

YEMANE BERHE WELDESLASSIE
versus
MORDORIC MARKETING (PVT) LTD
and
MOLLIE MUCHABAIWA
and
SHAMSTER INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 24 January 2013

Urgent Application

Ms B. Rupapa, for the applicant
T.I. Gumbo, for the respondents

MATHONSI J: The applicant has approached this court on an urgent basis seeking the following relief:-

“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) First and second respondents be and are hereby interdicted from removing or disposing of any stock of goods from Bay 1 of Number 483 Hawthorn Road, Lochnivar, Harare until finalisation of ownership dispute.
- (b) First and second respondents be and are hereby ordered to return forthwith 70 (seventy) boxes of floor tiles removed by the respondents from Bay 1 of Number 483 Hawthorn Road Lochnivar Harare.
- (c) First and second respondents be and are hereby ordered to return forthwith any other goods that they removed from Bay 1 of Number 483 Hawthorn Road, Lochnivar, Harare.

TERMS OF INTERIM RELIEF SOUGHT (SIC)

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

- (a) First and second respondents be and are hereby interdicted from removing or disposing of any stock of goods from Bay 1 of Number 483 Hawthorn Road, Lochnivar, Harare until finalisation of ownership dispute.

- (b) First and second respondents be and are hereby ordered to return forthwith 70 (seventy) boxes of floor tiles removed by the respondents from Bay 1 of Number 483 Hawthorn Road Lochnivar Harare.
- (c) First and second respondents be and are hereby ordered to return forthwith any other goods that they removed from Bay 1 of Number 483 Hawthorn Road, Lochnivar, Harare”.

The interim relief sought by the applicant is exactly the same as the final relief that it seeks. This is undesirable in that the applicant seeks to virtually obtain final relief without having proved its case. This obtains from the fact that in an urgent application, the applicant is granted relief merely on establishing a *prima facie* case See *Kuvarega v Registrar General and Anor* 1998(1) ZLR 188 (H) 192 G-H and 193 A-B, *Qalisa (Pvt) Ltd v Zimra and Anor* HB 106/11 at pp 3-4 and *Chisina and Ors v Minister of National Housing and Social Amenities* HH 443/12 at p 3.

Confronted with that issue Ms *Rupapa* for the applicant conceded the irregularity and sought to amend the interim relief sought submitting that the papers had been drafted in a hurry owing to the exigencies of the matter.

At the commencement of the hearing of the matter Mr *Gumbo* for the first and the second respondents made an application for a postponement to enable him to file opposing papers which the respondents had not filed as they were given short notice of the hearing. The application was opposed by the applicant on the basis that further prejudice will be suffered by the applicant if the postponement was granted. Ms *Rupapa* added that the second respondent has been systematically removing goods which form the subject of the dispute from the warehouse. On 11 January 2013 she carted away 70 boxes of floor tiles.

Even as late as yesterday, 23 January 2013, the second respondent removed 250 boxes of floor tiles, a clear indication that she wants to defeat the process of this court. This court is obliged to protect its process.

The second respondent has not disputed that the goods are being removed even as the matter is pending in court or that this morning the parties had to attend at Southerton Police station over the continued removal of the goods. Owing to the urgency of the matter and the fact that the second respondent continues to act in disregard of the process that has been issued, the applicant issued summons against the respondents in case number HC 14184/12 seeking a determination of the ownership dispute, I refused to postpone the matter.

Indeed, no meaningful case was made for the postponement considering that the rules do not compel the respondents to file opposing papers in an urgent application.

On the merits of the application, the papers before me show that the parties entered into an agreement, the spirit of which was that the applicant would inject money and stock into a joint venture. The second respondent would market the goods brought into the country on behalf of the applicant for a commission and was also paid an allowance.

It would appear that at some stage the applicant wanted to suspend the joint venture agreement as a result of which the parties then signed a written agreement on 2 March 2012 the terms of which are clear, namely that the goods or stock being marketed by the second respondent as representative of the first respondent were to be moved to another warehouse to reduce overheads at their then warehouse number 1 Wayne Street Harare. In terms of clause 2.6 all the trading stock was to be placed under the control of one Tigist while the second respondent continued to market it. The arrangement was to subsist until 30 April 2012.

That agreement was extended by an addendum signed on 17 May 2012 to 31 July 2012 at which time the applicant was to take over the responsibility of selling the outstanding stock. No further extension was made.

Subsequent to that, a dispute arose between the parties over ownership of those goods. This prompted the applicant to institute summons action, aforesaid, seeking an order determining the rights of the parties. The first and the second respondents are still to oppose that action which was filed on 11 December 2012. What they have done though is to ignore the process and resort to removal of goods as if no litigation is pending.

I agree with Ms *Rupapa* that if the first and the second respondents actions are allowed to perpetuate there would be nothing left for the court to determine in HC 14184/12. Justice therefore demands that until such time that the respective rights of the parties are determined, the goods in dispute should remain secured.

I am therefore satisfied that a case has been made for interim relief barring removal or disposal of the goods which are the subject of the agreement signed on 2 March 2012 and its addendum signed on 17 May 2012 until the dispute is resolved by the court.

Accordingly, I grant the provisional order in terms of the draft order as amended.

Mutumbwa, Mugabe & Partners, applicant's legal practitioners
Atherstone & Cook, 1st & 2nd respondents' legal practitioners