict it against alleges unlawful activities.

According to section 22(1) “no person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Zimbabwe, the right to reside in any part of Zimbabwe, the right to enter and to leave Zimbabwe and immunity from expulsion from Zimbabwe”. This, however, is not an absolute right since it may be curtailed – *Chirwa v Registrar-General* 1993(1) ZLR (H) at 16. It is, in other words, a limited right like most fundamental rights enshrined in Part IV Chapter 2 of the Constitution. Part of relief sought is to interdict the respondents from *inter alia*, “coming within a radius of 50 metres” of the applicant’s premises. The applicant’s premises are in the city centre the “50 metres: radius involves the streets and pavements and other properties which do not belong to the applicant. This is a serious form of restriction of freedom of movement. To this extent the relief sought is not justified on the facts even without making reference to the constitutional issue. The disputes of fact, in *casu*, are such that can be resolved by adopting a robust approach. From the papers it is clear that both sides seek dialogue, so if I hold that the provisional order is merited, the terms should be such that they create a conducive atmosphere for dialogue. Has the applicant satisfied the requirements of the interdict sought? It is trite that to obtain an interlocutory interdict, the applicant must establish a clear or *prima facie* right and show:

- (a) an infringement to his right by the respondent or at least a well grounded apprehension of such infringement; and
- (b) the absence of any other satisfactory remedy; and
- (c) that the balance of convenience favours the granting of an interlocutory interdict – *Setlogelo v Setlogelo* 1914 AD 221; *Knox D Arcy Ltd & Ors*

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v Jamieson & Ors 1995(2) SA 579 (W) at 592; *Sanachem (Pty) Ltd v Farmers Agri-care (Pty) Ltd & Ors* 1995(2) SA 781(A); *Mabhodo Irrigation Group v Kadye & Ors* HB-8-03 and *Econet (Pty) Ltd v Min of Information, Posts and Telecommunications* 1997(1) ZLR 342(H).

Even where the requisites are established, the court has a discretion whether to grant or refuse the remedy. The right in (a) must be legal right. A financial or commercial interest alone will not suffice. The right must be enforceable in law – *Lipschitz v Wattrus NO* 1980(1) SA 662(T); *Min of Law & Order, Boputhatswana & Anor v Committee of the Church Summit of Boputhatswana & Ors* 1994(3) SA 39(B); *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban & Ors* 1984 (4) SA 593 (N) at 600H and *Paton v British Pregnancy Advisory Service Trustees & Anor* [1979] I QB 276 at 218. Reference to substantive law will assist in determining the existence or otherwise, of a right – *The Civil Practice of the Supreme Court of South Africa* by Herbstein & Van Winsen 4ed at 1066. From the facts alleged by applicant and the undisputed facts a clear right has not been established.

Seeing, however, that the applicant is seeking a temporary interdict, a *prima facie* right may suffice – *Ferreira v Levin NO & Ors; Vryenhoek & Ors v Powell NO & Ors* 1995(2) SA 813(W). In my view, the disruption of business coupled with the crowding of the applicant's office and the demonstration inside the applicant's office accompanied by denouncing remarks constitute a *prima facie* right in relation to the temporary interdict sought. I will, however, grant the relief only to the extent as shown above.

I, accordingly grant the provisional order in the following term:

“Terms of the final order sought

That the provisional order granted by this honourable court be confirmed in the following manner:

- (a) The first respondent and the second respondent's executive members be and are hereby permanently interdicted from entering the applicant's premises except with the prior consent of the applicant.
- (b) The first respondent and the second respondent's members be and are hereby ordered to keep peace towards applicant's partner Oswald Nyakunika and the applicant's employees.
- (c) The respondents jointly and severally, one paying the other to be absolved, be and are hereby ordered to pay costs of suit.

Interim Relief Granted

Pending the finalisation of the matter, the applicant be granted the following relief:

1. The respondents and members of their executive and employees be and are hereby interdicted from entering the applicant's premises at Robert Mugabe Way, Bulawayo except with prior consent of the applicant.
2. The respondents and their members be and are hereby interdicted from threatening the applicant's partner Oswald Nyakunika or the applicant's employees."