

STANBIC NOMINEES PRIVATE LIMITED
and
STANBIC BANK ZIMBABWE LIMITED
versus
REMO INVESTMENT BROKERS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 29 July, 2013 and 16 October, 2013

Advocate T. Magwaliba, for applicant
E. Samkange, for respondent

MTSHIYA J: On 5 April 2012 respondents, under an *ex parte* application in case number HC 3694/12, were granted an Anton Pillar provisional order by this court. The terms of the interim relief were:

- “2. Respondent, its officials assigns, or agents on whom service is effected in terms of this order is ordered to allow the Deputy Sheriff, Mr Charles Chinyama (the Supervising Attorney) together with *Mr Jonathan Samkange* or failing him *Mr Everson Samkange*, the Applicant’s Attorney including the applicant’s officials to immediately enter the premises listed in paragraph 11 in the Founding Affidavit and any facilities and/or vehicles on such premises for the purposes of searching for and delivering into the Deputy Sheriff all the share certificates and any such documents listed in paragraph 5 of the Founding Affidavit and Annexure “A” and such documents which any of the afore mentioned persons reasonably believe to relate to the Applicant.
3. Respondents, its officials, assigns or agents on whom service is effected in terms of this order is further ordered to permit the said persons to remain on the premises until the search is completed and if necessary to re-enter the premises on the same or following day to complete the search.
4. The Supervising Attorney mentioned in paragraph 2 above together with the Deputy Sheriff shall make a list of the recovered and removed share certificates in terms of this order. A copy of this list shall be handed by the Supervising Attorney to the Applicant’s Attorney and to the 1st Respondent or any such officials representing the 1st Respondent referred to in paragraph 2 and 3 above. If present and a copy shall be retained by the Deputy Sheriff.
5. in the event any of the said share certificates or relevant documentation exist in computer readable form, Respondent and its official is ordered to forthwith provide the Deputy Sheriff with effect access to the computers and all necessary password to enable them to be searched and cause the listed items to be printed

- out, a printout of these items is to be given to the Deputy Sheriff or displayed on the computer screen so that it may be read and copied by him.
6. The listed items taken into possession by the Deputy Sheriff pursuant to this order shall be retained by him until the court orders otherwise. Save as provided hereinafter no person shall be entitled to inspect any of the items taken into possession by the Deputy Sheriff nor shall any copies of such documents be made. Provided that pending the return day for the sole purpose of satisfying himself that the inventory correctly reflects the items seized. 1st Respondents and his Attorney shall be entitled to inspect the items in the Deputy Sheriff's possession.
 7. Applicant is directed to serve the court application in case number HC 3624/12 on the Respondents within ten days from the date of this order and if it fails without good reasons being shown on the return day to have filed and served such application by that date, the Sheriff shall return all the items immediately to 1st Respondent and in such event the Court in its discretion shall make such order as it deems fit.
 8. On the return day there shall be placed before the Court the report of the Supervising Attorney with proof that a copy thereof has been served on the Applicant's Attorney and on 1st Respondent or their Attorney and an Affidavit of the Applicants Attorney that the said action has been duly instituted and if not the reason why this has not been done.
 9.
 - (a) Service of this order, together with the Notice on the 1st Respondent or the person responsible for the premises shall be effected and the content thereof shall be explained by the Supervising Attorney before the provisions of paragraph 2 are carried out.
 - (b) In addition to the served referred to in sub paragraph (a) above service of the order together with the Notice of Motion, supporting affidavits and accompanying Notice to Respondent shall be effected by the Deputy Sheriff in accordance with the rules of the court no later than 48 hours after the Supervising Attorney has directed that the search is finished.
 - (c) The provisions of paragraph 2 and 3 of this order may only be carried out in the presence and under the supervision of the Supervising Attorney.
 10. Pending the finalisation of the Applicant's claim against the Respondents in case number HC 3624/12, the 1st Respondent be and is hereby barred and interdicted from destroying, concealing in any way, cause to be shipped or flown our any of the documents relating to share and certificates belonging to the Applicant."

On 3rd May 2012 the provisional order was amended as follows:-

- "The Provisional Order granted on the 5th of April 2012 is hereby amended by;
- (i) Deleting on paragraph 2 line 5, paragraph 10- and substituting it with paragraph 11, and,
 - (ii) Adding on paragraph 2, the list of the companies and premises to be searched as follows;

Interfin Securities – 38 McChlery Avenue, Eastlea, Harare

Corpserve Private Limited – 2nd Floor, ZB Centre, Corner Kwame Nkrumah Avenue/First Street (formerly UDC Centre), Harare.

Kingdom Stockbrokers (Pvt) Ltd – 4th Floor Karigamombe Centre, Julies Nyerere Way/Samora Machel Avenue, Harare

Platinum Asset Management – 1st Floor, 5 Central Avenue, Harare

Stanbic Bank Zimbabwe Custodial – 59 Samora Machel Avenue, Harare

Barclays Bank Zimbabwe Custodial – Birmingham Road, Harare and any other such addresses to which Applicant's shares or subsequent shares are reasonably believed to be kept or hidden.”

The above amendment was necessitated by a failure on the part of the Deputy Sheriff to execute the order on the applicants.

The background to the above order is that on a date, not indicated in these papers, the respondent obtained a loan from Interfin Securities (Pvt) Ltd. (Interfin) and pledged its shares as security. The respondent repaid the loan in full and then demanded the return from Interfin of its shares and certificates. The shares and certificates were not returned. The respondent then filed an urgent *ex parte* application. The result was the above provisional order granted by this court. The Deputy Sheriff was then instructed to execute the order against those holding the shares and certificates. An attempt to execute on the applicants failed because the applicants argued that the order was not binding on them since they were not cited in the *ex parte* urgent application. That development led to this application wherein the applicants seek a declaratory order in the following terms:

“IT IS ORDERED:

1. That the Provisional Order issued on the 5th April 2012 as well as the Amended Provisional Order issued by this Honourable Court on the 9th May 2012 under Case no. HC 36894/12 are not binding on the 1st and 2nd Applicants.
2. That the Respondent shall pay the costs of this application.”

The parties to the *ex parte* urgent application appear on the provisional order. They do not include the applicants. However, paragraph 2 of the order makes reference to the Founding Affidavit in HC 3694/12 – wherein in paragraph 11 of the said affidavit the following entities are listed:-

- “(i) Interfin Securities – 38 McChlery Avenue, Eastlea, Harare
- (ii) Corpserve Private Limited – 2nd Floor, ZB Centre, Corner Kwame Nkrumah Avenue/First Street (formerly UDC Centre), Harare.
- (iii) Kingdom Stockbrokers (Pvt) Ltd – 4th Floor Karigamombe Centre, Julies Nyerere Way/Samora Machel Avenue, Harare
- (iv) Platinum Asset Management – 1st Floor, 5 Central Avenue, Harare
- (v) Stanbic Bank Zimbabwe Custodial – 59 Samora Machel Avenue, Harare
- (vi) Barclays Bank Zimbabwe Custodial – Birmingham Road, Harare and any other such addresses to which Applicant’s shares or subsequent shares are reasonably believed to be kept or hidden.”

The amendment of the Provisional Order on 3 May 2012 was meant to incorporate the above listed entities. However, that incorporation did not amend the parties to the application. The parties remained as they were in the *ex parte* application.

In its opposing affidavit, the respondent, in part, states:

“1. **Relief sought incompetent**

Applicants are seeking to review or appeal the provisional order in case no HC 3694/12 by applying for a declaratory order. The provisional order complained of categorically authorised the Deputy Sheriff to enter certain premises which included Applicants’ premises. What Applicants are seeking now is to have the provisional order varied through a declaratory order. This is incompetent. Applicants are seeking this same court to review its own order and the application should fail on this basis alone.

2. **Applicants have dirty hands**

Applicants’ conduct is contemptuous and unethical. A litigant who defies a court order cannot be heard until they have complied with what the order says. Applicants deliberately, in a bid to defeat the provisional order, caused the transfer of Old Mutual shares through Corpserve (Private) Limited, to a South African Company Peregrinne Pty Ltd and which shares were deposited with Kantor and Immerman on 16th May 2012.

More fundamentally, the Respondent sought amendment to the order specifically to cover the Applicants and it was this amendment, which Applicant evaded. This conduct is unlawful and defeats the integrity of court orders. Applicants should therefore be denied audience until they comply with the court order.”

15. Applicants have ignored free legal counsel. Applicants, though their legal practitioners of record were hinted to make an application for joinder which application would not be opposed. The Applicants did not do so. It was not only legally impossible, but it is also a practical falsity to believe that all the depositories of the Respondent's shares could be cited with precision. The volatile nature of shares was also taken into account by His Lordship in granting the order in HC 3694/12. This application is an attempt by the Applicants to cover up for their disobedience of a valid court order. The court should proceed to deny Applicants audience until such time as they purge their contempt."

According to the respondent, at the time of the hearing of this matter, the shares were no longer in the custody of the applicants and hence the submission that "the declaratory order sought is of an academic interest to the applicants and no more than that." The respondent relying on *Ngulube v Zimbabwe Electricity Supply Authority and Others* (S) 52/02 correctly spelt out the requirements for a declaratory order as follows:

- "1. the applicant had to have an interest in an "existing future or contingent right or obligation";
2. the interest must not be an academic or abstract one;
3. there must be an interested person on whom the declaratory order would be binding;
4. the remedy is available at the discretion of the court and the applicant must satisfy the court that the case was a proper one"

The respondent went further to submit that;

- "12. Applicants did not comply with the order which required the search and seizure of shares and share certificates. Respondent, notwithstanding Applicants' disobedience of the order, have sought a confirmation of the court order from this Honourable Court. Applicants have disposed of the shares to a third party and there is nothing to be retrieved from them. Applicants defeated the court order.
13. It is submitted that the relief of a declaratory order is espoused in the various court cases, is not available for parties seeking to make an academic or intellectual point. There must be some justifiable advantage. See in this regard *Barron v Greendale Town Management Board* 1957 (2)SA 521 (SR), *Musara v Zinatha* 1992 (1) ZLR page 9 (H) and *Lupu v Lupu* 2000 (1) ZLR 120 (SC)."

The respondent prayed for the dismissal of the application with costs on an attorney – client scale.

On their part the applicants justified their case by relying on Section 14 of the High Court Act [Cap 7.06] which provides as follows;

“The High Court may, in its discretion, at the insistence of any interest person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

The applicants’ position was that they were not obliged to obey an order in which they were not cited. All they wanted was for the court to make a determination on whether or not the order granted to the respondent was binding on them when they were not cited as parties in the matter. The applicants submitted, in part, that:-

- “10. From the foregoing it is clear that the court order obtained by the Respondent in this matter was an order *ad factum praestundum*; that is an order to do, abstain from doing a particular act or deliver a thing “(See *Hebstein and Van Winsen*, the Civil practice of the Superior Courts in South Africa 3 ed p 653. Such an order by its nature can only be enforced against the particular Respondent named in the court order and by no way can be construed as an order affecting status and therefore an order or judgment in *rem*.
11. In view of the foregoing, it would have been therefore imperative in order for the Applicants to be bound by the orders obtained and sought to be enforced against them that they be cited therein. The failure to cite the Applicants clearly means that the order obtained cannot be enforced against them. In *Rodgers and Ors v Muller and Ors 2010* (1) ZLR 49 (H) this court ruled that Rule 87(1) of the High Court of Zimbabwe Rules 1971 did not absolve a litigant of the obligation to cite all the relevant parties. Patel J at 53B – C stated as follows:-

‘The discretion of the court in this regard must be exercised so as to ensure that all person who might be affected by its determination of the issues in dispute be afforded the opportunity to be heard before that determination is actually made.’

The court therefore held in the matter that, the failure to cite the relevant minister was a fatal defect and the application in that matter should be dismissed simply on the basis of that preliminary issue.”

In essence the applicants contend that there was no order to comply with and as such the issue of approaching the court with dirty hands does not come into play. The applicants neither deny nor confirm whether or not the certificates and shares are still in their custody. That, in any case, would be irrelevant to them, since, in the absence of a court order, they could deal with the shares and certificate without hindrance.

In the *Headnote to Cooper v Leslie and Ors 2000* (1) ZLR 14(H) the following appears;

“An *Anton Piller* order is a modern legal remedy devised to cater for modern problems in the prosecution of civil actions. The procedure allows a party to make an *ex parte* application, without notice to the other side, for the attachment and removal of

documents or other evidence. It has its genesis in English Law. Originally, its use was confined to cases *involving intellectual* property, but has since been extended to cover other civil cases. It has, after some initial reluctance and some contradictory judgments, been accepted by the courts of South Africa and should be accepted as part of the law of Zimbabwe.

An applicant for an *Anton Piller* order must *prima facie* establish:

1. that he has a cause of action against the respondent which he intends to pursue;
2. that the respondent has in his possession specific and specified documents or things which constitute vital evidence in substantiation of the applicant's cause of action, but in respect of which the applicant cannot claim a real or personal right; and
3. that there is a real and well-founded apprehension that this evidence may be hidden or destroyed or in some manner spirited away by the time the case comes to trial or to the stage of discovery.

The remedy may, if used indiscriminately, become an instrument of oppression, so the court must proceed with caution and impose safeguards to protect the rights of the party against whom the relief is sought. In exercising its discretion, the court must pay regard to the cogency of the *prima facie* case established with reference to the three items listed above; the potential harm that will be *suffered* by the respondent if the order is granted, as compared to the potential harm to the applicant it is not; and whether the terms of the order sought are no more onerous than is necessary to protect the interests of the applicant." (my own underlining)

In his judgment in *Cooper*, supra, Devitte J. notes:

1. "There are two respects in which an *Anton Piller* order is unusual. Firstly, it is akin to a search warrant, in that the plaintiff and his attorneys are authorised to enter the respondent's premises and to inspect them or remove documents or other goods. Secondly, no prior notice is given to the respondent." (my own underlining)

From the above it is, in my view, quite clear that the *Anton Piller* order should be directed to a specific respondent to whom notice is being denied until the search is effected. That is what brings the need for the court "to proceed with caution and impose safeguards to protect the rights of the party against whom the relief is sought." Surely such a party (respondent) must be known and it can only be known through citation as a party to the proceeding(s). The respondent *in casu*, as contained in its founding affidavit, knew who it wanted to proceed against

but decided to bring into the body of the order the “parties to be searched”. The respondent knew that the premises’ belonged to the applicants (*see paragraph 1 of the opposing affidavit quoted herein at page 4*). I am unable to accept that that was the citation expected by the applicants and envisaged in law. I am certain that, prior to the amendment, the respondent knew what the applicants wanted as reflected in one its letters.

On 3 May 2012 the respondent’s Legal Practitioners wrote to Hungwe, J in the following terms:

“At the hearing of the urgent application held on the 4th of April 2012 our Mr Samkange advised your Lordship that an application to amend the Anton Pillar order had been made before Justice Patel. Justice Patel had issued the original Provisional Anton Pillar Order. It has not been amended. A copy of the Amended Provisional Order is attached hereto.

Our appreciation of the Applicant complained against the original order is that they had not been cited in the Provisional order. This has since been rectified.

1. Consequently the basis of the complaint has since been attended to by the amendment. We are copying this letter to all the parties affected.” (my own underlining)

In *Dynamos Football Club (Pvt) Ltd and Anor v ZIFA & Ors 2006 (1) ZLR 346 (S)* it was stated:-

“.....It is trite that an order requiring the performance of acts which may be prejudicial to the interests of a person should not be made by a court of law when he is not a party to the proceedings and has not been heard on the matter.”

In casu the applicants were being ordered to surrender shares and allow searches of their premises. No regard was being made to any possible contractual arrangements they might have had with other third parties.

In light of the fact that I do not subscribe to the notion that the respondent’s order amounted to a judgment in *rem*, I find the purported actions of the Deputy Sheriff unacceptable. To me this was an order between specific parties and it applied only to those specific parties (i.e. the cited parties). This interpretation of the order, does not in any way interfere with the order as granted by the court. There is therefore no merit in submitting that the application is intended to review or rescind the order. The applicants are far from saying so. It cannot be denied that the effect(s) of the order had an adverse impact on the applicants’ rights and interests (i.e. present and future). Accordingly execution against them when there were not parties to the matter has

no place in our law. I therefore do not hesitate rejecting the submission that this is an academic exercise. The applicants have a right to have the legal position pronounced in terms of the declaratory order they seek.

I therefore order as follows:-

IT IS ORDERED THAT:

1. The Provisional Order issued on 5 April 2012 as well as the Amended Provisional Order issued by this Honourable Court on the 3 May 2012 under case number HC 3694/12 are not binding on the 1st and 2nd Applicants; and
2. The Respondent shall pay the costs of this application.

Messrs Atherstone & Cook, Applicant's Legal Practitioners

Messrs Venturas & Samkange, Respondent's Legal Practitioners