SOUTHMARK TRADING (PRIVATE) LIMITED
and
KINGS BRAKE AND CLUTCH (PRIVATE) LIMITED
and
MSASA AUCTIONS (PRIVATE) LIMITED
and
VENROCK T/A SOLBAT ENTERPRISES
(PRIVATE) LIMITED
and
RACER PANEL BEATERS (PRIVATE) LIMITED
and
L & D FIBREGLASS (PRIVATE) LIMITED
and
LEXINN (PRIVATE) LIMITED
and
FREDERICK PANEL BEATERS
and
LYSTRA OIL (PRIVATE) LIMITED
and
TURBO CENTRE
and
CARSON ENTERPRISES T/A MSASA
GEARBOX AXLE CENTRE
and
DALAS AUTO (PRIVATE) LIMITED
versus
KAROI PROPERTIES (PRIVATE) LIMITED
and
LORNA CRUGER
and
RETIRED MAJOR CHADEMANA
and
GEDION HWEMENDE
and
NATIONAL INDIGENISATION AND ECONOMIC
EMPOWERMENT BOARD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 and 24 September, 31 October 2012
and 15 February 2013

Urgent Chamber Application

Mrs *T Chiguvare* for the applicants
W Bherebhende for the 1st and 4th respondents
G M Crossland for the 2nd respondent
No appearance for the 3rd respondent
G N Mlotshwa for the 5th respondent

ZHOU J: The biblical aphorism: "Whatever a man sows, that he will also reap" has lost its meaning in our society. This matter presents a sordid picture of a culture of wanting to reap where persons did not sow. The matter was instituted as an urgent chamber application on 18 September 2012. Through the urgent application the applicants seek an order interdicting the respondents from claiming or demanding payment of rentals from them until the dispute relating to the directorship and shareholding of the first respondent is resolved. The applicants also want an order that they deposit their monthly rentals due to the first respondent into the trust account of Muvirimi Nyamwanza & Partners who represented them at the hearing. Finally, the applicants ask that proceedings instituted against them by the first respondent in the Magistrates Court at Harare for their eviction and rent be stayed pending determination of the matter. The proceedings in the Magistrates' Court were instituted by Bherebhende Law Chambers legal practitioners on behalf of the first respondent, and on instructions from the fourth respondent.

The facts which underlie the dispute may be summarised as follows:

All the applicants are tenants who occupy premises at Stand 184 Mutare Road, Msasa, Harare. The premises are owned by the first respondent. There are other properties which are owned by a company known as Beverley Properties (Pvt) Ltd which is a sister company to the first respondent. But those are not the subject of the instant application and are mentioned for because they are referred to in many of the documents produced by the parties. For some time before the dispute arose the applicants were paying rent to estate agents appointed by the first respondent, Robert Root & Co (Pvt) Ltd. From September 2011 the applicants were instructed to pay the rent to Honey & Blanckenberg legal practitioners who they were advised represented the first respondent. Problems started when the applicants were presented with a letter dated 30 September 2011 which was purportedly written on behalf of the fifth respondent, the National Indigenisation and Economic Empowerment Board. The letter is addressed "To Whom it May Concern". It states that the first respondent and its sister companies named in the letter have "been indigenised in favour of Gedion Hwemende, an

indigenous person as defined by s 2 of the Indigenisation and Economic Empowerment Act". The letter further states:

> "Mr Hwemende, who previously held 40% shares in the above mentioned companies, now holds 100% shares. As majority (*sic*) shareholder of the company we expect that all concerned will enable Mr Hwemende to take effective control of the company and all its assets."

Brandishing the letter referred to above, the fourth respondent demanded that the applicants pay rent for their occupation of Stand 184 to him. He asserted that he was the only shareholder of the first respondent. In response, Honey & Blanckenberg wrote to the applicants a letter dated 1 November 2011. The letter states the following:

> "There has been no change in ownership of the properties situate on Robert Mugabe Road which are owned by Beverley East Properties (Pvt) Limited and Karoi Properties (Pvt) Ltd. Robert Root Property Consultants of 65 Central Avenue who were managing the properties decided to withdraw from management of the properties while the present difficulties with the properties were being resolved. There has been to our knowledge no change in the share ownership of the Companies who are the registered owners of the properties and all tenants have leases with the companies in terms of which they are required to pay their rentals and their share of operating costs to the offices of Robert Root. This has now for the present been changed and tenants must pay their rentals and costs to this office as we have for years (represented) and still represent the companies from which you lease the properties you occupy. Should you make payment to any other party you will be in breach of your leases and will be evicted from the properties. Payment of your rent and charges to any third party does not constitute payment of your rent. The attached letter of 6th October 2011 from Robert Root addressed to the writer does not constitute a change in ownership of the companies or the obligation to pay rentals to the companies which monies must be used to pay for the rates and charges to the parties that provide services to the companies and to maintain the properties where the obligation is not on the tenant in terms of the leases. If you are concerned about this, you should consult your legal practitioners or your advisors or the writer."

In December 2011 the applicants were served with two letters written by Bherebhende Law Chambers. Both letters are dated 21 December 2011. The first letter is addressed to Kenneth Regan of Honey & Blanckenberg and makes reference to the collection of rentals from properties owned by Karoi Properties and Beverley East Properties. It reads as follows in the relevant parts:

> "We advise that as of 30 September 2011 our client Gedion Hwemende is now the 100% shareholder in the two companies as will more fully appear from annexure A hereto. We have been advised that you have been collecting rentals from the tenants

> occupying the factories and houses owned by these companies. We advise that you have no right whatsoever to claim rentals from the tenants of the two companies and should you continue to do so we will press criminal charges against yourself and against the person on whose behalf you are claiming. We hope you will be guided accordingly."

The second letter was addressed to the "tenants of Karoi Properties at 184 Mutare Road". Although it is written by Bherebhende Law Chambers, it is stated to be "from: OUR CLIENT GEDION Hwemende." The letter states the following:

> "We advise that Gedion Hwemende, our client, is now the owner and 100% shareholder of Karoi Properties, your landlord as will more fully appear from annexure A hereto. We advise therefore that all the rentals should be paid to Gedion Hwemende and not to any other person. Until you have been advised otherwise in writing payments should be made at:
>
> Bherebhende Law Chambers Legal Practitioners
> 124 Samora Machel Avenue West
> (Opposite Harare Exhibition Park)
> Harare
>
> And receipts will be issued. The payments should be made monthly in advance before every month end. The failure to pay rent on time or the payment of rent to any other person or authority who is not the landlord but who claims to be such shall result in legal proceedings being instituted for your eviction without further notice to yourself. We hope you will be guided accordingly."

The applicants' dilemma continued to unfold. By memorandum dated 9 February 2012 addressed by Honey & Blanckenberg to the "Tenants 194, 184, 186, 188 Mutare Road" the following was communicated:

> "It has been established from the Indigenisation Board set up by the Ministry of Indigenisation that none of the abovementioned properties owned by Beverley East Properties and Karoi Properties have in any way been indigenised. Accordingly Hwemende and any of the other parties connected to him should not come onto the properties and should not interfere with the tenants in any way. Any leases which they have purported to give to tenants are invalid. Many of the tenants particularly 184 and 186 and on the other properties have not been paying rent to the companies which they are required by law to do … Any tenants who has (*sic*) not paid his/their rent and operating charges for whatever reason since October 2011 are required to immediately move off the properties and where appropriate return the keys of the properties to the writer at this office failing which action will be taken against them. The properties must be left in good order and all debris must be removed from the premises. There are other tenants readily and willing to move on to the properties."

On 27 July 2012 Bherebhende Law Chambers wrote to the applicants referring to their letter of 21 December 2011 and demanding payment of rent to them within five days of the date of the letter. They threatened "to seek a rent attachment order (*sic*) pending your eviction from the premises". True to that threat, proceedings were instituted against the applicants for recovery of rent and eviction from the premises in August 2012. The proceedings were by way of summons issued out of the Magistrates Court at Harare under case number 14405/12. Those proceedings triggered the urgent application *in casu*.

The application was set down for hearing on 20 September 2012. At that hearing only Mrs *Chiguvare*, Mr *Bherebhende*, and Mr *Mlotshwa* appeared representing their respective clients stated above. The respondents had not filed opposing affidavits then. After I had dismissed the objection *in limine* taken on behalf of the first and fourth respondents by Mr *Bherebhende* that the matter was not urgent, the parties proceeded to make submissions on the merits. During the course of making his submissions Mr *Bherebhende* requested that the matter be postponed to 24 September 2012 to give the first and fourth respondent an opportunity to file opposing affidavits. I allowed the postponement, as the first and fourth respondents had made an undertaking that pending finalisation of the matter no further action would be taken which would affect the applicants' interests to which the application related. I directed the applicants to serve the chamber application upon Honey & Blanckenberg legal practitioners who were brought into the dispute by reason of having demanded payment of rentals from the applicants as shown above.

Mr *Mlotshwa* was excused from attending the resumed hearing following a concession by the other counsel that the fifth respondent should not have been cited in the first instance, as the document which was attributed to it was forged and had not emanated from its office. He, however, urged the court to award the fifth respondent the costs it incurred when it was cited in the proceedings. I will revert to this aspect of the fifth respondent's costs later in this judgment.

On 24 September 2012 only Mrs *Chiguvare* and Mr *Bherebhende* appeared. Opposing papers had been filed on behalf of the first and fourth respondents on 21 September 2012. During argument it became clear that the matter could easily be resolved if the directors of the first respondent resolved the question of who should receive the rentals from the applicants on behalf of the first respondent. The handing down of the judgment was accordingly postponed at the request of the parties who indicated that the matter could be

resolved out of court. The postponement was again on the undertakings given on behalf of the first respondent that no action adverse to the applicants would be taken and that the proceedings at the Magistrates' Court would be held in abeyance. In the intervening period a third law firm, Tavenhave & Machingauta legal practitioners, wrote to the applicants a letter dated 19 October 2012. In that letter they demanded that rentals owed to the first respondent and Beverley Properties be paid through their office. The letter stated that:

> "… failure to comply with the same shall result in eviction notices being preferred (*sic*) against you."

I caused the parties to attend a meeting to determine the fresh demand. At that meeting the parties agreed that the matter could be resolved and asked for more time to resolve the issue. During that time Atherstone & Cook advised of their instructions to represent the second respondent. They filed an affidavit in which the second respondent states that she does not oppose the granting of the relief being sought. The affidavit sets out what the second respondent perceives to be the correct shareholding structure of the first respondent. She challenges the agreement in terms of which the fourth respondent claims to be a shareholder of the first respondent which, according to her, is a forged document. It is not necessary for me to determine the question of the shareholding of the first respondent for the purposes of the instant application.

What is being sought by the applicants is essentially an interim interdict that the first, second, third and fourth respondents should not demand rentals from the applicants through different law firms as has been happening until they have resolved the directorship of the first respondent. The requisites for such temporary relief are settled. They are:

(a) That the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
(b) That, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) That the balance of convenience favours the granting of interim relief; and
(d) That the applicant has no other satisfactory remedy.

See *Nyika Investments* (*Pvt*) *Ltd* v *Zimasco Holdings* (*Pvt*) *Ltd & Ors* 2001 (1) ZLR 212 (H) at 213G-214B*;* *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Econet* (*Pvt*) *Ltd* v *Minister of Information, Post and Telecommunication* 1997 (1) ZLR 342(H) at 345B.

Where a clear right is proved the applicant for a temporary interdict need not show that he or she will suffer irreparable harm if the interdict is not granted. The applicant merely has to show that an injury has been committed or that there is a reasonable apprehension that an injury will be committed. *Nyika Investments* (*Pvt*) *Ltd* v *Zimasco Holdings* (*supra*) at 214B-D.

In the instant case the applicants have a clear right to occupy the premises which they lease from the first respondent. That right entails the right to peaceful use and enjoyment of the leased property without any disturbance from different agents or law firms purporting to act for the same landlord. Injury has already been committed in the form of the disturbances of or interference with the applicants' business operations and the making of a claim for their eviction in the Magistrates' Court. I have no difficulty in finding that the balance of convenience favours the granting of the relief. The prejudice which the applicants would continue to suffer if the interdict is not granted outweighs any inconvenience which may be experienced by the first respondent if the interim relief is granted. I accept, too, that the applicants have no alternative remedy which would afford them satisfactory relief against the infraction of their rights by the first to fourth respondents and their appointed agents. I am, therefore, satisfied that the applicants are entitled to the relief being sought.

A notice of renunciation of agency was filed by the applicants' legal practitioners before the judgment was given. That necessarily affects the relief relating to where the rentals to be paid are to be kept pending determination of the matter. In my view, a neutral person should receive the rentals and hold them in trust for the first respondent pending resolution of the disputes referred to above regarding its directorship. The Registrar of the High Court would be the appropriate authority to receive the money or to appoint a person to receive it.

The third respondent did not attend any hearing although he was served with the applicant's papers. He has not, therefore, contested the allegations made against him in the applicants' affidavits.

I need to consider the costs of the fifth respondent. It is clear from the papers filed that the fourth respondent, Gedion Hwemende, is the one who relied on the forged letter which he claimed had been written on behalf of the fifth respondent. Based on that letter, he claimed to

be the holder of the entire shareholding in the first respondent, and went on to demand rentals on that basis. The citation of the fifth respondent was, therefore, occasioned by him. The conduct of the fourth respondent warrants that the fifth respondent which was put out of pocket recovers its costs on an attorney-client scale. The fourth respondent was aware that he could not just wake up to find himself as the holder of all the shares in a company for free. He would know, too, that the indigenisation legislation does not operate in the manner that he sought to portray to justify his claim to a 100% shareholding in the first respondent.

The question of the applicants' costs will be determined at the stage of confirmation or discharge of the provisional order.

In the result, it is ordered as follows:

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:

1. The first, second, third and fourth respondents are interdicted from demanding rent from the applicants other than in accordance with a valid resolution of the duly appointed directors of the first respondent which resolution shall be furnished to the applicants.
2. The first, third and fourth respondents shall pay the costs of this application on an attorney-client scale jointly and severally the one paying the others to be absolved.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicants are granted the following relief:

1. The applicants shall pay the monthly rentals due to the first respondent to the Registrar of the High Court or to a reputable estate agent appointed by the Registrar and the amounts paid shall be held in trust for the first respondent until the issues of its shareholding and directorship have been resolved.
2. The proceedings instituted by the first respondent against the applicants in the Magistrates' Court in case number MC 14405/12 be and are hereby stayed.
3. The third respondent and all persons claiming occupation through him shall forthwith vacate the premises he occupies on Stand 184 Mutare Road, Msasa, Harare, failing which the Deputy Sheriff shall take all steps necessary to eject him from the premises.

4. The fourth respondent shall pay the firth respondent's costs on an attorney-client scale.

SERVICE OF PROVISIONAL ORDER

The applicants' legal practitioners are given leave to serve a copy of this provisional order upon the first, second, third and fourth respondents.

Muvirimi Nyamwanza & Partners, legal practitioners for the applicants
Bherebhende Law Chambers, legal practitioners for 1st & 4th respondents
Atherstone & Cook, legal practitioners for 2nd respondent
G.N. Mlotshwa & Company, legal practitioners for 5th respondent