

REPORTABLE (7)

(1) LIVERA TRADING (PRIVATE) LIMITED (2) SIMON
GEORGE WILBURN RUDLAND (3) SARAH LEIGH RUDLAND
v
(1) TORNBRIDGE ASSETS LIMITED
(2) CUT RAG PROCESSORS (PRIVATE) LIMITED
(3) THE SHERIFF OF THE HIGH COURT N.O.

**CONSTITUTIONAL COURT OF ZIMBABWE
HARARE, OCTOBER 3 & OCTOBER 17, 2016**

T Mpofo with *Chamisa*, for the applicants

A.B.Chinake, for the respondents

In Chambers in terms of r 32 (12) of the Constitutional Court Rules, 2016.

URGENT APPLICATION FOR LEAVE TO APPEAL AND INTERIM RELIEF

ZIYAMBI JCC:

[1] On 2 September 2016, the High Court (MTSHIYA J) granted a provisional order in favour of the respondents in the following terms:-

“IT IS ORDERED THAT:

1. The 1st, 2nd and 3rd respondents and any person acting through them be and are hereby interdicted from infringing on the applicant’s Trademarks No. 1710/200 in Class 34 by using the name RG or any packaging likely to deceive or cause confusion on or in relation to any of the goods for which the marks are registered.
2. The 1st, 2nd and 3rd respondents and any person acting through them be and are hereby interdicted from passing off its goods and the same RG by the use of the applicant’s Trademark Registered No. 1710/200 in Class 34.
3. The 1st, 2nd and 3rd respondents and any person acting through them be and are hereby interdicted from infringing on the applicants’ copyrighted products by

using similar or the same artistic works as that on the applicants packaging for its Remington Gold cigarettes.

4. The 1st, 2nd and 3rd respondents and any person acting through them be and are hereby ordered to deliver to the applicants, for destruction all products, packaging labels, posters, wrapping, advertising matter or other materials in the possession of the respondents and any person acting through them bearing them mark RG or so nearly resembling the trademark of the applicants.
5. The 1st, 2nd and 3rd respondents and any person acting through them, be and are hereby asked to account to the applicants for all gross sales generated by the “RG” brand within 7 (seven) days of the date of this Order.
6. 1st, 2nd and 3rd respondents jointly and severally the one paying the other to be absolved be and is (sic) hereby ordered to pay costs of suit on legal practitioner and client scale.

INTERIM RELIEF GRANTED:

That pending finalisation of this matter, an Interim Order is hereby granted in the following terms:

1. The 1st, 2nd and 3rd respondents and any person acting through them be and are hereby interdicted, with immediate effect, from carrying out any launch of the RG brand in Zimbabwe on any date until the matter is finalised.
2. The 1st, 2nd and 3rd respondents and any person acting through them be and are hereby interdicted, with immediate effect, from trading in or otherwise marketing, distributing or selling any cigarettes bearing the packaging likely to deceive or cause confusion on or in relation to any of the goods for which the applicants mark No 1710/2000 in Class 34 are registered without the leave of this Honourable Court.
3. 1st, 2nd and 3rd respondents and any person acting through them be and are hereby directed to immediately recall all goods bearing the packaging RG, identical thereto or resembling the applicants’ registered mark No. 1710/2000 in Class 34 from any of the outlets or its sales distribution agents to whom it may have sold or delivered such products.
4. The Sheriff of Zimbabwe and/or his lawful Deputies be and are hereby authorised to search for and remove to a storage facility all goods bearing the RG mark or identical to or resembling the applicants’ registered trademark No 1710/2000 in Class 34 from the 1st respondent’s premises at No. 40 Van Praagh Avenue, Milton Park, Harare respectively or from where ever such goods are located.
5. 1st, 2nd and 3rd respondents jointly and severally the one paying the others to be absolves (sic) including the Sheriff’s fees for removal and storage.”

[2] It will be seen that the interim relief sought has the same effect as would the final order if granted. The interim Order has immediate effect.

[3] The applicants appealed against the order on grounds, *inter alia*, that the copyright registered does not extend to the mark “RG” (the mark currently being used on the 1st applicant’s brand of cigarettes) and protects only the mark REMINGTON GOLD. It was alleged that no evidence was placed before the court as to the respondents’ reputation or goodwill in the mark RG, which evidence was essential for establishing the wrong of ‘passing off’. The respondents however argue that RG is used on their brand of cigarettes as a “nickname” in conjunction with the mark REMINGTON GOLD.

[4] Meanwhile, the respondents sought and obtained leave from the High Court to execute the interim order. MWAYERA J, on 19 September 2016, heard the application and granted the following order:-

- “1. The noting of the appeal by the respondent[s] jointly and severally, or anyone of them, in respect of the provisional order granted under High Court Judgment HH 517-16 shall not suspend the operation of the interim order.
2. Any appeal by any of the respondents against this order can only be made with the prior leave of this Honourable Court.
3. The costs of this application shall be borne jointly and severally by the 1st, 2nd and 3rd respondent[s], the one paying the others to be absolved.”

THE APPLICATION

[5] This application is brought as an urgent chamber application for leave to appeal to the Constitutional Court against para 2 of the Order of MWAYERA J on the grounds that the order, restricting as it did the applicants’ right of appeal, violates the applicants’ constitutionally protected right of access to the courts as enshrined in S 69 of the Constitution. The applicants seek, by way of relief, the following Order:

- “1. The operation of the order of the High Court granted under case number HC 8318/16 be and is hereby stayed pending determination of this matter and the eventual filing of applicants’ appeal in the Constitutional Court.
2. Applicants are granted leave to file an appeal against the Order of MWAYERA J issued under case number HC 9057/16.
3. The applicants shall file their appeal with the Registrar of the Constitutional Court within two (2) days of this order being served upon them.
4. First and second respondents shall bear the costs of this application.”

[6] It was stated in the certificate of urgency that:

- “- By reason of its violation of the applicants’ right of access to the courts as protected by s 69 of the Constitution, the order of MWAYERA J was invalid;
- The grant of this application would have an effect on whether the possibly invalid order is to be executed.
- The appeal, on the basis of which the application was brought, had been withdrawn prior to the hearing of the matter and that therefore the actual appeal which is now pending is not the subject of any application;
- The relief sought cannot be afforded in terms of the normal process otherwise any eventual grant of the application will be hollow.”

[7] Regarding the propriety of the Order, the applicants alleged that although the chamber application for leave to execute was served upon Messrs Atherstone & Cook who are its legal practitioners of record and who had represented the applicants in the main matter and noted the appeals from the order of MTSHIYA J, the notice of set down for the hearing in chambers was served at the applicants’ place of business when the deponent to the founding affidavit

was out of the country. It is only at about 2pm on 13 September 2016, during the course of enquiry with the clerk to MWAYERA J as to the progress in the matter, that the applicants' legal practitioner became aware that the application was set down for 3pm on the same date. The applicants' legal practitioner appeared before the Judge and requested that the matter be deferred to secure counsel's attendance but this failed and he was forced to present argument failing which the matter would be dealt with as unopposed.

[8] It was alleged, further, that the Order was constitutionally invalid and the applicants stood to suffer closure of their business and consequent loss of millions of dollars on the basis of that invalidity.

[9] The Order, it was averred, was in breach of the provisions of ss 56 (1), 69 (2), 69 (3) and 69 (4) of the Constitution of Zimbabwe.

SUBMISSIONS IN OPPOSITION

[10] The application was opposed by the respondents who raised various points, in *limine*, the most pertinent ones being that:-

- The applicants should have exhausted domestic remedies namely, an appeal to the Supreme Court; alternatively, the applicants ought to have proceeded in terms of s 85 (1) of the Constitution.
- The application was defective in that no affidavit by the applicants' legal practitioners was attached in support of the averments made by the applicant.

DISPOSITION

[11] As I understood Mr *Mpofu's* submissions, the Order of MWAYERA J was wrong. However, even if the applicants were to appeal against it to the Supreme Court, the relief of stay of execution would not be available to them in view of the wording of the Order. Such

relief, it was submitted, could only be granted by this Court pending the determination of an appeal before it.

[12] The difficulty I have with the relief sought is that there are other remedies available to the applicants. The sole reason advanced for bringing the matter before the Constitutional Court is that the remedy of stay of execution which is sought herein is not available in the High Court or the Supreme Court. I do not think the reason advanced is adequate.

[13] Decisions of this Court have indicated that where there are other remedies available, an applicant must pursue those remedies before approaching the Constitutional Court. If the applicants' grievances may be remedied by proceedings in another court, that is the route that the applicants must take.

[14] If, as the applicants contend, the Order of MWAYERA J restricting their right of appeal is wrong, the proper course is to appeal directly against that Order to the Supreme Court. That Court would be in a position to deal with any interlocutory applications pending the determination of the appeal before it.

[15] In my view, no good reason has been advanced as to why leave to appeal to the Constitutional Court should be granted. While the criticism advanced against the propriety of para 2 of the Order may contain some merit, there is, available to the applicants, another avenue for the vindication of its rights.

[16] The application is, therefore, dismissed with costs.

Atherstone & Cook, applicants' legal practitioners

Kantor & Immerman, respondents' legal practitioners