

LYDMOCLEANING SERVICES
versus
DAIRIBOARD ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATANDA-MOYOJ
HARARE, 20 and 25 March 2015

Urgent Chamber Application

Ms JJ Magaya, for the applicant
P Nyeperai, for the respondent

MATANDA-MOYOJ: Applicant approached this court on an urgent basis for the following relief:

“INTERIM RELIEF GRANTED

Pending determination of this matter the applicant is granted the following relief

1. That respondent be and is hereby ordered to immediately restore steam supply to the applicant's rented premises being Lydmo Cleaning services (Pvt) Ltd wing, Dairiboard Complex, 1225 Rekai Tangwena Avenue, Harare.
2. That pending finalisation of this matter, respondent and its employees and assigns be and are hereby interdicted from interfering with applicant's possession of the premises by entering with or terminating steam, electricity and water supply.
3. That the respondent shall pay costs of suit on a legal practitioner client scale”

The brief facts of this matter are that applicant is leasing certain premises from the respondent which plaintiff is using in carrying out a laundry business. Such lease agreement commenced on 1 August 1995. At the moment the applicant is a statutory tenant. On 17 October 2000 the City of Harare condemned the premises which were being used by the applicant but issued the applicant with a licence whilst giving them an opportunity to comply with the acceptable minimum standards. By 2002 applicant had not complied with those standards and the City of Harare on 20 February 2002 ordered applicant to stop all laundry operations until such time that they comply with City of Harare directive. The applicant

attended to City of Harare complainants and obtained trade licences and resumed business. On 12 March 2015 the respondent disconnected the supply of steam to the applicant and threatened to cut electricity and water supplies to the applicant. A letter was written to the respondents on the same day, requesting restoration of supply. The respondent refused to reconnect supply leading to applicant filing this application.

Applicant seeks a spoliation order as against the respondent.

The respondent challenged the application by the applicant arguing that spoliation is only available to a person who has physical possession of the item. Obviously the interpretation by the respondent is wrong and narrow. Van der Merwe and MJ de Waal in their book, *The Law of Things and Servitude* at p 52 has this to say on possession;

“This notion consists in the exercise of control over an incorporeal coupled with an animus to exercise such control. Factual control of an incorporeal is exercised whenever the thing is exploited in accordance with an actual or presumed legal right (for example a servitude or a contractual right of use with regard to the thing.”

Shapiro v SA Savings and Credit Bank 1949 (4) SA 985 (W);

“If not in actual possession *rhe ius possidendi* enables a person to demand that he be given possession of the thing, for example in terms of a contract of lease.” See *Bester v Gwindling* 1917 TPD 492 @ 495.

The applicant in terms of a contract entered between itself and the respondent has a right to use the steam, water and electricity. The applicant claims he was in possession of the right to use the steam and such right was unlawfully taken away by the respondent and is claiming restoration of such right. It is my finding that the applicant is within its rights to bring this application as it was in “possession” of the steam. The respondent strongly argued that this court’s hands are tied in so far as granting the order sought by the applicant as to do so would amount to aiding and abetting the defiance of a lawful order from City of Harare to close the premises. The respondent argued that the question of the directive of the City of Harare to close the premises was common cause. I do not agree. As I have already alluded to in the preceding paragraphs the City of Harare condemned the building in 2000 but did not order its closure. It directed that certain repairs be carried out. When such repairs had not been carried out by February 2002 the City of Harare withheld the issuance of a trade licence to the applicant until such repairs had been carried out. The subsequent issuance of trade licence by the City of Harare could be taken as an indicative of compliance with its directives. If the respondent had provided proof that indeed the City of Harare had condemned the premises and ordered their closure, I would not have hesitated to follow the principles laid down in

Drama Farm (Pvt)Ltd v Madondo NO & Anor 1998 (2) ZLR 410 and dismissed the application. I would have found that the disconnection was lawful as it would have been in compliance with a lawful directive of a Local Authority. The applicant's assertion that it possess a licence from the City of Harare without evidence to the contrary stands.

The law relating to a *mandament van spolie* is well settled. Two allegations must be made and proved. See *Davis v Davis* 1990 (2) ZLR 136 (H). The applicant must show that;

1. it was in peaceful and undisturbed possession of the property and
2. that the respondent deprived it of that possession forcibly or wrongfully without his consent.

This remedy as I said above is available to a person who is making use of some property to the extent of deriving a benefit from such use and by another. The applicant has shown that it was using the steam for its benefit. Such steam supply was cut off by the respondent against the applicant's consent unlawfully. The applicant has managed to prove the *van spolie* requirements and is entitled to the remedy thereof. The respondent failed to show that the dispossession was not unlawful and therefore did not constitute spoliation. The applicant also sought an interdict prohibiting the respondent from interfering with the applicant's possession of the premises by interfering with terminating steam, electricity and water supply. It is common cause the respondent has disconnected steam supplies to the applicant. In its founding affidavit the applicant does not state that the respondent has threatened to cut electricity and water supply except in paragraph 'm' where in passing the applicant says:

“Respondent has no justification in disconnecting steam and threatening to disconnect water and electricity.....”

and also in para 1 where unnamed engineers told the applicant that they had instructions to disconnect supplies.

For an interdict to be granted there must be proven a *prima facie* right. The applicant has proved a *prima facie* right emanating from a contract. There must be a reasonable apprehension of irreparable harm if the interdict is not granted and there must be no alternative satisfactory remedy available to the applicant. The balance of convenience must favour the granting of the interim relief.

I agree with the respondent's submissions that applicant has not dealt with the aspect of balance of convenience. I also do not find justification in applying for spoliation and prohibitory interdict where no evidence has been advanced that there is a likelihood that the

respondent would commit the feared breaches. Accordingly I am unable to grant the interdict sought.

In the premise a provisional order is granted in favour of the applicant as prayed for in para 1 of the interim order sought as follows:-

- 1) That the respondent be and is hereby ordered to immediately restore steam supply to the applicant's rented premises being Lydmo Cleaning Services (Pvt) Ltd using Dairiboard Complex, 1225 Reikai Tangwena Avenue, Harare.
- 2) That the respondent is ordered to pay costs of this application.

Magaya-Mandizvidza Legal Practitioners, applicant's legal practitioners
Costa & Madzonga, respondent's legal practitioners