

JIMMY REMEKANI
versus
NIGEL MOONO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 12 and 17 November 2021

Urgent Chamber Application

B. Mudhawu with M. Niga for applicant
M. G. Bondera, for respondent

TAGU J: This is an urgent chamber application for an interdict barring the respondent from running and operating a sheeben and from dealing in and storing dangerous mining explosives at Stand No. 6 Mashayamombe Road, Kadoma.

The background facts are that the applicant entered into an agreement of lease with Juke Box Music (Pvt) Limited, a company, on 8 June 2021 wherein the applicant leased Stand Nos. 6 and 7 Mashayamombe Road, Kadoma for the purpose of running an infant school called Father Flower Academy. At the time the applicant entered into the lease agreement, Stand No. 6 Mashayamombe Road was occupied by the respondent in terms of a verbal lease agreement. The verbal lease agreement between respondent and the company was due to expire on 15 August 2021. The respondent had been served with a three months' notice on 15 May 2021 to vacate stand No. 6 Mashayamombe Road, Kadoma on 15 August 2021. Despite the expiry of that notice period the respondent refused to vacate the said premises and the company has since approached this Court under Case No. HC 6140/21 in order to give applicant vacant possession of Stand No. 6 Mashayamombe Road, Kadoma.

Meanwhile, the applicant had previously successfully registered the elementary school with the relevant Kadoma City Council authorities and the Ministry of Primary and Secondary Education. Meanwhile the Ministry of Primary and Secondary Education officials carried an inspection of the premises. They found that the respondent was running a sheeben and storing dangerous mining explosives at the premises. As a consequence the applicant was given up to 8

November 2021 to rectify the situation failure of which the school now enrolling a total of 192 pupils would be deregistered and closed without further engagement by the authorities. It was on this basis that the applicant has approached this court on an urgent basis seeking the following provisional order.

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. That the Respondent and all those claiming occupation of Stand No. 6 Mashayamombe Road, Kadoma through him, be and is hereby interdicted from operating a sheeben and from dealing in and storing dangerous mining explosives at Stand No. 6 Mashayamombe Road, Kadoma.
2. That the Respondent be and is hereby ordered to pay costs of this application at the legal practitioners and client scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter the Applicant is granted the following relief-

1. That the Respondent and all those claiming occupation of Stand No. 6 Mashayamombe Road, Kadoma through him, be and is ordered to refrain from running and operating a sheeben and from dealing in and storing dangerous mining explosives at Stand No. 6 Mashayamombe Road, Kadoma.

SERVICE OF PROVISIONAL ORDER

This provisional order be served on the Respondent by the Applicant’s Legal Practitioners.”

Having been served with the copy of the application the respondent filed a Notice of Opposition. The relevant averments in the Notice of Opposition reads as follows-

“I wish to advise this Honourable Court that Applicant’s legal ammunition is directed or aimed at the wrong person. The correct party to these proceedings is my mother who is Beauty Moono (born Moyo) she is the tenant at stand Number 6. Mashayamombe, Kadoma in terms of a verbal lease agreement she entered into with Juke Box Music Company (Private) Limited in the year 2014. I used to operate my motor rewinding and assembling business at my mother’s residence but on 2 November 2021 I moved my business to Stand No. 1420, Eastview, Kadoma.”

He further attached a supporting affidavit from Beauty Moono who confirms the respondent’s averments. The respondent further submitted that persisting with the application would be a brutum fulmen. He further submitted that the applicant should not have filed an application for an interdict, but rather should have reported the matter to the Police who should carry out investigations since operating a sheeben and possessing explosives is a criminal offence. According to him this application is not urgent on account of the fact that it is directed at the wrong person.

In an answering affidavit filed of record as well as the oral submissions the counsels for the applicant maintained that the application is not directed at the wrong person. To buttress their submissions the counsels submitted that it is clear from the papers filed of record that the tenant who entered into a lease agreement with the landlord Juke Box Music (Pvt) Ltd is the respondent. For this contention they referred the court to the Notice to vacate served on the respondent specifically giving him three months' notice to vacate the premises. They said the landlord could be so foolish not to know their tenant. If respondent was not the tenant common sense business practice entailed that he should have directed the landlord to the right person. But he did not do so. Further they directed the court to the copy of the summons in Case No. HC 6140/21 wherein the respondent is cited as the respondent. Finally they submitted that the counsel for the respondent is not aware as to what constitutes urgency. They therefore persisted with their application indicating that all the requirements for an interdict are present in this case as stated in the case of *Setlogelo v Setlogelo* 1914 AD 221.

In his oral submissions the counsel for the Respondent back tracked and admitted that the issue of urgency does not arise in this matter. He therefore admitted that this matter meets the requirements of urgency though he persisted with his submissions that a wrong person had been cited.

All the counsels were in agreement as to the requirements to be satisfied in an application of this nature. The requirements for the grant of an interdict in this jurisdiction require no debate. In *Charuma Blasting & Earthmoving Services (Pvt) Ltd v Njainjai & Ors* 2000 (1) ZLR 85 (SC) where the court held that:

“What an applicant for an interdict should establish in order to succeed has been set out in many previous cases.

In *Setlogelo v Setlogelo* 1914 AD 221, Innes JA (as he then was) said the following at 227:

“The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.”

See also *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (2) ZLR 52 (S).

The only point of departure was that the counsels for the applicant submitted that the law is that it is not necessary for applicant to establish a well- grounded apprehension of irreparable harm

once he has established a clear right. For this contention they relied on the Supreme Court case in *Equity Properties (Pvt) Ltd v Alshams Global BVI Ltd & Anor* SC 101-21 where the court said:

“Where a clear right is established the applicant is precluded from establishing a well-grounded apprehension of irreparable harm but must do so where only a prima facie right open to some doubt is established. See *Pinkstone Mining (Pvt) Ltd & Ors v Lafarge Cement (Pvt) Ltd & Anor* HH-118-18.”

On the other hand counsel for the respondent submitted that all the requirements must be established. He too relied on the case of *Veld Cliff Engineering (Pvt) Ltd T/A Firematic Consulting Engineering* (represented by Watson Muruvira) v *Firematic Consulting Engineering (Pvt) Ltd* and *Venson Gambiza and Nomthandazo Ngenya* HB-20-14 where MOYO J said at p 4 of the cyclostyled judgment-

“It is the totality of all the three requirements that would win the Applicant an interdict in this court. Therefore, even if Applicant does satisfy the 1st two requirements for a final interdict, but the third requirement of lack of any other alternative remedy is not satisfied...”

The court accordingly dismissed the application for the confirmation of the final interdict and the provisional order was discharged on that basis.

Before I deal with the requirements of an application of this nature I need to examine the defence raised by the respondent that the applicant is suing a wrong party. A look at page 25 of the application reveals a notice to vacate Stand 6 Mashayamombe Road, Kadoma. The notice to vacate is couched in the following terms-

“Attention: Nigel Moono
House No. 6 Mashayamombe Rd
KADOMA

Dear Sir.

REF: NOTICE TO VACATE THE HOUSE

This letter serves to advise you that we would like to use our house for our Company business, house no. 6 Mashayamombe street, Kadoma, therefore three months’ notice is being given to you, to look for another accommodation. The three (3) months shall be from the 15th May 2011 to the 15th August 2021.

I would like to thank you for being a good and liable tenant and advise you to make sure that all your outstanding rentals, water, city council rates are paid to date before you vacate the house. Total rental outstanding due is US\$100.00.

For more information please do not hesitate to contact the undersigned”

Two things appear abundantly clear from the above notice. It is addressed to the respondent. Secondly it clearly thanks the respondent for being a good and reliable tenant. If indeed

the respondent was not the correct tenant he should have taken issue with the notice to vacate as far back as May 2021. He did not. The other piece of evidence that shows he is the right party is the citation of the defendant on the summons in Case HC 6140/21. Surely the company could not have been mistaken as to the party it entered into a lease agreement with. The Supporting Affidavit of Beauty Moono, his mother is full of falsehoods and I dismiss the assertions with contempt they deserve. The applicant therefore is directing his ammunition at the right party.

In an application for this nature, therefore the three requirements that must be satisfied can be stated as follows-

1. A clear right;
2. Injury actually committed or reasonably apprehended;
3. Absence of similar protection by any other ordinary remedy.

I will analyze each of the three requirements to find if they have been satisfied.

A CLEAR RIGHT

In casu, there is no doubt that the applicant has a clear right. That clear right draws its lifeblood from the lease agreement for the occupation and use of Stand No. 6 Mashayamombe Road, Kadoma as a school which applicant entered into with Juke Box Music Company (Pvt) Limited, the owner of the property. The written memorandum of lease is on page 19 of the record. That right has been given effect as applicant has obtained the relevant paperwork for running the school. The school has been established and the existence of such a right cannot be disputed. The first requirement has thus been established.

INJURY ACTUALLY COMMITTED OR REASONABLY APPREHENDED

The applicant established that his clear right is about to be injured. I say so because the applicant's licence to operate a school is under threat. A reading of p 32 of the record reveals a final notice given to the applicant to make sure the tenants are removed. On recommendations it is stated as follows-

“The school is hereby given an ultimatum of seven days running from 01/11/21 to 08/11/21 to make vacant property number 6 so as clearing all dangerous dealings but are putting our good and vibrant education system into disrepute.

Your failure to comply with this directive shall invite lawful closure and deregistration of the institution without further engagement, greatly disadvantaging learners and other stakeholders at large.”

There is therefore real apprehension of harm if the order being sought is not granted. I checked with the counsels for the applicant and have confirmed that the Ministry of Education has

not yet acted on its threat awaiting the outcome of this application. The second requirement has thus been satisfied.

ABSENCE OF SIMILAR PROTECTION

The suggestion that the applicant should report to the police is not a remedy that can arrest the situation as soon as possible. There is therefore no alternative remedy which is not onerous. The balance of convenience therefore favours the grant of the relief sought.

IT IS ORDERED THAT

TERMS OF ORDER SOUGHT

That you show cause to the Honorable Court why a final order should not be made in the following terms:

1. That the Respondent and all those claiming occupation of Stand No. 6 Mashayamombe Road, Kadoma through him, be and is hereby interdicted from operating a shebeen and from dealing in and storing dangerous mining explosives at Stand No. 6 Mashayamombe Road, Kadoma.
2. That the Respondent be and is hereby ordered to pay costs of this application at the legal practitioner scale.

INTERIM RELIEF GRANTED

Pending the determination of this matter the Applicant is granted the following relief-

1. That the Respondent and all those claiming occupation of Stand No. 6 Mashayamombe Road, Kadoma through him, be and is ordered to refrain from running and operating a sheeben and from dealing in and storing dangerous mining explosives at Stand No. 6 Mashayamombe Road, Kadoma.

SERVICE OF PROVISIONAL ORDER

This provisional order be served on the Respondent by the Applicant's Legal Practitioner.

Ahmed & Ziyambi, applicant's legal practitioners

DR Chirairo, c/o Mutindi Bumhira legal practitioners, respondent's legal practitioners