AMOROSE INVESTMENTS (PRIVATE) LIMITED (under Liquidation)
versus
NORWICH TRADING (PRIVATE) LIMITED
and
SPRAYTECH (PRIVATE) LIMITED
and
THE MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 24 & 25 September & 3 October 2018

Urgent chamber application

T. Goro for the applicant
S. Mpofu for the 1st respondent
T. W. Nyamakura, with him *M. Mbuyisa*, for the 2nd respondent
No appearance for the 3rd respondent

ZHOU J: This is an urgent chamber application for an interim order that pending determination of the present matter on the return date the first respondent forthwith delivers to the Sheriff all the machinery and equipment listed in the applicant's papers and for such machinery and equipment to be kept under the custody of the second respondent with the third respondent exercising supervision over such custody. The final order sought is that pending determination of the application for rescission of judgment instituted by the applicant under Case No. HC 8599/18 the machinery and equipment referred to in the interim relief be "parked and stored at the premises of the second respondent under the control and supervision of the third respondent". The application is opposed by the first respondent. The second respondent filed an affidavit but advised in the affidavit and through its legal practitioner at the hearing that it elected to abide by the decision to be made in this matter and was not, therefore, opposing the application.

The interim relief sought in this application is the same as the final relief which is being sought, a situation which this court has held to be undesirable, see *Kuvarega* v *Registrar-General & Anor* 1998 (1) ZLR 188(H) at 192G-193D. The applicant would have no motivation to seek

confirmation of the provisional order if the interim relief sought was to be granted in its current formulation as it would have obtained that which it seeks in the final relief. In fact, the background of this case illustrates the need for avoidance of relief which has final effect in a provisional order, because in Case No. HC4411/14 the applicant herein obtained a provisional order, executed upon it, and withdrew the application instead of seeking confirmation of the provisional order. It had used the interim relief granted to obtain custody of the property which is also the subject of the instant application. This concern enjoins litigants to properly apply their minds to the formulation of the draft orders in court application.

The background to this case is as follows. The applicant and first respondent had a dispute over certain movable property consisting mainly of machinery and equipment which were being used in the restaurant business of the first defendant. The applicant instituted proceedings by way of an urgent chamber application under Case No. HC 4411/14 and obtained a provisional order which entitled it to take custody of the machinery and equipment. The provisional order was granted on 5 June 2014. The interim relief granted in that order was as follows:

> "That pending confirmation or discharge of the provisional order, the Applicant is granted the following relief:-
> (a) The Sheriff or his authorized deputy is hereby empowered, directed and ordered to take possession of assets listed in the attached schedule, Annex C, wherever they may be situate and deliver them to Spraytech Private Limited at 12 Nuffield Road Workington, Harare for safe custody."

Spraytech (Private) Limited is the second respondent *in casu*.

The terms of the final order sought were as follows:

> "1. The assets listed in the attached schedule, Annex C. shall be delivered to the liquidator of applicant.
> 2. Respondent shall pay the sum of US$31 000.00 together with interest *a tempore morae* at the prescribed rate until the date of final payment.
> 3. Respondent pays the costs."

The applicant proceeded to execute the provisional order by removing the property and placing it in the possession of the second respondent. No steps were taken to set the matter down for confirmation of the provisional order. Instead on 7 March 2018, nearly four years later, the applicant failed a notice of withdrawal of Case No. HC 4411/14. On 22 June 2018 the first respondent instituted a court application under Case No. HC 5822/18 and obtained an order for

the recovery of the machinery and equipment. The applicant and second respondents were cited as the respondents in that application. Only the applicant filed a notice of opposition and opposing affidavit in that matter. The first respondent withdrew the application in HC 5822/18 against the applicant and proceeded against the second respondent, apparently on the basis that it was the party that had custody of the property. Having obtained the order in Case No. HC 5822/18 the first respondent recovered the property from the second respondent. The first respondent alleges, and it has not been disputed by the applicant, that some of the property which was had been placed under the custody of the second respondent had gone missing and no account had been given about its whereabouts. The recovery of the property pursuant to the order granted in HC 5822/18 is what triggered the instant application. The applicant has also filed a court application under Case No. HC 8599/18 for the setting aside of the judgment granted in Case No. HC 5822/18.

The requirements for an interim or a temporary interdict are settled. These are (1) that the right which is sought to be protected is clear; or (2)(a) if it is not clear, it is *prima facie* established, though open to some doubt and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right; (3) that the balance of convenience favours the granting of interim relief; and (4) the absence of any other satisfactory remedy, *Econet (Pvt) Ltd* v *Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342(H) at 344G-345B. Whether the applicant has a right is a matter of substantive law; whether that right is clearly or only *prima facie* established is a question of evidence. The right must be a legal right, one that derives from a branch of law, see *Minister of Law and Order* v *Committee of the Church Summit* 1994 (3) SA 89(B) at 98; *Lipschitz* v *Wattrus NO* 1980 (1) SA 662(T) at 673D.

The applicant has not adduced evidence to establish the right to the property. Mr *Goro* for the applicant submitted that the interdict must be granted because there are competing claims between the applicant and respondent over the property. The mere existence of a dispute over property does not create a right to that property. The existence of the right must be established by evidence. The applicant had taken the property and placed it under the custody of the second respondent in the execution of an order granted in its favour in Case No. HC 4411/14. The right to place the property under the custody of the second respondent had been conferred by the order

of court. Once the application was withdrawn by the applicant the order fell away. The first respondent was entitled to demand a return of the property to it because the order in terms of which it had been deprived of its possession of the property was no longer in existence.

Once the conclusion has been reached that no right has been established the question of harm or injury or prejudice does not arise. In any event, the applicant would not on the papers filed establish such prejudice or that there are grounds for a reasonable apprehension that his rights will be detrimentally affected. The first respondent had always had custody of the property prior to the granting of the provisional order in HC 4411/14. Even after the order was granted the goods were kept not by the applicant but by the second respondent. As noted earlier on, some of the property cannot be accounted for as it appears to have gone missing under the custody of the second respondent. Yet the applicant seeks an order that the remaining property be returned to the same second respondent even in the face of the undisputed statement pertaining to the missing property. Thus on the papers filed prejudice is actually likely to be suffered if the property is returned to the custody of the second respondent. On this account, the balance of convenience would favour the refusal to grant the interdict sought.

The applicant has also not shown that it has no other adequate remedy if the interdict is refused. If at all the applicant was to establish a right to the property any loss of or damage to the property would be compensated by way of damages. Cilliers *et al* in *Herbstein & Van Winsen The Civil Practice of the High Courts of South Africa 5th Ed*, at p. 1469 state the following about damages as an alternative remedy: "The alternative remedy that most frequently arises for consideration is damages. The general rule is that courts will not grant an interdict if the applicant can be adequately compensated for the injury complained of by an award of damages." The applicant made no submissions on this factor and must be taken to admit that there is an alternative remedy.

It is trite, too, that an interdict is a discretionary remedy. In the case of *Francis v Roberts* 1972 (2) RLR 238(A) at 248F, BEADLE CJ said: "(T)he court always has a discretion to refuse to grant an interdict even though all the requisites for an interdict are present. That that is so is beyond question." See also *Watson* v *Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E. The effect of the interdict which is being sought by the applicant is to reverse the execution of an order which execution has already taken place while the order itself remains extant. The

interdict being sought seeks to undo the effect of an order which is valid. There is nothing in the interim relief sought to suggest that the applicant is seeking suspension of the order but even if that were so, the suspension would be of no consequence because the process of executing that order has been completed. The applicant is not seeking the setting aside of the writ of execution which was issued pursuant to the order granted in Case No. HC 5822/18. The relief which is being sought in the present case is therefore incompetent as what is being sought is to reverse a lawful execution that has been completed. Even if all the requirements for the interdict had been established, which is clearly not the case, it would be an improper exercise of discretion to grant an interdict to stop the exercise of a lawful right.

In all the circumstances of this case, the applicant has failed to justify the relief which it is seeking in this application. This is the same relief which the applicant obtained in HC 4411/14 but chose to withdraw the application after enforcing the interim relief of the provisional order.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The applicant shall pay the costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
Munangati & Associates, first respondent's legal practitioners