

OBBRIDGE ENTERPRISES (PRIVATE) LIMITED
versus
DETECTIVE STANLEY MUSEKIWA N O
and
COMMISSIONER GENERAL OF
THE ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 14 May 2013

R R Nyapadi, for the applicant
R M Bhasera, for the respondents

ZHOU J: This matter was instituted as an urgent chamber application for an interdict preventing the respondents from removing “any bags of maize from (the) applicant’s premises” pending determination of the matter. The final order sought is that the applicant be given leave to process the maize in its custody into mealie-meal. After hearing argument from the legal practitioners representing the applicant and the respondents I dismissed the application with costs and indicated that my reasons would follow. The applicant has asked for the written reasons. These are they.

The applicant is a company which is in the business of producing and selling mealie-meal. The first respondent is an officer of the Zimbabwe Republic Police. The second respondent is the Commissioner General of the Zimbabwe Republic Police. In the founding affidavit deposed to by its Managing Director, Xing Wang, the applicant states that sometime in April 2013 it purchased 600 bags of maize from a company referred to as Half Grain. The maize was delivered to it by one Zvikomborero Nyamakura, a transporter, and an agent of Half Grain called Trymore Tefere on 20 April 2013. The maize was immediately processed into mealie-meal and sold to the applicant’s clients.

The first respondent is a police officer investigating a case of theft of 419 x 50kg bags of white maize which are alleged to be in the possession of the applicant. On or about 22 April 2013, the first respondent attended at the applicant’s premises in connection with the investigation. The applicant’s Managing Director was informed of the investigation. He states that on 7 May 2013 the first respondent returned to the applicant’s premises accompanied by Zvikomborero Nyamakura who is the person accused of the alleged theft.

The latter identified some 419 bags as those which he had delivered to the applicant and were the subject of the police investigation.

The respondents' contention is that the bags containing the maize are required as exhibits in the case of theft which is being investigated by the first respondent. In his opposing affidavit the first respondent states that the police have a proper storage facility at which the maize can be stored. That assertion has not been disputed, albeit the applicant in its founding affidavit had raised concern regarding the availability of storage facilities where the respondents can keep the maize. In the case of *Fawcett Security Operations (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121(S) at 127F McNALLY JA stated the position of the law as follows:

“The simple rule of law is that what is not denied in affidavits must be taken to be admitted.”

See also *Chihwayi Enterprises (Pvt) Ltd v Atish Investments (Pvt) Ltd* 2007 (2) ZLR 89(S) at 93E-F. The maize is not being taken away for the purpose of disposing of it but as an exhibit since it is the subject of allegations of theft.

The applicant is in essence seeking a final interdict that the maize should not be removed from its warehouse. It has been held by this court that an interdict:

“can be used to prevent the threatened commission or continued commission of an unlawful act. It is an order made by a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm.”

Bulawayo Dialogue Institute v Matyatya N O & Ors 2003 (2) ZLR 79(H) at 85F-G.

In other words, in order to succeed the applicant must show that the threatened act is unlawful.

The requirements for a final interdict are settled. An applicant must show:

- (a) a clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the absence of an alternative remedy.

See *Setlogelo v Setlogelo* 1914 AD 221; *Bulawayo Dialogue Institute v Matyatya N O & Ors* (*supra*) at 86B.

Section 49 of the Criminal Procedure and Evidence Act [*Cap*] provides as follows:

“The State may, in accordance with this Part, seize any article –

- (a) which is concerned in or is on reasonable grounds believed to be concerned in, the commission of an offence, whether within Zimbabwe or elsewhere; or
- (b) which is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence, whether within Zimbabwe or elsewhere; or
- (c) which is intended to be used or is on reasonable grounds believed to be used in the commission of an offence.”

It goes without saying that both para(s) (a) and (b) of the section cited above afford valid grounds for seizure of the maize in *casu*. The maize was duly identified by a person accused of the alleged theft. It is therefore relevant as an exhibit and is the subject of the offence under investigation. The applicant admits in para 9 of its founding affidavit that the maize was to be removed for use as exhibits and not to be disposed of. If the maize is found by the appropriate court not to have been stolen the applicant will be entitled to it.

This court cannot determine on the papers the disputed fact of whether the maize identified by Zvikomborero Nyamakura is that which he delivered or not. The fact remains, however, that that maize was pointed out to a police officer. Thus the actions of the respondents cannot be said to be unlawful. Granting the relief being sought by the applicant has the effect of preventing the police officer from properly investigating the matter.

As for the requirement to prove a clear right, the position of the law is that the word “clear” relates to the degree of proof that is required to establish the right. The existence of a right is a matter of substantive law; whether that right is clearly established is a matter of evidence. See *Prest, Interlocutory Interdicts*, p 47 and *Erasmus, Superior Court Practice*, p E8-6A. The applicant’s right to the maize is being contested on the basis that the maize was stolen. I cannot make a finding on that disputed fact on the papers. What can be said, though, is that the disputes of fact show that that applicant’s right has not been clearly established. *Nument Security (Pvt) Ltd v Mutoti & Ors* 2007 (2) ZLR 300(S) at 303 B-C; *Phillips Electrical (Pvt) Ltd v Gwanzura* HH 374-88.

The applicant states in the founding affidavit that if the respondents are not interdicted from taking custody of the maize it will be irreparably prejudiced in that the respondents have no suitable facilities to store the maize. As pointed out above, the respondents have stated that they do have appropriate facilities. The fact that the applicant has standing orders with its clients does not justify the granting of the interdict. The applicant by that assertion seems to

suggest that if the police do not take custody of the maize then it will process it into mealie-meal and meet its clients' orders. That is the very mischief which must be prevented by the placing of the maize in the custody of the police. If the court which will determine the criminal matter involving the maize determines that the maize was indeed stolen and the applicant is prejudiced as a result of that determination its recourse would be against the persons who sold the maize to it.

In the circumstances, I do not believe that the requirement by the police to have custody of the maize pending completion of the criminal matter constitutes "unlawful confiscation" as alleged by the application.

Accordingly, the application is dismissed with costs.

Muza & Nyapadi, applicant's legal practitioners
Attorney-General's Office, respondents' legal practitioners