REDAN PETROLEUM (PVT) LTD T/A PUMA ENERGY
versus
REDAN COUPON (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL LAW DIVISION
CHIRAWU-MUGOMBA J
HARARE, 11, 12,17, 18 and 20 May 2022.

T. Mpofu, for the applicant
T. Magwaliba, for the respondent

Urgent Chamber Application

CHIRAWU-MUGOMBA J: This matter goes down in the annals of Zimbabwean legal history as the first ever matter to be heard virtually at the newly established Commercial Court in Zimbabwe.

The applicant seeks the following relief through a provisional order.

> **"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. Respondent shall continue to observe the terms of the agreement of license of the 19th of March 2019, that is to say, it shall not procure or sell from third parties the petroleum products to which the agreement pertains unless otherwise excused in terms of an arbitration award.
> 2. Any failure by respondent to procure from Applicant's petroleum products as mandated in the agreement of the 19th of March 2019 is in the absence of an arbitration award excusing such procurement unlawful.
> 3. The respondent shall pay the applicant's costs at a legal practitioner to client scale.
>
> **INTERIM RELIEF GRANTED**
>
> Pending resolution of this matter on the return date:
>
> 1. Respondent is interdicted from receiving and selling petroleum products from this parties but shall continue to sell petroleum products received from the applicant in terms of the agreement of license of the 19th March 2019.

SERVICE OF THE PROVISIONAL ORDER

The applicant or their legal practitioners or any employee thereof shall be authorised to serve a copy of this provisional order on the respondents."

Applicant's case

The applicant and the respondent entered into two agreements of licensing in September 2018 and March 2019. These agreements relate to two service stations situated in Avondale and Westgate Mall, Harare. The agreements are to the effect that the applicant is obliged to deliver fuels, oils and other petroleum products to the respondent at the two service stations. This is exclusive in the sense that the respondent at the two service stations in terms of the agreements is restrained from receiving any products to sell from competitors. The service stations have been branded with the PUMA logo. In breach of the agreements, the respondent has refused to receive products from applicant and has procured products from third parties.

Respondent's opposition

The respondent raised the following points *in limine.* That the deponent to the founding affidavit lacks authority to act on behalf of the applicant; that the application is not urgent regard being had to the fact that no urgency has been motivated; that the relief sought is invalid and that similar relief is sought in the interim and final orders. On the merits, the respondent vehemently denies that it has breached the agreements. It avers that the fact that it has not placed any order for products does not mean that it is getting such from third parties. It still has enough products in its stock. In addition, the products procured from the third parties has not been identified and the third party has also not been identified. The dispute has its roots in disagreements over a shareholders' agreement.

The submissions on points in limine

Although *T Mpofu* and *T Magwaliba* agreed to adopt on a rolled approach which entails those submissions are made on points in *limine* and on the merits, it is trite that the preliminary issues be dealt with first.

Both counsels made lengthy submissions on the *locus standi* of the deponent to the founding affidavit to act. Reference was made to provisions of the Companies and Other Business Entities Act [*Chapter 24: 31*]. In my view, what is critical is that the applicant and the respondent entered into contracts as stated. To deny the applicant audience on the basis that the deponent to the affidavit has no authority to act would be to effectively shut the door.

Locus standi has been defined by Herbstein and Van Winsen in *The Practice of the High Courts of South Africa* 5thed on p 186 as follows: -

> *"*In some cases, it has been held that the applicant must have a direct and substantial interest in the relief claimed, other cases have explained that a 'direct and substantial interest' means a legal interest. Traditionally South African Courts adopted a restrictive attitude to this issue, requiring a person who approached the court for relief to have an interest in the sense of being personally adversely affected by the wrong alleged".

However, given the fact that this is an urgent application for which a provisional order is sought and where only a hearing on the points *in limine* was conducted, making a finding on *locus standi* would be going into the merits of the matter and denying applicant or effectively shutting the door on any other relief that they may seek. In that regard, I can do no better than quote ZIYAMBI (JA) (As she then was) in *Madza and Ors* v *Reformed Church in Zimbabwe Daisyfield Trust and Ors*[1]*;*-

> "It is a contradiction in terms to dismiss a matter on the twin bases that it is not urgent and that the applicant has no locus standi for the latter basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing."

T Magwaliba, referred me to a decision of the High Court being *Twin Castle Resources (Pvt) Ltd* vs. *Paari Mining Syndicate, and ors,* HH-153-21. In that matter, TSANGA J, based on the decision in *Mandishaka* vs *Sithole,* HH-798/15, upheld a point *in limine* to the effect that an affidavit to the main notice of opposition was defective having only a computer-generated date on which it was signed before the Commissioner of Oaths.

Commenting on the issue of the stamp of a Commissioner of Oaths, the Supreme Court in *Firstel Cellular (pvt) Ltd vs. Netone Cellulah (pvt) Ltd,* SC-1-15, per PATEL JA;

> "It is common cause that there is no specific legislation regulating the issue in this jurisdiction and that the matter is one that is governed by practice. In that regard, what is required is that any stamp that is used to designate a commissioner of oaths should clearly identify the person before whom an affidavit is deposed and the office or capacity in which he or she acts as a commissioner. *In casu*, it is not disputed that Raymond Moyo is a legal practitioner and a notary public and, as such, a recognised commissioner of oaths. The respondent has therefore verified its cause of action in an affidavit, deposed by its functionary duly authorised thereto, before a clearly identified commissioner of oaths. That, in my view, suffices for the intended purpose of adducing evidence under oath and renders the validity of the respondent's founding affidavit manifestly impervious to challenge."

[1] SC 71/14

In *S. vs Hurle,* 1988(2) ZLR 42(H), the concern as I understood it is that, the deponent signed his affidavit that was not prepared by him but from notes that he had prepared for the autopsy. It was placed on his desk for his signature and he then signed in the absence of a Commissioner of Oaths.

In *casu,* the operative part reads, *"Thus done and sworn to at Harare…".* The date of the 9th of May 2022 is typed. I do not read the *Twincastle* decision as general authority for the proposition that an affidavit on which a date is typed on is irregular. What matters in my view as per the *Firstel Cellular (pvt) Ltd* is that the affidavit is signed before a Commissioner of Oaths. I did not understand *T Magwaliba* to be questioning the identity of the Commissioner of Oaths.

On urgency, the basis of the submission as I understand it from *T Magwaliba's* is that there was no certificate of urgency attached to the application. The High Court Rules of 2021 make provision for a certificate of urgency in R60(6). I accept as settled law the following per GOWORA JA who described a certificate of urgency as, *"the sine qua non for the placement of an urgent chamber application before a judge."*[2] Accordingly,

> "In certifying the matter as urgent, the legal practitioner is required to apply his or her own mind to the circumstances of the case and reach an independent judgment as to the urgency of the matter. He or she is not supposed to take verbatim what his or her client says regarding perceived urgency. I accept the contention by the first respondent that it is a condition precedent to the validity of a certificate of urgency that a legal practitioner applies his mind to the facts."[3]

However, as submitted by *T. Mpofu,* the Commercial Court Rules do not have provision for a certificate of urgency. Rule 40(1) states as follows: -

> "An urgent chamber application shall be in Form No. CC11 and shall be clearly labelled as an urgent chamber application stating clearly and concisely on the face of it the nature and grounds of the relief sought and the grounds upon which the matter is urgent, and shall be accompanied by an affidavit by any person who can swear positively to the facts, together with any documents which may be used in support thereof."

[2] Oliver Mandishona Chidawu & 2 Ors v Jayesh Sha & 4 Ors SC12/13

[3] At page 6

In my view, there is no need for a certificate of urgency in a matter brought before the Commercial Court. The certificate is incorporated into Form no. CC 11. In my view, the omission of the certificate of urgency is meant to reinforce the general thrust of the Commercial Court, which is the speedy resolution of disputes without being bogged down by technicalities. There is therefore no *casus ommisus* as submitted by *T Magwaliba,* which would necessitate reference and use of the High Court Rules, as per R4(2). In any event, R4(2) refers to issues of procedure. A certificate of urgency is not a matter of procedure.

T Magwaliba, submitted that the interim relief sought is the same as final relief and further that the interim relief sought is worded so widely that it will affect the respondent's operations at all service stations. Time and again, the courts have sounded warnings on interim relief sought being the same as the final relief. At the risk of belabouring the point, but still necessary to do so, I can also do no better than quote from the late CHATIKOBO J in *Kuvarega* v *Registrar General & Anor*[4]

> "The practice of seeking interim relief, which is exactly the same as substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a prima facie case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on the proof merely of a *prima facie* case. This to my mind is undesirable especially where, as here, the applicant will have no interest in the outcome of the case on the return date." (At p193 A-C)

Nonetheless, there is nothing that prohibits a judge from having a faulty provisional order being amended though I would add a rider that this should be the exception rather than the norm. It is expected that interim relief sought should not be the same as the final relief because granting the interim relief defeats the purpose of discharge or confirmation process.

Accordingly, the points in *limine* fail.

MERITS

The two agreements that the parties entered into in clause 23:1 have provision for mediation and arbitration in accordance with the laws of Zimbabwe. The Arbitration Act [*Chapter 7:15*] makes provision for Arbitration in Article 9 as follows.

"ARTICLE 9

Arbitration agreement and interim measures by court

[4] 1998(1) ZLR 188

(1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection and, *subject to paragraphs (2) and (3) of this article, for the High Court* to grant such measure.

(*2) Upon a request in terms of paragraph (1) of this article, the High Court may grant—*

(a) an order for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or

(b) an order securing the amount in dispute or the costs of the arbitral proceedings; or

(c) an interdict or other interim order; or

(d) any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual.

(3) The High Court shall not grant an order or interdict in terms of paragraph (1) of this article unless—

(a) the arbitral tribunal has not yet been appointed and the matter is urgent; or

(b) the arbitral tribunal is not competent to grant the order or interdict; or

(c) the urgency of the matter makes it impracticable to seek such order or interdict from the arbitral tribunal; and the High Court shall not grant any such order or interdict where the arbitral tribunal, being competent to grant the order or interdict, has determined an application therefor.

(4) The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal."

Given that the Article refers to granting of an interim interdict, it resonates with the requirements of the granting of such relief as set out in the oft cited *Setlogelo* v *Setlogelo* 1914 AD 221 at 227 of :-

a) a *prima facie* right, though open to doubt;
b) that 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 the right;
c) the balance of convenience favours the granting of interim relief, and
d) that the applicant has no other satisfactory remedy. See also *Cool* v *Minister of Justice* 1955 (2) SA 682 (C) at 688.

This also resonates with the requirements of R60(9) for the granting of a provisional order if the papers establish a *prima facie* case.

The agreements submitted by the applicant make reference to the guarantee of security of tenure (clause 4:3); prohibition of procuring product from third parties except in certain specific instances (clause 4:4 for the Avondale Service Station) and prohibition of selling of products from competitors' clause 9:4. Clause 21:3 specifies that if there is wilful discontinuance of sale of products, this constitutes a breach.

What constitutes a *prima facie* case as submitted by *T Mpofu,* was aptly stated In the *Balasore Alloys Ltd* HH-228-18, by CHITAPI J as follows: -

> 'A *prima facie* case in my view can be holistically described as one that does not merit absolution from the instance. ……. In determining whether a *prima facie* case is established the focus should not be to determine whether the applicant has provided evidence to establish what the applicant must finally establish. The approach is to determine whether the applicant has placed evidence before the judge from which a court properly directed and applying its mind to the evidence could or might find for the applicant. The standard of proof required to establish a *prima facie* case is much lower than proof on a balance of probabilities. In other words, the judge only needs to be satisfied that there is a case made by the applicant which merits referring to the court for further and fuller argument so that a final determination is made by the court which still hears full argument. It is seldom though that urgency of a matter can be divorced from a finding on the existence of a *prima facie* case.'

In my view, what is critical is whether or not the applicant has established a *prima facie* case of breach. Based on annexures D to H of the applicant's founding affidavit and the response by the respondent, there is *prima facie* evidence of breach of the contract on the part of the respondent. Apart from at most a bare denial, the respondent has not been forthcoming and instead has given a lukewarm response.

The applicant has clearly articulated the potential harm that it stands to suffer. The balance of convenience clearly favours the applicant. In terms of a remedy, apart from the fact that the Arbitration Act recognises the awarding of interim relief pending arbitration, at this stage the applicant has no other remedy to arrest the situation save for seeking an interdict.

I do agree however with *T Magwaliba,* that the interim relief sought by the applicant is too wide in its scope. As indicated, I am at liberty to grant relief as varied- see R60(9).

I also note that if the applicant is granted its interim relief, care must be taken that the dispute resolution process stated in clause 23 of the agreements be invoked. This will ensure that the rights of the respondent are also protected. This is regardless of the terms of the final order sought. I say this mindful of the submission by *T Magwaliba* that the applicant has not been forthcoming on the issue of arbitration. I note also that the final relief sought is based on the outcome of the arbitration process. I also did not see a time frame in clause 23:1 as to when notice can be given to the other party to initiate the settlements of disputes.

The applicant has established a firm case for the granting of a provisional order. I will however vary the interim order.

DISPOSITION

INTERIM RELIEF GRANTED

Pending resolution of this matter on the return date:

1. Respondent be and is hereby interdicted from receiving and selling petroleum products from third parties at the following service stations: -
   a. Westgate Mall Service Station situated at Stand number 1642 Bluffhill, Harare.
   b. Avondale Service Station situated on the Remainder of Lot 3, Block C of Avondale, Harare.
2. The applicant is directed to invoke clause 23 of the licencing agreements of September 2018 and 19th of March 2019 on settlement of disputes within seven days of the date of this order or any other longer period as the parties may agree in writing.
3. The applicant or their legal practitioners or any employee thereof shall be authorised to serve a copy of this Provisional Order on the respondents.

Gill, Godlonton and Gerrans, Legal Practitioners for the applicant
Chimuka Mafunga Commercial Attorneys, Legal Practitioners for the respondent