

ESTATE LATE GEORGE UTAUMIRE

And

SHYREEN GOREMUCHECHE

Versus

EPIPHANIA KADZUNGE

And

MORGAN KADZUNGE

And

TEL ONE

And

ZIMBABWE ELECTRICITY DISTRIBUTION COMPANY

And

CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 25 AUGUST 2006

C Dube, for applicant
Ndlovu, for respondents

Urgent Chamber Application

BERE J: On 31st of August 2006 I granted the following order and indicated my elaborate reasons would follow:

“It is ordered:

- 1) That in the absence of a proper court order the 1st and 2nd respondents be and are hereby interdicted from interfering with the 2nd applicant’s occupation of the premises in question namely stand number 942 Emakhandeni, Bulawayo, including the instruction to 3rd, 4th and 5th respondents to terminate their services to the said premises, including bringing or referring people to view the premises as potential tenants;

- 2) That the 3rd, 4th and 5th respondents be and are hereby interdicted from terminating services to the phone shop's four lines, electricity and water to stand number 942 Emakhandeni, Bulawayo, provided 2nd applicant continues to pay for such services;
- 3) That 1st and 2nd respondents or any person(s) acting or purporting to be acting in their interest keep absolute peace with 2nd applicant or any of the employees on the estate property;
- 4) That the 1st and 2nd respondents shall not harass, threaten or use abusive language against 2nd applicant or conduct themselves in any manner that might cause fear in the 2nd applicant and or her employees;
- 5) That the 1st and 2nd respondents pay costs on the ordinary scale jointly and severally, the one paying the other to be absolved."

Here are my reasons.

On 18 February 1985 the late George Utaumire (the deceased) had his marriage with one Pheobie Machaka solemnized in terms of the then African Marriages Act [Chapter 238] (now the Marriages Act Chapter 5:07). According to the 2nd applicant the deceased subsequently entered into a second but unregistered customary union with her seven years ago. Before his untimely demise, the deceased had on 28 April 2004 entered into a ten year lease agreement with the 1st and 2nd respondents for a property referred to as stand 942 Emakhandeni, Bulawayo to run a supermarket, butchery and phone shop. The leased property is also commonly referred to as Woza Woza Supermarket.

The lease agreement was to commence on the 1st of May 2004 and continue for a period of 10 years. Upon assuming occupation the deceased together with the 2nd applicant started running the business operations. The 2nd applicant states that she was actively involved in the running of the enterprises and was part of the management. This averment has not been controverted by the two respondents. The 2nd applicant's averment that she was customarily married to the deceased about seven years ago has equally not been seriously challenged by the respondents.

It appears from the papers that have been put before me that despite the respondents having leased out their property to the deceased, the 1st respondent's name was retained in the registers of the service providers, namely 3rd, 4th and 5th respondents. There is no suggestion in the filed papers that this arrangement presented any difficulties to the parties to the lease agreement.

As fate would have it the deceased passed away before enjoying the full life span of the signed lease. When this occurred the 2nd applicant continued to run the business entity in her capacity as the manager and surviving spouse of the deceased. She continued to honour all the bills by the above referred service providers.

When the 1st and 2nd respondents got wind of the death of the deceased they wrote to the 2nd applicant giving her notice to vacate the premises by 31 July 2006 failing which eviction proceedings would be instituted. The letter in question is dated 29 June 2006 and marked annexure 'C'.

The 2nd applicant's reaction to annexure 'C' was to approach her own legal practitioners who through their letter of 13 July 2006 and on her behalf pleaded with the 1st and 2nd respondents to consider giving 2nd applicant three months within which to wind up her operations.

Whilst all this was going on the respondents then instructed the 3rd, 4th and 5th respondents to terminate their services to the leased property. The termination was done on the 12th, 13th and 14th of July and on the specific instructions of the 1st and 2nd respondents.

Aggrieved by the sudden and unexpected turn of events the 2nd applicant filed an urgent chamber application in which she cited 1st applicant as the “Estate late George Utaumire” and herself as the 2nd applicant.

When the matter was brought as an urgent chamber application my brother judge, CHEDA J, on 16 July 2006, felt compelled to grant the following provisional order;

“2. Interim Relief Sought

Pending the finalisation of this matter, applicants be and are hereby granted the following interim relief:

- (i) That 1st and 2nd respondents be and hereby interdicted from interfering with 1st applicant’s operations at Woza Woza Supermarket, Butchery and Phone shop at stand 942 Emakhandeni, Bulawayo including the bringing in or referring any other people thereat.
- (ii) That 3rd, 4th and 5th respondents be and are hereby ordered to immediately upon service of this order reconnect phone shop telephone lines, electricity and water respectively, to stand 942 Emakhandeni, Bulawayo.
- (iii) That 1st and 2nd respondents or any other person(s) acting or purporting to be acting in their interest keep absolute peace towards 2nd applicant or to any employee(s) of the 1st applicant at its business known as Woza Woza Supermarket situated at stand 942 Emakhandeni, Bulawayo, particularly that they do not harass, threaten or use abusive language or conduct themselves in any manner that might cause fear in her and 1st applicant’s employees.”

The matter now before me is to consider confirmation or discharge of the provisional order granted.

Before the matter could be heard on merits counsel for the respondents raised two pertinent points *in limine*. He argued that these two fundamental flaws were:

- (a) that the 1st applicant lacked *locus standi in judico* to initiate the current proceedings because in the absence of an executor having been duly appointed 1st applicant had no legal status and therefore could

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not be referred to as a properly constituted party to any proceedings.

See section 23 of the Administration of Estates Act¹ and section 68B of the Administration of Estates Amendment.²

This point was conceded by counsel for the applicants and I am satisfied that that indeed is the legal position and that the concession was properly made. See *Gartrell v Sonther Life Association*³ where the point was made that it is imperative that the executor firmly takes charge of litigation on behalf of or against a deceased's estate. It is therefore the court's position that the citation of the estate of the late George Utaumire as 1st applicant was not competent and 1st applicant was therefore not properly before the court.

- (b) The second point raised *in limine* was targeted on the *locus standi* of the 2nd applicant. The point was aggressively made that the lease agreement having been between the deceased and the 1st and 2nd respondents the lease agreement therefore terminated with the demise of the deceased and the 2nd applicant could not sue on the lease agreement which she was not party to.

The point was also made loud and clear that because the 2nd applicant did not have a registered marriage with the deceased she could not

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¹ The Administration of Estates Act (Chapter 6:01)

² The Administration of Estates Amendment No. 6/1997

³ 1909 TS 57

claim to be a lawful wife of the deceased for purposes of laying her hands on the deceased's estate.

Counsel for the 1st and 2nd applicant, Mr *Dube* argued that the 2nd applicant having been customarily married to the deceased had *locus standi* to protect the deceased's estate in terms of section 42 of the Administration of Estates Act.

Counsel further sought to buttress his position by relying on the decision of their Lordships in the Zimbabwean case of *ZIMNAT Insurance Company Limited v Chawanda*⁴ where after extensive reference to other decisions the court concluded that a wife married under unregistered customary union had a right to sue the insurance company for loss of support brought about by the untimely death of her husband. The insurance company's liability stemmed from it being the insurer of the offending motor vehicle which was alleged to have caused the deceased's death.

Although the case cited by counsel for the 1st and 2nd applicants was not dealing with a similar scenario as in the instant case, I am sufficiently persuaded that the principle of law enunciated therein would apply in the instant case.

It is also clear from the papers filed that the deceased had prior to staying with the 2nd applicant entered into a potentially polygamous marriage with one Phoebe Machaka. The 2nd applicant said she was married to the deceased in terms of an unregistered customary union and that she had been in this relationship for seven years prior to the deceased's death.

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⁴ 1990(2) ZLR 143 (SC)

It is clear to me that if the 2nd applicant's position is true, then her marriage to the deceased would safely have co-existed with the deceased's earlier marriage and would entitle her to a share of the deceased's estate. This position is fortified by section 68(3) of the Administration of Estate Amendment⁵ which is worded as follows:

“(3) A marriage contracted according to customary law shall be regarded as a valid marriage for the purposes of this part notwithstanding that it has not been solemnized in terms of the Customary Marriages Act (Chapter 5:07)...”

If the law recognises an unregistered customary law union, it must recognise the need for any woman in such a union to take reasonable steps to protect the deceased's estate whilst awaiting the formalities for the proper registration of that estate. It would be idle reasoning in my view for anyone to argue that a woman in the position of 2nd applicant would not have *locus standi* to protect the deceased's estate. It does seem to me further that even if the 2nd applicant turns out to have been a mere manager of the deceased's businesses she would still be entitled at law to protect that property pending the regularisation of that estate. It is unimaginable in my view that once someone is deceased the duty to protect his estate exclusively rests with an executor. It is clear to me that this duty to protect such property lies with any person who can demonstrate he/she has an interest in that estate. This is particularly so given the fact that the appointment of an executor is certainly not an overnight exercise. It has its own formalities which have to be followed and in the interim the deceased's estate must be protected.

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⁵ No. 6/1997

Having made a finding that the 2nd applicant had *locus standi* to bring the action before this court, I am satisfied that in essence her application before the court was one for a spoliation order. I move on to consider the requirements for the order sought. It is trite that in order to obtain a *mandament van spolie* or spoliation order, the applicant must show that:

- (a) he/she was in peaceful and undisturbed possession of the thing; and
- (b) he was unlawfully deprived of such possession.

As his Lordship McNALLY JA (as he then was) re-stated, the only valid defences that may be proffered are:

- (a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession;
- (b) the dispossession was not unlawful and therefore did not constitute spoliation;
- (c) the restoration of possession is not impossible;
- (d) The respondent acted within the limits of counter-spoliation in regaining possession of the article;⁶

As manager and one of the surviving spouses of the deceased, I am more than satisfied that in running Woza Woza Supermarket and other ancillary businesses, thereat, the 2nd applicant was indeed in peaceful and undisturbed possession of the business entity despite her not having been part and parcel of the leasing arrangement.

I am further satisfied that the 1st and 2nd respondents' decision to instruct 3rd, 4th and 5th respondents to terminate services on the leased property was calculated to

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⁶*Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-operatives & Ors* 1999(2) ZLR 19(S) at 21

unlawfully interfere with the 2nd applicant's peaceful and undisturbed possession of the leased property.

I accept that the 1st applicant has been wrongly cited and further that being a deceased estate matter the Assistant Master should have been cited in these proceedings. However I do not accept that both these omissions are fatal to the order sought by the 2nd applicant whom I hold to have *locus standi* to seek an order for spoliation.

I was satisfied that the 2nd applicant was able to establish all the requirements for spoliation and accordingly I felt inclined to confirm the provisional order granted by my brother judge CHEDA J on 16 July 2006.

Dube and Partners, applicants' legal practitioners
Cheda and Partners, 1st and 2nd respondents' legal practitioners