

ADLECRAFT INVESTMENTS (PRIVATE) LIMITED
versus
CASSANDRA MYBURGH
and
COLINS BAKER

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 13, 14 & 30 September 2021

Urgent application

Mr *T L Mapuranga*, for the applicant
Ms *R Mabwe*, for the respondents

[1] TSANGA J: The applicant filed an urgent chamber application seeking the following final spoliation order:

1. That the respondents shall immediately restore to applicant through its authorised officials possession of Number 1 Belper Close, Mt Pleasant Harare as well as 41189 Marlborough Harare.
2. Applicant is granted leave to effect service of this order through its legal practitioners.
3. Costs of this application shall be borne on a higher scale of legal practitioner and own client by respondents jointly and severally, the one paying the other to be absolved.

[2] The applicant company has a three member board of directors. A resolution by two of the company's directors purportedly appointed one of the directors, Mr Munyaradzi Gonyora, as the Acting Managing Director of Adlecraft. This was against allegations of theft committed by the Company's Managing Director, Mr Ofer Sivan. He was averred to have abandoned his duties and gone to America at least at the time that the resolution appointing Mr Gonyora was made. In fact he was averred to be effectively on the run. The appointment of Mr Gonyora as Acting Manager was said to be effective from 18 August 2021 "until the Board has been officially advised of the return of Ofer Sivan **and** ventilated the appropriateness of him continuing to be Adlecraft's Managing Director".

[12] The operative part of the resolution is therefore important to capture. It reads as follows:

- "1. Munyaradzi Gonyora (National ID 63-889609B18) be and is hereby appointed at (sic) the Acting Managing Director of Adlecraft effective 18 August 2021 until the Board has been officially advised of the return of Ofer Sivan and ventilated the appropriateness of him continuing to be the Adlecraft's Managing Director.
2. Munyaradzi Gonyora's duties shall include (but not limited to) the following:
 - a. Overseeing all the companies' day to day operations

- b. Providing leadership to the Company's employees
 - c. Handling any other administrative functions of the Company and delegating same as sees fit
3. Munyaradzi Gonyora shall continue to operate in the capacity of managing director of Adlecraft until such time as the Board appoints a substantive Managing Director. This position shall not change whether or not Ofer Sivan decides to return to Zimbabwe.”

[3] According to Mr Gonyora who filed this urgent application in his representative capacity on behalf of the company, when he tried to assume duties on the 18th of August 2021, he was denied doing so by the respondents who are the company's employees, one being the Managing Director's personal assistant, and, the other being the workshop manager. Both were averred to have since been suspended although according to their opposing affidavits no valid suspension was served on them as the person who served them having resigned, was no longer a director of the company since he had resigned. Notably the company was rents its premises from Mr Ofer Sivan who also lives on a separate part of those premises.

[4] Mr Gonyora made a police report of the events of that day being the 18th of August. On the 27th of August he averred that he had further learnt that workers had been prevented from gaining entry at work and that he had also received unverified reports that the company's assets were being stripped. On the 3rd of September 2021 he had then filed this urgent chamber application for despoliation.

Points in limine

[5] At the hearing, the respondents raised a number of preliminary points. The matter was said not to be urgent since the main issue averred as giving rise to the urgency, which was the locking out of employees at the workshop, was said to have occurred on the 27th August 2021 yet the urgent application was filed on the 3rd of September 2021. In other words, the seven (7) day delay was deemed inordinate. There was also said to be no explanation as to what had happened between the 18th and the 27th and why the applicant had not acted earlier.

[6] The application was also said to be defective on the basis that the order should have included provisional relief in addition to articulating the final relief to be sought. Ms *Mabwe* for the respondents therefore argued that the matter should be struck off the roll on account of the relief being defective and being in an improper form. The application was also said to be defective in that it did not articulate a remedy that can be afforded. The certificate of urgency was also said to be defective and dishonest in that the alleged violation complained about regarding shutting out workers from premises was said to have occurred on the 27th of August 2021 and yet a resolution had been taken by the company on the 26th of August which was a

day earlier than the alleged event of locking out employees at the workshop had even occurred. The applicant was also said not to have disclosed that it did not own premises. Finally, the application was also said to be defective in that Mr Ofer Sivan had not been made part of the proceedings.

[7] Mr *Mapuranga* for the applicant emphasised that the delay was not inordinate bearing in mind that one of the parties to the resolution was outside the jurisdiction and modalities were in fact taken within a short space of time. I determined that the delay was not inordinate and in any event it was clear from the application that a police report had been made on the 18th of August and was in the hands of the police even if this application had come some days later. As such the matter could therefore be determined on its merits as to whether Mr Gonyora had indeed been denied permission to assume duties by the employees on behalf of the company.

[8] As regards the need for a provisional order, Mr *Mapuranga* for the applicant correctly pointed out that as the application was for spoliatory relief which was final in nature, a provisional order would not be appropriate. What was emphasised in this application as justifying urgency was that the company's representative was being prevented by employees from having control of the company. The relief sought would thus be final in nature as the company, through its representative, has absolute right to be in control of its premises through its chosen representative. In other words, the order in this instance would not be based on *prima facie* proof since a company is indeed entitled to have control of its business and its premises. I was in agreement with this reasoning and I therefore dismissed that objection. See *Dreamoss Invstms (Pvt) Ltd v National Housing Delivery Trust & Anor* HH-490-13 for the kinds of circumstances where a provisional order may be appropriate in an application for spoliation.

[9] The counter argument on urgency by the applicant was that the refusal to allow the acting director on to the premises occurred on the 18th of August 2021. On ownership of premises, the counter argument was that with spoliation the issue is not about ownership but about possession. It being not in dispute that the company was indeed conducting its business from the said premises which it leases from Mr Sivan against the preliminary objection that these were premises that belong to the applicant lacked merit as that is not the point.

[10] On making Mr Sivan part of the proceedings, Mr *Mapuranga* argued that it was only necessary to cite those parties committing the acts of spoliation. In any, event as he argued, a matter does not fail because of non-joinder of a party. In this instance, the application made it clear that that acts of despoliation had been perpetrated by the cited respondents even if acting in cahoots with Mr Sivan. I agreed that from the application the alleged spoliation complained

of was at the hands of the employees on the dates concerned as Mr Sivan was alleged to be not even in the country at the time.

For these reasons I ordered that the matter proceed on merits.

The merits

[11] Applicant emphasised that what was before me was a company whose employees were being denied access to the company. Furthermore, the two respondents who locked out the other employees and refused the applicant's deponent his right to assume his acting managerial responsibilities, had in fact been suspended. Mr Mapuranga therefore submitted that by authority of the Board they should not be accessing the premises since the board resolutions suspending them were clear to that effect. He also emphasised that they have no right to be obstructing Mr Gonyora the applicant's Acting Managing Director from carrying out the resolution. He added that he was still shut out and that the act of despoliation was therefore continuing. The company was said to therefore have no control of its premises by virtue of two employees who believe that their employer is Mr Sivan.

[12] Ms *Mabwe* for the respondents denied that the applicant was despoiled and said Mr Sivan was in fact in the country contrary to assertions that he was on the run. She also stated that there was no proof that he was suspended and that if suspension did occur, then the proper course would have been to join Mr Sivan given this ready availability. She said the premises were open and referred to a logbook which showed the workers were logging in and out of work even up to the 3rd of September when the urgent application had been filed. The respondents were said to be the only employees of the company located at No.1 Belper Close Mt Pleasant.

[13] Following Mr *Mapuranga's* response that he was not aware that Mr Sivan was back in the country, I requested that both Mr Sivan and Mr Gonyora attend in person and consequently the hearing was postponed for this purpose to the following day. The court also requested that resolution that appointed Mr Munyaradzi Gonyora as Acting MD should also be placed before the court. It was an important point of continuing reference by both sides but had not been placed on record.

[14] At the rolled over hearing, I ascertained that Mr Sivan had only returned into the country on the 3rd of September 2021. In other words at the time that the alleged reported events took place he was indeed out of the country. The Board resolution appointing Mr Gonyora was also placed before me. Mr Gonyora took to the stand to speak to the process of how it came to be adopted and its circulation among the three board members. The process had been through

telephone conversations and emails but Mr Sivan was not party to the conversations as admitted by Mr Gonyora. Emails from Mr Shabtai to both Mr Sivan and Mr Gonyora were also requested by this court to be placed before me. *Prima facie* by virtue of his name indeed being on the emails, there is an indication that the resolution was indeed circulated to all directors even if Mr Sivan did not sign it or give his approval or respond to the emails for his own reasons.

Analysis

[15] He who has been despoiled must be prostituted. As stated in the case of *Swimming Pool & Underwater Repair (Pvt) Ltd & Ors v Rushwaya & Anor* S-32-12 an application for a spoliation order in a court of first instance is heard on an urgent basis because of the need to urgently stop unlawful conduct and self-help and to restore the *status quo ante* until the law has taken its course.

[16] This court thus has to be careful to remain focused on the principles of spoliation and not be side-tracked into dealing with the merits or demerits of the internal dispute among the shareholders. What is clear is that the company's majority board passed a resolution which has not been effected because some resistance was met from the respondents. The resolution was passed by the majority board members of the applicant and on the face of it that company's representative cannot and should not be denied access to the company. It matters not that the respondents believe their suspension is invalid or that they work for Mr Sivan. They cannot take the law into their own hands.

[17] The second issue for consideration is whether Mr Gonyora was forcefully denied the right to be on the company's premises in readiness for him to assume his duties. In his report to the police which he made on the 18th of August 2021 soon after the events, he describes having a meeting with the PA, that is the first respondent, Cassandra Myburgh, and giving her tasks for her to prepare a report which they would go over before he proceeded to the company's workshop. It was on his return that he says he found the gate and offices locked. He found that she had taken away his company car keys and those of Mr Shabtai and other company vehicles worth over US\$200.000.00. His complaint as far as the premises were concerned was that her actions were illegal and crippled daily operations and she was not reachable on the phone.

[18] As regards the workshop visit, a report was also made on the 18th regarding the resistance there. Whilst the events of the 27th are not verified and indeed workers may be coming to work as indicated by the respondents, this does not detract from the reality that there is indeed resistance to the applicant's representative taking over as per the resolution. On p 39

of this application, he recounts in his police report his visit to stand 4118 Marlborough at around 1000 hours where he told the second respondent Colins Baker, of the new management arrangement and that he was the managing director in an acting capacity. He alleged verbal and physical assault by the second respondent with both hands and fists on his face. He also reported bigoted racial utterances. He says he then left after being told he was not welcome. In so far as Mr Gonyora is the appointed Acting Managing Director of the applicant as captured in the resolution, I am satisfied that the reported actions in support of his affidavit amount to spoliation. He two employees cannot take the law into their own hands. The fact that Mr Sivan is back does not affect the need for Mr Gonyora to continue acting as the resolution is clear on what needs to happen.

[19] Costs have been sought on a higher scale. Indeed the respondents believing that they work for Mr Sivan have been caught in the middle and have been intransigent but I do not think that costs on a higher scale ought to be incurred by two employees when Mr Sivan driving the process behind the scenes remains unaffected. Ultimately the company directors will have to address their dispute.

In the circumstances the application for spoliatory relief is granted as follows:

It is ordered that:

1. The respondents shall immediately restore to applicant through its authorised officials possession of Number 1 Belper Close, Mt Pleasant Harare as well as 41189 Marlborough Harare.
2. Applicant is granted leave to effect service of this order through its legal practitioners.
3. Each party to pay their own costs.

Rubaya & Chatambudza, applicant's legal practitioners
G Sithole Law Chambers, respondent's legal practitioners