THIRDLINE TRADING (PRIVATE) LIMITED
t/a ZITAC
and
ONCLASS INVESTMENTS (PRIVATE LIMITED)
versus
BOKA INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAVANGIRA J
HARARE, 19 and 26 January 2011

Urgent Chamber Application

E Jori, for the applicants
J M Mafusire, for the respondent

MAVANGIRA J: On 7 February 2001 the first applicant and the respondent entered into a lease agreement in terms of which the respondent leased to the first applicant certain premises known as the Boka Tobacco Auction Floors.

On 24 December 2010, in HC 9478/10, by the consent of all the parties herein, this court issued an order in terms of which the respondent herein was allowed reasonable access to the leased premises on the following conditions:

> "1.1 The access shall be restricted to inspection of the premises and causing necessary repairs thereof.
>
> 1.2 The access shall be exercised upon reasonable written notice being given to the respondents, through their Chief Executive Officer or the Security Manager, at least 48 hours before the initial visit to allow proper co-ordination and facilitation of the exercise after which oral notice to the said company representatives shall suffice.
>
> 1.3 The applicant be and is hereby directed not to exceed the limits of clause 14 of the lease agreement executed by the parties on 7 of February 2001".

The above order ought to be understood in the context that the applicants herein were the respondents in HC 9478/10 and the respondent herein was the applicant.

In *casu* the applicants contend that "the respondent has exceeded the limits of the order and is seeking to achieve an ejectment of the applicants without following due process". They allege that the respondent broke into the premises and also made indications that there would be massive demolitions on part of the premises. They also allege that the respondent's representative also advised subtenants on the premises that they were to remove their property from the premises as the respondent would be undertaking extensive demolitions, alterations and additions to the premises. The respondent allegedly also caused the demolition of two pillars holding the main gate, removed asbestos roofing on the parking sheds and also removed the steel poles. The respondent allegedly also caused the erasure of the applicants' signage inscribed at the reception doors and on the premises and has proceeded to have its own name inscribed on the signage.

The applicants therefore seek in *casu* a provisional order in the following terms:

"1. INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicants be and is (*sic*) hereby granted the following relief:

(a) That the respondent be and is hereby interdicted from carrying out any ejectment of the applicants and all those claiming occupation through them from, and or interfere with the business of the applicants and the sub-tenants at, the premises situate at 13km peg Simon Mazorodze Road, Harare without the authority of an order of a competent court.

(b) The respondent be and is hereby interdicted from conducting the business of Tobacco Auction Floors on the premises which form subject matter of the Lease Agreement executed between the parties on the 7th of February 2001 until resolution of all disputes relating to, or arising from, the Lease Agreement which are currently pending in this court in cases number HC 9478, HC 7005/10, HC 8312/10 and HC 7324/10.

(c) The respondent be and is hereby directed to, restore, at its cost, the applicants' signage at the premises in issue within twenty four (24) hours of this order being made failing which the applicants shall restore same at the respondent's cost.

(d) The repairs to be effected pursuant to the order made on the 24th of December 2010 be and are hereby suspended pending finalisation of the

matters pending in this court in cases number HC 7055/10, HC 8312/10 and 7324/10.

2. TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable court why a final order should not be made in the following terms:

(a) That the provisional orders issued in this matter be and are hereby confirmed.

(b) That the respondent shall pay the applicant's costs of suit on the applicable scale in terms of the Law Society Tariff for fees charged by legal practitioners or, alternatively, costs on an attorney –client scale be and are hereby granted to the applicants".

The respondent denies that it intends to unlawfully evict the applicants. The respondent's legal practitioner submitted that it is rather the applicants who have, without the authority of a court order barred the respondent from entering or accessing the premises in defiance of the consent order of 24 December 2010.

The applicants' contention that the respondent intends to evict them from the leased premises without their consent or the authority of a court order is based or premised on suspicion and from certain media reports. It is not based on any direct communication to them from the respondent. It is the applicants' suspicion that as the respondent has been, or is to be awarded a tobacco auctioning license and in view of the nature of repairs or demolitions and alterations that the respondent is carrying out, it follows that when the tobacco auctioning season starts in three and half weeks' time, the respondent will conduct the business of tobacco auctioning from the leased premises thereby effecting a constructive eviction of the applicants. This appears to be the reason why the applicants have now barred the respondent from entry into the premises. The applicants do not state their authority for barring the respondent as alleged.

It appears to me that the applicants' suspicion as detailed above cannot be justification for the relief sought in para (a) of the interim relief sought *viz*, that the respondent be interdicted from unlawfully ejecting the applicants and from interfering with their business without the authority of an order of a competent court. In any event, besides it being mere suspicion on the part of the applicants, it is the applicants' word against the respondent's word. The respondent has categorically denied harbouring the intention ascribed to it by the applicants. If anything, despite

the clear provisions of the consent order of 24 December 2010, the respondent finds itself barred from obtaining access into the premises for the purposes stated in the order.

In para (b) of the interim relief sought the applicants seek to interdict the respondent from conducting the business of Tobacco Auction Floors on the premises until the resolution of all disputes relating to or arising from the lease agreement which are currently pending in this court. It is common cause that the applicants have been denied a tobacco auction floor licence by the Tobacco Industry Marketing Board. The said Board indicated in its letter of 29 November 2010 that it resolved to award the respondent a licence to operate an auction floor in 2011 subject to the respondent "and the premises … fulfilling requirements of the Tobacco Marketing and Levy Act [*Cap 8*:20] and SI 29 of 2000, … the Tobacco Industry and Marketing ("Marketing") Rules, 2000".

The effect of para (b) of the interim relief sought appears to me to be to bring the court into the fray or realm of the issuance of licenses by the TIMB. However, any disgruntlement on the part of the applicants at the issuance of a licence to the respondent is not a matter that is before the court. The relationship between the parties in *casu* is that of landlord and tenant. The operation or conducting of the business of Tobacco Auction Floors would be done in terms of an appropriate licence granted for the purpose. The relief sought in paragraph (b) is therefore not for this court to entertain in these proceedings. There should ordinarily be a proper procedure provided by the relevant legislation in such situations. It was not contended that there is no procedure provided in the relevant regulations in the event of a party being aggrieved by the refusal or grant of a licence. The clothing of such "aggrievement" as a basis for the applicants' suspicion that the respondent is about to or intends to break the law does not in my view, justify or lay the basis for the granting of the relief sought in both paras (a) and (b).

In addition to what is stated above, the applicants, by their own admission, have decided to withhold payment of rentals for the premises for the month of January 2011. They justify this decision on the basis that they are not certain whether or not they will be ejected. Thus in one breath the applicants advise the court that they have decided not to and they have not paid rent as required in terms of their lease agreement and in the next breath they ask the same court to ensure that the other party is held to the terms of the same lease agreement which they are breaching themselves.

It is common cause that the dispute relating to the rights of the parties in terms of the lease agreement is pending before the court. The proceedings in which the eviction of the applicants

from the leased premises is sought is also pending before the court. In all, the parties they have four matters pending in the High Court. The applicants seek the relief stated in paras (a), (b) and (d) pending the determination of the said pending matters yet they have decided to withhold payment of rentals to the respondent before the same matters have been determined. If the applicants' clear or *prima facie* right is based on their rights in terms of the lease agreement, as they contend, it makes a mockery of justice for them to ask the court to grant the relief that they seek when they have decided to conduct themselves as if they are not bound by the lease agreement.

Clause 14 of the lease agreement which was referred to in the order of 24 December 2010 provides as follows:

> "14. LESSOR'S RIGHT OF ENTRY
>
> 14.1. The lessor's representatives, agents, servants and contractors may at all reasonable times enter the property, or any part of the property, in order to inspect it, to carry out any necessary repairs, replacement or other works of a structural nature, or to perform any other lawful function in the *bona fide* interests of the lessor. The lessor shall ensure that this right is exercised with due regard for, and a minimum of interference with, a beneficial enjoyment of the property by those in occupation thereof.
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> 14.2. The lessee shall not, however, cause or allow any major building works to be carried out anywhere upon the property without the lessor's prior written consent. The lessor shall ensure that, even after the lessee's consent is so obtained, the building works are completed within a reasonable time"

The relief sought in para (d) is in effect a review of an order issued by this court on 24 December 2010. It does not appear to me to be a competent order for this court to grant. In any event, in answer to the court's question as to the competency of such an order, the applicants' legal practitioner submitted that he had also advised his clients earlier about his doubts as to its competency and about the possibility of the court raising such a query. He was unable to make any submissions in support of the competency of such an order. It is not proper for a legal practitioner whether in an urgent chamber application or otherwise, to seek from the court an order which he knows to be incompetent. Such conduct is reprehensible.

As for the order sought in para (c) of the interim relief wherein the respondent is to restore the applicants' signage, the applicants' justification is that the respondent has exceeded the limits of the order of 24 December 2010. If the respondent has exceeded the limits of the order as alleged, the applicants' remedy would appear to be, as submitted on behalf of the respondent, to bring contempt of court proceedings against the respondent. The applicants have chosen not to do that. Rather, after denying the respondent access granted to it in terms of the order of 24 December, 2010, they then instituted these proceedings in which the relief which they seek, if granted, has the overall effect, in the main, of circumventing the said consent order.

In the result I am not satisfied that the applicants have established a right; that they have established a reasonable apprehension of irreparable harm and that there is no other alternative remedy. The applicants have not laid a basis justifying the court exercising its discretion in their favour and granting them the relief that they seek in the provisional order attached to their application. The applicants' own admitted conduct further tips the balance against them. Costs will follow the cause.

I therefore dismiss the application with costs.

Wintertons, applicants' legal practitioners
Scanlen & Holderness, respondent's legal practitioners