

PRIMEDIA EVENTS AND ENTERTAINMENT
PROPRIETOR LIMITED
versus
MOPANI PROPERTY DEVELOPMENT

IN THE HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 16 January 2018 and 28 March 2018

Opposed Application

M Mako, for the applicant
R Stewart, for the respondent

PHIRI J: This matter came before me as an opposed application. The applicant sought confirmation of an interim order that was granted by consent on the 22nd May 2017 by the Honourable JUSTICE TSANGA.

The operative part of the consent order granted was as follows;

“Interim Relief Granted

That pending confirmation of this order on the return day, the following relief is granted.

1. It is ordered by consent that both parties immediately stop any and all street light installation work on the section on Borrowdale road outside Sam Levy’s Walk between Dorme and Piers Road.”

The terms of the final order sought when the matter was presented before me for argument was couched as follows;

Terms Of The Final Order Sought

1. The respondent shall remove all installations, equipment and materials and is restrained from all and any future installations of solar street lights on the section on Borrowdale road outside Sam Levy’s Village Walk between Dornie and Piers Road, assigned to the applicant in terms of an agreement between the City of Harare and the applicant or interfering with the rights of the applicant in any way thereof.
2. The respondent shall pay the costs of this application.”

At the hearing of this application, an application for condonation of the late filing of respondent's heads of argument, was made, and, this was granted by consent.

Factual Background

A brief background to this dispute is outlined in paragraphs 6 to 7 of the application and its founding papers. It is necessary to briefly quote them as follows;

“6 The applicant is a registered foreign company, an outdoor advertising media specialist, focusing primarily on the marketing and sales of outdoor advertising signage. It offers outdoor exposure across a mix of media types, including digital signs, airport advertising, freeway and suburban spectaculars and street furniture such as solar streetlights.

7. The applicant has an agreement with the City of Harare, entered on the 21st March 2014. The material terms of the agreement are that the applicant would install, commission and maintain solar streetlights in and around Harare CBD. In return, the applicant is assigned advertising rights on the installed solar streetlights at no costs to the City of Harare. Copies of the main agreement and addendum V are annexed hereto as Annexure A1 & A2 respectively.

8. In October 2016, to pave way to road expansion works at the Sam Levy Village Walk, the applicant was requested by the City of Harare to remove the street light poles on section on Borrowdale Road outside Dornie and Piers Road. A copy of the letter from City of Harare is annexed hereto as Annexure B.

9. The respondent, who are the managers of the project had to assist the applicant identifying the poles that need to be removed to allow for the road expansion works.”

The applicant avers that it duly complied with the City of Harare's request for the removal of the street light poles on the section on Borrowdale Road outside Dornie and Piers Road. “to pave way for the expansion of the Section on the Borrowdale road” or “the disputed section.” [my own words].

Applicant contended that to its astonishment it noticed that the respondent was installing solar street lights on the “disputed section” that is, the section that applicant was assigned to it by the City of Harare in terms of its agreement with the City of Harare.

Applicant's accordingly further contended that the respondent's conduct constituted a violation and interference with the applicant's contractual rights and obligations with the City of Harare to the applicant's prejudice.

“The prejudice is that;

17.1 The applicant is entitled to profit from advertisement rights in relation to the solar streetlights.

17.2. the applicant tends to lose revenue generated from such advertisement rights which it is contractually entitled to.

17.3 The applicant has invested heavily in the entire solar street light project to the tune of US\$4 million which it should recoup from the revenue from the advertisement on the solar

streetlights. The respondent's actions and conduct has an impact and effect on the applicant's investments in the country.

17.4 There is no effective remedy to stop the unlawful and iniquitous installation by the respondent if the streetlights interference of applicant's contractual rights with the City of Harare."

Respondent's Position

The respondent's position was outlined in its opposing affidavit deposed to by its director a Mr Michael Craft who stated the following;

"4.1. The applicant was tasked by the City of Harare in October 2016 to remove certain twelve (12) identified solar lights from an identified stretch of Borrowdale Road in order to accommodate the dualisation of this stretch of road, the cost of which dualisation, together with the installment of traffic and street lighting, was being borne by the respondent with the consent and direction of the City of Harare. The City of Harare has since October 2016 to date NOT instructed or otherwise directed or authorised the applicant to re-install the solar lights so removed. The alleged "urgency" in casu is a self-made fabrication of the applicant who has taken it upon itself without authority to seek to re-install the solar lighting despite provision having been made by City of Harare for permanent grid lighting of the intersection in the approved plans for the dualisation.

4.2. The alleged harm sought to be averted by the applicant by the order it seeks is not something that has arisen by virtue of the respondent, who is merely fulfilling the terms of its own contract with City of Harare. The respondent is NOT installing solar lighting and is acting purely and solely in compliance with its own City of Harare mandate."

The respondent further alleged that the applicant has acted unilaterally in seeking to re-install solar lighting that it was expressly tasked to remove without having acquired the requisite approval of the City of Harare.

Respondents further submitted that the applicant should have cited the City of Harare in these proceedings as the respondents in turn has its own obligations with City of Harare and is merely complying with its own obligations in terms of such agreement with City of Harare.

Respondent contended that it has no privity of contract relationship with the applicant neither was respondent privy to the contractual arrangement between the City of Harare and the applicant.

Respondent further argued that the applicant has a wealth of remaining roadside coverage in which to erect solar advertisement lighting and that there is no determination that the lighting need expressly incorporate the brief sketch of road abutting the new dualised intersection. (see paragraph 11 of respondent's opposing affidavit.

Respondent further relied on a supporting affidavit of one Christopher Seager who in the main submitted that the project (being the construction of the traffic light controlled intersection and road dualisation on the corner of Borrowdale and Dornil Roads) was not complete as at 11 April 2017 and was in fact only due for handover in mid June 2017. He stated that;

“The handover process will involve a twelve month management agreement with City of Harare wherein the respondent will be in charge of managing the project for the period of twelve months from the date of handover after which the City of Harare will assume control.”

Applicant’s Answering Affidavit

Applicant, in its answering affidavit contended that the granting of the Interim Order by consent satisfied the requirement for a final order being granted.

Applicant also averred that the removal of poles to accommodate the respondent was only temporary. It also submitted that respondent had failed to adduce any evidence giving it the right to install poles on the disputed area.”

Applicant’s Head of Argument

In its heads of argument and indeed in submissions made before this court the applicant maintained that it had satisfied the requirement for the confirmation of the provisional order granted on 22 May 2017.

Applicant also argued that respondent had failed to justify the joining of the City of Harare as a party to these proceedings.

Accordingly the applicant maintained that it had a right to install and reinstall solar lights on the disputed area,”

Respondent’s Heads of Argument

In its heads of argument and in submissions made on its behalf the respondent argued that this court should dismiss the application for confirmation of the provisional order granted on 22 May 2017 and that this court should direct that the present dispute proceeds by way of action and that those proceedings enjoin the City of Harare as a party to the proceedings.

The respondents maintained that it was not erecting street solar lights but a grid-powered “street lights” that would be powered by the village walk project” and that on that basis alone the interdict sought by the applicant is patently defective.

Applicant also submitted that there is a dispute of competing rights.

Non Joinder

The respondent reiterated and maintained that it was acting for and on behalf of the City of Harare in constructing a grid-based lighting which was to be handed to the City of Harare.

It submitted that this matter cannot be determined without the input of the City of Harare.

In support of this contention the respondent cited various authorities. See para 21 of respondents heads of argument. It submitted that joinder is necessary where a party has a;

“direct and substantial interest in any order the court might make in proceedings or if such order cannot be sustained or carried into effect without prejudicing the other party” See p 107 Herbstein and van Vinsen, *The Civil Practice of the Supreme Court of South Africa*.

Respondent, cited authorities where a party can be said to have direct and substantial interest.

In para 21 (C) of its heads of argument respondent states that;

“In *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), the court came up with two tests in deciding whether a third party had direct and substantial interest, namely:

- i. A consideration of whether the third party would have *locus standi* to claim relief concerning the same matter (at page 661); and
- ii. An examination of whether a situation could arise in which, because a third party has not been joined, any order of the court might make would be *res judicata* against the third party entitling him to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first instance.”

Respondent also cites the case of *Abrabase & Others v Cape Town City Council* 1854 (2) SA 178 where the court held that:

“It seems to me clear that the court has consistently refrained from dealing with issues in which a third party may have a direct and substantial interest without having that party joined in the suit or, if the circumstances admit of such a course, taking either adequate steps to ensure that its judgment will not prejudicially affect that party’s interest.”

The respondent argued that in the present matter the City of Harare has a direct and substantial interest in the matter as both parties were afforded rights by the City of Harare.

This court is persuaded that the interests of justice, in this matter, would demand that the City of Harare be joined to these proceedings that this court can come out with an informed position as regards the circumstances surrounding the present dispute. I am satisfied that *prima facie* evidence appears to have been adduced justifying the enjoining of the City of Harare to these proceedings.

Material Dispute of Fact

The respondent also submitted that there is a material dispute of fact in respect of this matter. The respondent avers that without the input of the City of Harare in the present proceedings there exists material disputes of fact arising from the evidence led as regards the compelling rights and interests of the parties involved in this case.

The respondent cited the case of *Supa Plant Investments (Pvt) Ltd v Edgar Chiidavaenzi* HH 92/09 at p 4 where it was stated that:

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

In citing the judgment of CHIGUMBA J, in the case of *Grain Marketing Board v Mandizha A* HH 16/14 the respondent refers to p 17 of the judgment where she reasoned as follows:

“put differently, it is my view that, the phrase material disputes of facts, in the application procedure, refers to the untenable position where averments are made in an affidavit, which averments have a direct bearing on the outcome of the matter, yet the papers which will be before the court, from the founding affidavit, the opposing affidavit, the answering affidavit, the annexures attached, the heads of argument, the parties oral address at the hearing of the matter, leave the court riddled with doubt and uncertainty as to the veracity of the averments, to the extent that it ought to have been clear to the applicant, at the outset, that the court would be unable to come to a conclusive decision, on the merits of the application.”

The respondent further submits that this court would have its own inherent jurisdiction as to how best to deal with the material dispute of facts. In the case of *Afrasia Bank Zimbabwe v Rio Zimbabwe Limited* HH 17/79 MAKONI J held that:

“Where the facts are in dispute the court has a discretion as to the future course of proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of any Rule of Court.”

This court is of the considered view that additional evidence must be led particularly from the City of Harare as aforesaid, in order to clarify the true position as regards the alleged compelling rights of the applicant *vis-viz* the respondent. Accordingly as already held by this court the justice of this case can be best resolved by referring disputes herein raised to

Final order confirmation/Discharge

This court takes judicial notice of the submissions made by the respondent that:

“In order to succeed in obtaining a final prohibitory interdict the applicant must establish:

- (a) a clear right

- (b) an injury actually committed or reasonably apprehended and
- (c) the absence of similar protection by any other ordinary remedy

(See the case of *Dialogue Institute v Matyatyu NO and Ors* 2003 (2) ZLR 79 (H))

I agree with the respondents observations that the applicant has failed to demonstrate a clear right in circumstances wherein the applicant admits that it was ordered to remove certain poles on the “area of dispute” in order to pave way for the project which was being undertaken by the applicant. Applicant, has also, in this courts view, not clearly articulated the full nature and extent of the specific harm and or damages it may have suffered as a result of either the respondents and or City of Harare’s actions.

There also exists the possibility as regards alternative remedy being available by way of possible relief being sought from the City of Harare.

In the final analysis it is this court’s considered view that the cumulative effect of all these arguments raised by the respondents would call for this court to exercise its discretion in directing the City of Harare to be joined to these proceedings unless off course, such joining of this third party would unduly embarrass the plaintiff or unless the City of Harare can show some other special circumstances why the direction for its joinder should not be given or why it should not be joined to these proceedings.

Costs

Having exercised my discretion that this is a matter which should be referred to trial I also hold that this is an appropriate matter in which the question of costs must be reserved pending the finalisation of this matter at the trial.

Accordingly I hold that:

- (a) the provisional order granted on the 22nd May, 2017 be discharged and hereby give direction that this matter proceeds by way of action proceedings including an order that the City of Harare be joined to the action proceedings.
- (b) Costs to be costs in the main cause of action.

Scanlen & Holderness, applicant’s legal practitioners
Matizanadzo & Warhurst legal practitioners, respondent’s legal practitioners