

INNSCOR AFIRCA LIMITED  
and  
SIMBISA BRANDS LIMITED  
versus  
CHICKEN SLICE (PRIVATE) LIMITED  
and  
THE REGISTRAR OF TRADE MARKS N.O  
and  
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 20 March, 2019 and 28 March, 2019

### **Urgent Chamber Application**

*E. Mubayiwa*, for the applicants  
*Ms N.C Ndlovu*, for the respondents

MANGOTA J: The applicants and the first respondent operate fast food restaurants. They sell fried chicken and chips. The applicants use the brand name *Chicken Inn*. The first respondent's brand name is *Chicken Slice*. The two are competitors in the fast food industry.

The applicants filed this application through the urgent chamber book. They did so on 14 March, 2019. They seek an interdictory relief against the first respondent. They couched their draft order in the following terms:

“Final Order sought

1. The 1<sup>st</sup> respondent and any person acting through it be and is hereby interdicted from infringing on the applicants' Trademark No. 1070/2006 by using the term “*Luv*” and the combination of the colours black, orange, yellow, red and white on any flier, notice, advert, label, stickers or any packaging or similar likely to deceive or cause confusion on or in relation to the goods for which the mark is registered.
2. The 2<sup>nd</sup> (*sic*) respondent and any person acting through it be and is hereby interdicted from passing off its goods by the use of the unauthorised use of applicants' Trademark Registered No. 1070/2006 or by the unauthorised use of a mark during the course of its trade resembling or similar to the aforementioned registered trademark.

3. The 1<sup>st</sup> respondent and any person acting through it be and is hereby ordered to deliver to the applicants, for destruction, all fliers, notices, packaging labels, postures, wrapping, advertising matter or other materials in the possession of the 1<sup>st</sup> respondent and any person acting through it bearing the word *luv*, or using the colour combination of which the mark is registered or hereby resembling the trademark of the applicants.
4. The Sheriff of Zimbabwe and/or his lawful deputies be and are hereby authorised to search for and remove to a storage facility and for the purposes of destruction all fliers, notices, stickers, labels, packaging material or any material whatsoever bearing the word *luv*, or with the colour combination, or bearing any mark identical to or resembling the applicants' registered trademark No. 1070/2006 from the 1<sup>st</sup> respondents (*sic*) premises at No. 49 Borrowdale Road, Harare or any of its warehouse(s) respectively or from wherever such goods are located.
5. In relation to para 4 above, that the 1<sup>st</sup> respondent be liable for the Sheriff's fees for removal and storage.

Interim Order sought

1. The 1<sup>st</sup> respondent and any person acting through it be and is hereby interdicted, with immediate effect, from creating, producing, issuing, distributing, publishing or otherwise causing to be available to the public any notice, flier, labels, advertisement, packaging, stickers or material of whatever kind in relation to the goods for which the mark is registered, containing the word *luv* or using the colour combination for which the mark is registered, or using any other mark identical, resembling or similar to the registered mark until the matter is finalised.”

The applicants premise their complaint on the allegation that the first respondent has infringed, and continues to infringe, their registered trademark. They aver that it remains guilty of what, at common law, is referred to as the delict of passing off. They state that its use of the word *luv* which is a mark registered in their favour or the statement “*I luv it*” which is identical or closely resembles or is similar to their own which reads *luv dat chicken* – a part of their registered trademark – continues to confuse consumers to their prejudice. They complain of the colour combination which the first respondent uses. They insist that the first respondent is infringing their trademark by copying substantial and material aspects of its (*sic*) trademarks as well as promotional practices for purposes of advertising its products and, in the process, seeks to gain advantage over them. They aver that they became aware of the first respondent's conduct on or around 1 March 2019. They insist that they treated the matter which relates to this application with the urgency which the same deserves.

The first respondent opposes the application. It raises five *in limine* matters after which it deals with the substance of the application. The second and third respondents are cited in their respective official capacities. None of them filed any notice of opposition. My assumption is that they intend to abide by my decision.

The first respondent's *in limine* matters are that:

- (i) the application is not urgent;
- (ii) there is a dispute of fact;
- (iii) the second applicant has no *locus standi*
- (iv) relief sought by the applicants is incompetent – and
- (v) the applicants sued a non-existent party.

This initial hearing relates only to the abovementioned preliminary issues. The parties requested that a ruling be made on the same before the court and then proceed to deal with the substance of the application.

I mention, in passing, that before the hearing commenced, counsel for the applicant sought a 30 minutes delay. He said he wanted to establish the veracity or otherwise of the first respondent's allegation which is to the effect that it used the word *luv* in its advertising material since 2017. The 30- minutes delay was duly granted to him and, when the hearing commenced he, for reasons known to him, did not advise the court of what he established. He kept that aspect of the case a guarded secret which only his client and him remained aware of to the exclusion of the court and the first respondent.

The court will, however, not draw any adverse inference from counsel's observed and stated conduct. It will, instead, consider as well as make an analysis of the *in limine* matters which the first respondent raised. It will ascertain whether or not the one or the other or all the *in limine* matters hold(s). Where it/they hold (s) and is /are dispositive of the application which is before it, the same will be at an end. Where, on the other hand, the opposite remains the case, the applicants shall not be denied their right to be heard on the merits. They will, therefore, have their day in court.

It is on the strength of the foregoing that I proceed to consider the first respondent's preliminary matters in the order that they have been raised as follows:

- (a) Whether or not the application is urgent.

An application is not urgent just because the person who files it through the urgent chamber book says it is so. An application is urgent when all the circumstances which relate to it, viewed objectively, show that it cannot wait to take its place in the queue of applications

which are filed at court and that any delay of its hearing will visit the applicant with dire consequences which are of unimaginable proportions.

In assessing the urgency or otherwise of the application, the court is, by and large, guided by such factors as the time that the applicant became aware of the event which constitutes his complaint as measured against the date that he files the application, the steps which he took to remedy the complaint as well as whether or not, in the circumstances of the particular case, he ought to have known - as a reasonable person who takes a keen interest of his affairs - all matters which are injurious to his business, or other, interest as well as the existence of what is likely to harm him mainly in his pocket.

The first respondent states that it has been using the colour combination which appears on its advertisements since 2010. The advertisements, it alleges, comprised fliers, newspaper publications, billboards and the television. It insists that it used the same from 21 June 2011 - the date that it registered its trademark under certificate of registration number 755/2011 - to date. It alleges that it started using the word *luv* in its advertising material in 2017 and the catchphrase “*slice .... I luv it*” from the mentioned period of time to date. It attached to its opposing papers two supporting affidavits. These are deposed to by one Burningstone Chidari and one Sandra Beta.

Mr Chidari describes his designation as that of a graphic designer who is in the employ of Lanfine Investments (Private) limited which trades as the Design House. He states that he has, through his employment as the Design House, been involved in the design of the first respondent's branding and promotional material including store displays and fliers. He confirms that the first respondent has used the catchphrase “*Slice .... I Luv It*” in its advertising and branding materials since 2017.

Ms Beta works for the first respondent in the capacity of branch manager. She is based at the first respondent's Samora Machel branch, Harare. Her deposition is to the effect that she worked at the mentioned branch from June 2018 to date. She states that when she came to the branch, the same was branded with advertising material which used the phrase “*slice ...I luv it*” and that the same continues to remain in use at the branch.

The first respondent's submission is that the applicant cannot complain of matters which came into existence in 2010, or 2011 or 2017 in March, 2019 on the basis that the same are urgent. It insists that matters which the applicant allowed to lie undisputed for 9 years, or 8 years or 2 years respectively cannot be said to have suddenly become urgent in March, 2019.

It, in short, argues that the applicants should have acted when the need to act arose. The fact that they did not, it contends, shows that this application is not urgent.

The applicants do not traverse the statement of the first respondent in specific terms. All what they say is that they became aware of what they term the offending material which they are complaining of on 1 March, 2019. They make every effort to explain away the thirteen (13) days-delay which occasioned this application. They allege that they became aware of the injury which the first respondent is allegedly causing to them when they received complainants from some of their customers through the facebook channel of communication.

The consumers who drew their attention to the injury, if such exist, remain anonymous. The dates when they posted the complaints/concerns also remain unknown.

The question which begs the answer is whether or not the applicants' narration of events is capable of belief. If it is, then it is well and good that they applied as they did.

It is evident that a subjective test cannot be employed in an application of the present nature. It cannot be employed for the simple reason that the court must have an acceptable yardstick through which complaints which have a bearing on urgency can be assessed. Indeed, the whole issue of urgency or otherwise of a matter can never be assessed on the subjective test.

If the subjective test which the applicants want its case to be measured by were to be accepted as the measuring rod, all matters which are lodged at court would be filed through the urgent chamber book; it being a fact that all litigants want to have their cases heard and determined as quickly as yesterday. Court work would, under the stated set of circumstances, remain not only untenable but also unmanageable.

It is for the observed and mentioned reason that the rules of court insist on the point that all applications which are filed through the urgent chamber book be accompanied by a certificate of urgency or an affidavit which justifies the fact that the matter cannot wait for its turn in the queue of applications which preceded it in terms of filing. The certificate or the affidavit must contain cogent and convincing reasons for the matter to be treated as urgent. The same are assessed on the basis of the objective, and not the subjective, test. The assessment is based on a commonly accepted standard and not on the will or whim of the applicant.

Using the reasonable man test, therefore, the applicants' statement which is to the effect that it failed to observe the injury which it alleges against the first respondent in 2010 or 2011 or 2017 becomes very improbable. It, in other words, could not have failed to discover the injury which it says its business competitor was/is causing it to endure. *A fortiori* when the

same competitor asserts, as it does, that it used the materials which allegedly offend the applicants' trademark in advertisements, newspaper publications and on the television from as far back as 2017.

The applicants, in my view, were not being candid when they employed the subjective test. Their aim and object were to bring their application within the ambit of urgent chamber applications. They must have realised that, if they made a concession to the statement of the first respondent, their application would not have qualified to be considered under the purview of those which the court allows to jump the queue.

The correct position of the matter is that the applicants did not act when the need to act arose. The application does not, on the basis of the above analysed matters, qualify to be treated as an urgent one. It, to all intents and purposes, falls under what CHATIKOBO J called self-created urgency in *Kuvarega v Registrar-General & Anor*, 1998 G ZLR 188. It is not urgent at all.

b) Whether or not the application has a dispute of fact.

The date(s) that the applicants became aware of the first respondent's alleged unwholesome conduct remain(s) a matter for serious debate. The applicants insist on 1 March 2019 as the date that they became aware of what they complain of against the first respondent. A finding has already been made to the effect that their statement does not reflect the correct position of the matter given the contrary view which the first respondent gave.

The first respondent states that the applicants became aware of the events which characterize their complaint in 2010 or 2011 or 2017. It disputes their assertion which gives the date as having been 1 March 2019.

The date(s) of the applicants' knowledge of the events which they complain of is/are a *sine qua non* aspect of this urgent chamber application. It is on the strength of that date or those dates that the court can assess, on a balance of probabilities, if the application which the applicants placed before it:

- i) is urgent and/or
- ii) was treated by them with the urgency which the same deserves.

It is evident, from a reading of the parties' respective submissions on the matter at hand, that the application has a material dispute of fact. The dispute, it is trite, cannot be resolved on the papers. It requires *viva voce* evidence for its resolution. It, indeed, is as a result of its acknowledgment of the dispute that the applicant urged the court to adopt the procedure which the court took in *Grandwell Holdings (Pvt) Ltd v Minister of Mines and Mining*

*Development & 5 Ors* HH 193/16 wherein, in an effort to resolve the dispute of the parties, the court conducted a trial within an application.

The procedure which is stated in *Grandwell* is, in my view, not desirable. It is not good because it tends to encourage parties to bring their applications to court with the full knowledge of the existence of a dispute/disputes of facts in the vein hope that the court would sanction the same in terms of the stated procedure.

It should be emphasised that the case of *Grandwell v Minister of Mines* should not be taken as the general rule which applies to urgent chambers application. It should be taken as an exception which can only be delved into under very exceptional circumstances which are more often than not dictated by the justice of the case.

The generally accepted rule is that, where a dispute of fact arises in an application, the court's discretion remains unfettered. It can dismiss the application on the strength of the dispute. Alternatively, it can refer the same to trial. Reference is made in this regard to *Magurenje v Maphosa & Ors* 2005 (2) 44 (H) and *Supa Plant Investments (Pvt) Ltd v Chidavaenzi*, 2009 (2) ZLR 132(H).

Referring to trial a matter which the applicants enrolled on the basis of urgency remains unconscionable. It will be more of an academic exercise than it aims at resolving the complaint of the applicants. The logical course which remains open to the court under such described circumstances is to dismiss the application which cannot be resolved on the papers.

(c) Whether or not the second applicant has *locus standi* to sue

The relationship of the two applicants was not explained in the founding affidavit. There, however, appears to be such in existence. The observation which I make on the same is that the deponent of the founding affidavit is the second applicant's director of finance. The fact that the first applicant authorised him to institute the application on its behalf shows the existence of the relationship of the two applicants.

The applicants' papers, unfortunately for them, do not articulate the interest which the second applicant has in the application. Only the first applicant's name appears in the certificate of registration of the trademark. The second applicant's name does not.

It is for the mentioned reason that the first respondent remains of the view that the second applicant does not have a direct and substantial interest in the application. Its assertion is well taken.

The concession which the applicants make on this aspect of the case puts that issue to rest. The concession, therefore, leaves the first applicant and the first respondent in the equation.

(d) Whether or not the applicants sued a non-existent party.

A party who sues a non-existent party is as good as having not filed any suit at all. A party, it is trite, cannot sue nothing. One is, in such a case, reminded of what Lord Denning stated in *MacFoy v United Africa Co. Ltd*, (1961) 5 All ER 1169 (PC) 1172 wherein the learned Lord Justice stressed that:

“If an act is void, then it is a nullity. It is not only bad, but incurably bad.... It is automatically null and void without more ado..... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

The above-cited words sum up the position of the applicant(s). They cited *Chicken Slice (Pvt) Ltd* as the first respondent. The resolution which they passed conferring authority on the second applicant’s director of finance, one Baldwin Guchu, to sue the first respondent and others describes the first respondent only as *Chicken Slice* and not as *Chicken Slice (Pvt) Ltd*. It is evident that the two cannot be one and the same thing. *Chicken Slice* which appears in the resolutions connotes a name of something. *Chicken Slice (Pvt) Ltd* is a legal entity. *Chicken Slice* and *Chicken Slice (Pvt) Ltd* are not one and the same thing. They are different things.

The name of the first respondent which should have been cited, but was not so cited, is Slice Distributors (Pvt) Ltd trading as *Chicken Slice*. It is for the stated reason that it takes issue with its citation. It states that it only filed its notice of opposition because the application was served on it.

That a suit filed against a non-existent party is null and void requires little, if any, debate. I, in the mentioned regard, associate myself with what the court stated in *Gariya Safaris (Pvt) Ltd v Van WYK*, 1996 (2) ZLR 246 (H) wherein it remarked that:

“A summons has legal force and effect when it is issued by the plaintiff against an existing legal or natural person. If there is no legal or natural person answering to the names in the summons as being those of the defendant the summons is null and void ‘*ab initio*’”

The applicants’ reliance on r 8 (C) of the High Court Rules, 1971 is totally disingenuous. The rule makes reference to associations. It excludes corporate entities. Its definition section reads:

“association” includes-

- (a) a trust; and
- (b) a partnership, a syndicate, a club or any other association of persons  
which is not a body corporate” [emphasis added]

The applicants’ statement which is to the effect that the first respondent is, in terms of r 8 (C), cited by its trade name cannot hold. It cannot hold because the first respondent’s trade name is not *Chicken Slice (Pvt) Ltd*. Its trade name is *Chicken Slice*. In any event, as a legal entity, the citation of the first respondent falls outside the ambit of r 8 (C).

The long and short of the matter is that the first respondent is not cited in the application. The applicants are, in substance, suing no one else other than the second and third respondents who are cited in their official capacities and only for the purpose of enforcing the order which they are moving the court to grant to them.

It is on the basis of the above-observed matters that the application cannot stand. It fails at each turn of all the four preliminary matters which were raised. Because the issue which relates to the word *luv* and the phrase *I luv it* go to the merits of the application, I consider it inappropriate to deal with the same as an *in limine* matter. The application, therefore, fails on the basis of the preliminary issues which the first respondent raised. It is, accordingly, dismissed with costs.

*Lunga Attorneys*, applicants’ legal practitioners  
*Mawere Sibanda*, respondents’ legal practitioners