SANITA CONSTRUCTION (PVT) LTD

Versus

OBERT MPOFU

And

DRASTIC CONSTRUCTION COMPANY (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 6 AND 13 MAY 2010

G Nyathi for the applicant
N Ndlovu for the respondents

Urgent Chamber Application

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

"Terms of final order sought

That the first and second respondents should show cause to this honourable court why a final order should not be made on the following terms:

(a) That the first respondent be and is hereby permanently interdicted from chasing away the applicant company as the sole constructor at stand number 327 BT 4th Avenue and Fife Street, Bulawayo, [pending a proper termination of the oral agreement].
(b) That the first respondent pays the costs of this application on an attorney-client scale.

Interim relief granted

That pending the confirmation or discharge of this order, this order shall operate as an [*sic*] temporary order having the effect of:

(a) Directing the first respondent to reinstate the applicant company as the sole constructing company at stand number 327 BT 4th Avenue and Fife Street, Bulawayo.
(b) Barring the second respondent from carrying out any construction work for the first respondent at stand number 327 BT 4th Avenue and Fife Street, Bulawayo.

(c) In the event of first respondent failing to comply with this order, the first respondent be and is hereby declared to be in contempt of court."

The salient facts of this case are the following. On 19 October 2009, applicant entered into a verbal contract with 1st respondent (this is disputed) in terms of which applicant undertook to construct a shopping mall for first respondent. The 1st respondent's case is that applicant entered into this agreement with a company known as Trebo and Khays (Pvt) Ltd in which he is one of the directors. Be that as it may, it is beyond dispute that between 19 October 2009 and 14 April 2010 the applicant performed construction work at the above-mentioned site. On 16 April 2010, the applicant's case is that the 1st respondent cancelled the verbal agreement. And without giving the applicant notice, chased applicant out of the construction site and installed the 2nd respondent. The applicant's case is that the 1st respondent's said conduct is unlawful and wrongful and has caused applicant financial prejudice. It is for this reason that this application was issued. The 1st respondent raised several points *in limine*. I propose to deal with them in turn.

I will start with the issue of urgency. It is trite law that the extension of protection under a certificate of urgency is relief available from this court as a matter of discretion – *Dilwin Invstms (Pvt) Ltd t/a Farmscaff* v *Jopa Eng Co (Pvt) Ltd* HH-116-98 and *General Transport & Engineering P/L Ors* v *ZIMBANK Corp P/L* 1998 (2) ZLR 301 (H). In the circumstances I will exercise my discretion in determining whether this application is indeed urgent.

The applicant seeks an interlocutory interdict under a certificate of urgency. The interdictory remedy has meant different things at different times in its history. But, I have to once more emphasize that from the earliest times it manifested itself as an extraordinary remedy *The Law and Practice of Interdicts* (1993) by C B Prest at pages 3-4. In short, it is an unusual, extraordinary and discretionary remedy – *Natham* v *Hoffenburg Bros & Lunz* 1919 EDL 184 at 187 and *Eriksen Motors (Welkom) Ltd* v *Protea Motors, Warrenton & Anor* 1973(3) SA 685(A) at 691C. In other words, it is not available to a litigant who is possessed of an alternative ordinary remedy – *Setlogelo* v *Setlogelo* 1914 AD. The following statement of the requirements by CORBETT J (as he then was) is representative of what has become the almost standard formulation of the requirements:

"Briefly these requirements are that the applicant for such temporary relief must show-

(a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established, though open to some doubt;

(b) That, if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) That the balance of convenience favours the granting of interim relief; and
(d) That the applicant has no other satisfactory remedy" – *Mabhodho Irrigation Group* v *Kadye & Ors* HB-8-03; *L R Boshoff Investments (Pty) Ltd* v *Cape Town Municipality* 1969(2) SA 256 (c) at 267A-F. This remedy does not fall within the mould of ordinary judicial remedies.

Unfortunately this remedy is abused and litigants are willy-nilly approaching these courts under certificates of urgency under Rule 223 of the High Court Rules, 1971.

GILLESPIE J, in *General Transport & Engineering P/L Ors* v *ZIMBANK P/L supra*, rightly held that the preferential treatment of allowing a matter to be dealt with urgently is only extended if good cause is shown for treating the litigant in question from most litigants. Legal practitioners issuing certificates of urgency under Rule 223A must not do so where they do not genuinely consider the matter as urgent. *In casu*, in his scant certificate of urgency all the legal practitioners states is the following –

> "First respondent's conduct is unlawful and wrongful in that is has caused or has a potential to cause applicant huge financial loss. There are workers that need to be paid salaries. In the circumstances the applicant is bound to suffer irreparable harm should the unlawful and wrongful conduct of the first respondent remain in force."

This shows that the legal practitioner granted the certificate without having regard to the above-mentioned requirements of an interdict. In this case the applicant can sue the 1st respondent for damages arising from the alleged breach of the verbal agreement. In the founding affidavit, the applicant did not aver or outline the terms of the verbal agreement. The cause of action is not clear save above allegations that the 1st respondent acted unlawfully and wrongfully. More importantly the founding affidavit does not state why the application is being instituted under a certificate of urgency. All that is averred in the founding affidavit is the following –

> "The applicant submits that the actions of the first respondent are unlawful and have caused the applicant financial loss … The 1st respondent owes the applicant USD22 000,00 outstanding from construction work already done and if applicants are prevented from working they stand to lose this amount …"

As alluded to above, the applicant is possessed of an ordinary remedy for damages *ex contractu*. It is not clear why he chose the route of urgent application. For this reason alone I find that this application is not urgent.

For this reason alone and without considering the other points raised *in limine* and the merits of the case I dismiss the application with costs.

Sansole & Senda, applicant's legal practitioners
Cheda & Partners, respondents' legal practitioners