HERENTALS COLLEGE (PRIVATE) LIMITED
versus
RELEASE POWER INVESTMENTS (PRIVATE) LIMITED
and
ONIYAS GUMBO
and
MR CHINYAMUCHIKO (In his capacity as the
Headmaster of Cold Comfort Primary School)
and
MR MAPANURE (In his capacity as Deputy Headmaster
Of Cold Comfort Primary School)

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 19 AND 20 May 2011

Urgent Chamber Application

G. Machingambi, for applicant
Adv. *T. Mpofu with Muza*, for the respondents

BERE J: From the papers filed coupled with the detailed submissions made by both counsel it is apparent that the applicant and the first respondent are literally fighting over the ownership of stand number 7953 Tynwald of Stand 7739 Tynwald Township, Harare.

The conflict between the two parties has manifested itself mainly over the control of the educational activities which are taking place within this stand. Both parties are laying claim to these educational activities.

The applicant has sought to be granted interim relief interdicting the first, second, third and fourth respondents from interfering with the running of the educational institution pending the determination of this dispute.

The urgent chamber application itself in summary provides the background to the issue that has been placed before the court and it has been summarised as follows:-

> "Applicant's operations of running the school are being seriously interfered with by the first and second respondent who is claiming ownership of same. The applicant purchased Stand No. 7953 Tnywald Township of Stand 7739 Tynwald Township together with the school and has registered hundreds of minor children at the school who are now being barred from attending lessons unless they pay fees to the first respondent and recognise the second, third and fourth respondents.
>
> Applicant's business has been disrupted together with minor children's education hence the need for this Honourable Court's intervention on an urgent basis".

The same averments are amplified in the certificate of urgency filed by Raphael Tapiwanache Maganga.

The applicant's position is further graphically canvassed in the founding affidavit of Emmanuel Silas Mahachi, the Executive Director of Applicant.

The applicant is a duly registered company in terms of this country's laws operating throughout Zimbabwe and runs private education colleges. It is basically an educational institution.

POINTS *IN LIMINE*

It is imperative that before I deal with the matter on the merits I consider the points *in limine* raised by the respondent in its notice of opposition.

NON CITATION OF COLD COMFORT SCHOOL

It was passionately argued by Advocate *Mpofu* (respondent's counsel) that although Cold Comfort School is owned by the first respondent, the school ought to have been cited in the instant proceedings and that such omission made the order sought by the applicant incompetent and unenforceable and consequently rendered the proceedings fatal.

I was not persuaded by that argument. The argument missed the point that the dispute was between the applicant and the first respondent which is claiming ownership of the school in question and in my view there was no need to cite the school in question but to deal with the company claiming ownership and control of same.

In any event I did not believe such an omission would have any bearing at all on the effect of the provisional order sought if regard is had to the provisions of Order 13 r 87[1] which for the avoidance of doubt reads as follows:-

> "87(1) No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter".

Really, I do not see how the respondents would have succeeded on this point.

THE CONCEPT OF DIRTY HANDS

It was further argued by the respondent's counsel that the applicant is the one that had caused mayhem at the institution and then rushed to court with the instant application. The argument was that the applicant had created the situation that it was now calling for the court's intervention. Counsel's very strong view was that such conduct meant that the court was precluded from hearing the application in question because its (applicant's) hands were soiled.

[1] Order 13 rule 87, High Court of Zimbabwe Rules

The view I took was that counsel had a total misconception of the dirty hands concept. In almost all the situations where this concept is raised and relied upon as a weapon of defence there would have been in place an existing court order which the other party would then be alleged to have violated.

This is a simple appreciation of the law which can be gleaned without much difficulty from such cases like *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity and Ors*[2], *The Director General of the Central Intelligence Organisation and the Minister of State and Security N.O and Manners Mafuta*[3].

There was no suggestion in this case that the applicant had violated any existing court order and had approached the court with dirty hands. It was clear there was a total misconception of the dirty hands concept.

In fact what the respondents' counsel was arguing is actually one of the issues which the court had to deal with in this case and there was no basis upon which the court would have declined to hear the applicant.

ALLEGED OWNERSHIP OF THE PROEPRTY

It would appear to me that the respondents' position was that in the absence of evidence that the applicant had acquired ownership of the property in question then it could not sue for an interdict to be granted in its favour. I am afraid I did not find this argument to be appealing at all for ownership of the violated property is certainly not one of the requirements that must be established to assert one's entitlement to a temporary interdict. It is doubtful if at all the respondents' counsel believed in the submissions he made on this point.

THE URGENCY OF THE MATTER

From the submissions made by both counsel and what one could read through the papers filed of record, it was clear that the dispute between the applicant and the first respondent had created total chaos at the institution in question with the result that the education of the children was being severely interfered with. If such action could not have been heard on urgent basis then I am unable to imagine any better situation that would scream for the court's urgent attention.

It was for these reasons that I found it necessary to deal with the matter on merits and on an urgent basis.

THE REQUIEMENTS OF AN INTERDICT

[2] SC 20/2003
[3] HH 37/2005

The applicant sought to have the respondents restrained and interdicted from interfering with the applicant's smooth operations of the children's learning pending the resolution of the raging dispute over ownership of the learning institution in question.

The requisites of a prohibitory interdict as sought by the applicant in this matter are not in issue and I am relieved, both counsel are in agreement. These requirements can be traced back to the much celebrated case of *Setlogelo v Setlogelo* 1914 AD 221 at 227 and these requirements are:-

1. The existence of a clear or definite right on the part of the applicant
2. That there is an injury actually committed against applicant or reasonably apprehended against same.
3. The absence of a similar protection by any other ordinary remedy.

As stated, it is a trite principle of our law that before an interim interdict can be granted the applicant must establish that he has at the very least a *prima facie* right screaming for protection.

The evidence placed before the Court is that the applicant purchased the property upon which the school is located. Annexures A-C confirm the transaction in question. The applicant which is an educational institution avers in para 7 of its founding papers as follows:-

> "In essence, when Applicant College purchased the said property it effectively became the owner of the school, which was the main reason why it bought the property, anyway, since it is in the education services".

Counsel for the respondent has strongly argued that by purchasing land the applicant did not necessarily purchase the school. Quite a persuasive argument it was. The tragedy is that none of the respondents gave evidence to this effect despite having been afforded numerous opportunities to do so. The result was that their counsel literally ended up giving evidence on this issue.

The respondents' notice of opposition was not helpful in this regard. The thrust in the notice of opposition was to highlight the possibility of fraud in the bringing to life of the sale agreement 'Annexure A' to applicant's papers. There was no pointed submission by the respondents that the applicant did not purchase the school in order to counter the averments by the applicant. In my well considered view, it would have been inconceivable for the applicant, given its accepted role in the education system to have purchased the property in question minus the school.

As rightly pointed out by the applicant's counsel Annexures G and H reaffirm the school itself has always been regarded as inseparable from Unitime Investments (Pvt) Ltd. In the Court's view, the applicants must be believed when they allege that the acquisition of the property was inclusive of the acquisition of the school in question. This does not amount to re-writing the parties' contract.

Annexure 'D' which is the letter of 6-5/11 further reaffirmed the applicant's position. Further, the signature and the name of A.J Mapanzure on Annexures 'G' and 'H' do not portray the fourth respondent in good light in this whole saga. This probably explains why he has failed to put in an affidavit or any other form of evidence in this matter in supporting the position taken by the first respondent or in support of that position.

The urgent application itself, the certificate of urgency and the founding affidavit (para 9 thereof) highlight the injury or reasonable apprehension caused to the school by the respondents. The interference in the smooth running of the school is canvassed and the specific roles of the respondents in that regard is equally highlighted. The harassment of pupils and the running of a parallel structure for the school are both mentioned and if true these are a serious threat to the school itself.

Faced with these pointed allegations, there is no response filed of record from the second, third, and fourth respondents, thus creating a serious yawning gap in the evidence. In fact the second respondent has not even availed himself at court to try and counter the allegations levelled against him. Equally true is the failure by the third and fourth respondents to give evidence to counter what was pointedly levelled against them. They did not file opposing affidavits to counter the allegations levelled against them. They did not give *viva voce* evidence to try and cleanse themselves of the serious allegations levelled against them.

What the Court was informed yesterday was that the affidavit by Edmore Mutare incorporated the views of the third and fourth respondents. How strange?

Pushed against the wall, the respondents' counsel purported to himself give evidence on behalf of the litigants who were themselves in court. It was clearly not competent for counsel to try and give evidence on behalf of his clients. If he was desirous to let the court hear them he should have led them in evidence here in court.

It was not a persuasive argument for counsel to argue that Edmore Mutare's position was incorporating the third and fourth respondent's position. This is so because for starters, Edmore Mutare's own affidavit does not state that he was authorised to speak on behalf of other respondents other than that of the first respondent. Even if his affidavit had said so it would have been incompetent for him to do so in the absence of an affidavit of collegiality authorising him to speak on behalf of the other respondents. This legal position is explored by GILLESPIE J in the case of *Chisvo & Ors Aurex (Pvt) Ltd and Another*[4].

[4] 1999 (2) ZLR 334 (HC)

In the absence of any responses to controvert the position outlined by the applicant, the applicant's story must therefore be accepted and the court consequently accepts the applicant's concerns captured therein.

There is another dimension to this case. If one were to accept the position stated by Edmore Mutare in para 1.1 of his affidavit one is left to ponder on the seriousness of the allegations stated therein. If true these allegations would have attracted relief of a *mandament van spolie*.

Neither the first respondent nor the other respondents sought to obtain this relief. The first respondent has not counter claimed in this application.

Looked at in conjunction with the newspaper cuttings referred to in its notice of opposition the conclusion would be in escapable that its hitherto peaceful and undisturbed occupation of the school had been seriously violated.

It is the inaction on the part of the first respondent and the rest of the other respondents which casts serious doubt on the *bona fides* or veracity of such allegations. Even the newspaper articles must be looked at within this context.

In any event, the newspaper articles which appear to be loaded with hearsay information cannot be granted greater weight than the evidence on oath tendered by the applicant.

There is no doubt in my mind that whichever way one looks at this case, the education of the children is being extremely compromised by the conduct of the respondents as alleged by the applicant. I am unable to imagine any other remedy that could be put in place to protect them until the dispute between the parties is resolved other than granting the provisional order sought.

Consequently I order as follows:

Pending the determination of this matter, the applicant is granted the following relief:

1. The first, second, third and fourth respondents be and are hereby restrained and interdicted from interfering with or otherwise disrupting applicant's business operations including the running of a school at Stand Number 7953 Tynwald Township of Stand 7739 Tynwald Township.
2. The first, second, third and fourth respondents be and are hereby restrained and interdicted from registering and otherwise receiving levies and school fees from children registered by the applicant and from attempting to run parallel school administration structures other than those currently being run and operated by the applicant at Stand Number 7953 Tynwald Township of Stand 7739 Tynwald Township.

Service of Provisional Order

This provisional Order shall be served on the respondents by the applicant's legal practitioners.

G. Machingambi Legal Practitioners, applicant's legal practitioners
Muza & Nyapadi, respondents' legal practitioners