PETROMOCEXOR (PRIVATE) LIMITED
versus
ENERGY PARK (PVT) LTD
and
FREDDY CHIMBARI N.O
and
KUDZAI MUKONDIWA
and
TRYMORE MANYANGA
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 7 July & 21 October 2022

Opposed Application

T G Chigudugudze, for the appellant
Mr V Masaiti, for the 1st respondent
M S Kutandada, for the 2nd respondent
T Manyange, for the 4th respondent

MANGOTA J: At the center of the dispute of the parties is Stand 262, Muzarabani Growth Point ("the property"). It is in Muzarabani which is under Mashonaland Central Province. The late Pascale ("Pascale") Shambi Nyamukondiwa is its owner. He leased it to the applicant in May, 2001. The lease was to endure for twenty-five consecutive years. Its operation was with effect from 1 June, 2001. Its terms which are relevant to the circumstances of this application are that:

a) the property would be used for erecting and operating a fuel retail outlet;
b) the lessee would develop the property for its intended use and…construct and install necessary improvements thereon on the mutual acknowledgement and understanding that each development(s) and/or improvement(s) would always remain the sole and exclusive property of the lessee- and
c) at the expiry of the lease, the lessor would regain possession of the property only and the development(s) would remain the sole and exclusive property of the lessee.

The applicant's unchallenged statement is that, pursuant to the lease which it signed with Pascale, it took occupation of the property and channeled investment on to it with a view to making it a going concern for its fuel retail business. It, in the mentioned regard, obtained the necessary building plans approvals and operating licences, erected on the property building(s) for shop and offices, fuel tanks, pumps and canopy. This, according to it, enabled it to carry out its fuel retailing business.

Its further unchallenged assertion is that, whilst it operated the service station at the property, Government promulgated new regulations. These, according to it, required all existing service stations to install, at their stations, an oil interceptor and separator as a way of managing effluent from spillages at the service station. The Environmental Management Agency ("EMA"), it alleges, set deadlines for the construction and installation of the additional improvement(s). It asserts that, because the parties had not contemplated these new improvements at the time of their contract, Pascale and it agreed between them that the attendant costs would be on Pascale's account so that if it (applicant) were to foot the bill which related to the additional costs, its payment of the same would affect either the period of the lease or payment of agreed rentals. It states that it proposed three options to Pascale. These were/are that the parties would:

i) agree on a nominated contractor's value with Pascale settling the contractor's invoice in full and the applicant supervising the contractor's works to ensure that such works meet the standard which EMA prescribed; and/or
ii) nominate a contractor and agree on the invoice with the applicant settling the contractor's invoice in full and, in return, Pascale would forego annual rentals equivalent to the amount the applicant settled; and/or
iii) nominate a contractor and agree on the invoice value with the applicant settling the contractor's invoice in full and Pascal extending the period of the lease by eight years.

The applicant's statement is that the parties agreed on the second option. It alleges that, before they executed the agreed option, however, Pascale died. He met his demise on 22 January, 2016. At his death the second respondent came into the equation. He had been appointed by the fifth respondent to the position of executor dative of the estate of the late Pascale Shambi Nyamukondiwa. His appointment was with effect from 29 July, 2016.

At his appointment, the second respondent wrote advising the applicant of the same. He requested it to deposit all rentals which accumulated from the time of the deceased's death. He furnished his bank details into which payments would be made. In its reply, the applicant requested confirmation of the second respondent's appointment to the position of executor. It paid the requested rentals into the furnished bank details of the second respondent and sought to dialogue with the latter regarding the new regulatory framework mandating the construction and installation of additional improvements as well as the three options which were available to the parties. The second respondent, the applicant claims, became non-committal and evasive. Absent the prescribed additional improvements, it asserts, it had no choice but to suspend operations at the property until the same had been upgraded to the prescribed standard. It insists that it did not ever part with possession of the property notwithstanding its suspension of operations. It states that it had its security personnel guarding the property whilst it awaited resumption of business consequent to prescribed compliance. It asserts that it removed from the property, for security reasons, its fuel pumps, generator and some other movables. These, it claims, were to be returned upon resumption of operations.

On 24 March, 2020 the second respondent wrote accusing the applicant of not paying rent, not operating at the property, irregularly removing the fuel pumps from the property and inviting it to terminate the lease if it was no longer able to proceed. His aim and object, the applicant claims, were to pave way for a new tenant who was/is interested in taking over the property with the beneficiaries of the same. His second letter of 29 June, 2020 repeated the accusations which he made in his letter of 24 March, 2020. He invited the applicant, on a 7 days' notice, to surrender the lease to the beneficiaries of the property. The applicant states that it paid the balance of the arrear rentals. However, the payment notwithstanding, the second respondent continued to be recalcitrant.

The above-mentioned expose' places this application into context. The applicant is moving me to grant to it an interdict, a declaratur and consequential relief in terms of s 14 of the High Court Act. For it to succeed, it must allege and prove, on a preponderance of probabilities, that it has a clear, as opposed to a *prima facie*, right to the possession of the property. Where it has such a right, its case remains unassailable and where, on the other hand, its right to possess the property is in doubt or is non-existent, its application will not succeed.

The requirements which an applicant for an interdict must satisfy were aptly stated in *Setlogelo* v *Setlogelo*, 1914 AD 221 at 227. These are:

i) a clear right or a right which is open to some doubt;
ii) harm suffered or reasonably apprehended;
iii) absence of alternative remedy – and
iv) balance of convenience favouring the applicant.

In this application, the applicable right should be a clear one. The applicant must show that it has a clear right to possess the property. It cannot prove its case where it shows that it has a *prima facie* right. Such a right does not suffice as proof for the motion which it mounted.

Because its application is premised on the relief of an interdict as well as that of a declaratur, it is pertinent for the applicant to prove, on a balance of probabilities, that it has a direct and substantial interest in the property which is the subject-matter of these proceedings. It should, in other words, show that it has a right which it is moving me to pronounce for its own benefit. Its right should be existent in terms of s 14 of the High Court Act which confers upon me the discretion to inquire into and determine the existence, or otherwise, of such a right upon the application of the applicant.

The applicant attached to the application Annexure B. The annexure is the lease which it signed with Pascale in May, 2001. It appears at p 40 of the record. It defines the relationship of the parties to it. It defines their rights and obligations as against each other. Its interpretation section, clause 2.1.1 defines the word 'Equipment' to mean the garage equipment which the lessee will install namely accepted fuel tanks for petrol, diesel, unleaded petrol and paraffin, industrial pumps and canopy. These, in terms of clause 9.1 of the lease, shall become the sole and exclusive property of the lessee.

It cannot, in view of the above-observed matter, be suggested that the applicant does not have a clear right to possession of the property. Nor can it ever be argued that it has no right to ownership of what it installed at the property. It, in short, has the requisite right to the property and the assets-movable or otherwise- which it installed onto the property which it acquired from Pascale as an open ground to which it added value through improvements which it made onto the same. That the applicant has a direct and substantial interest in the property requires little, if any, debate. The massive investment which it made into the property speaks volumes of its interest

which no one has controverted. The fact that the second respondent did not cancel the lease which it concluded with Pascale confirms the applicant's clear right to the property which is the subject of these proceedings. The relief which it is moving me to grant to it in the circumstances does not appear to be a far-fetched one.

When the applicant learnt of the presence of the first and third respondents on the property through its operations director, it engaged the first respondent whom it advised of its interest in the property as the latter was on the same without its consent and/or concurrence. It requested the first respondent to furnish it with details of its occupation including the date of occupation, total rentals it paid as well as a proposed way to amicably resolve the matter. The first respondent, it alleges, ignored its email which it addressed to it on 30 August, 2021.

When this application was filed, it was served upon all the respondents whom the applicant cited. The second, third and fourth respondents did not file any opposing papers. They were, therefore, barred. Their belated application for upliftment of the bar was unsuccessful. That left only the first respondent in the equation. It lamented the bar which operated against the three respondents in the following words:

> " It has been noted that the 2nd, 3rd and 4th Respondent(sic) who ordinarily would have more information regarding the claim and therefore in a better position to put such information before the court have failed to do so for reasons best known to themselves."

The first respondent denied that it was in occupation of the property. It, in the mentioned regard, placed reliance on the contract which it signed with the fourth respondent one Trymore Manyange. The Fuel Supply Contract which it concluded with Mr Manyange, it insists, makes it clear that, although it provides branding and fuel, the dispensing pumps and tanks did not belong to it. They, it asserts, remain the property of the dealer namely Mr Manyange. It denied that it was occupying the applicant's property. It also denied that it was using the applicant's tanks.

The Fuel Supply Contract to which the first respondent makes reference is at pp 115-120 of the record. Clauses 1.4,3.2, 3.3.1, 3.3.2, 4.2 and 4.7 show its presence at the property. Its statement which was to the effect that it did not take occupation of the property was/is misplaced. The cited clauses show, in a clear and categorical manner, its occupation of the property. It cannot, for instance, deny its presence at the property when it agreed with Manyange to brand the site with its logo, branding and uniform, or when it allows the petrol and/or diesel it supplies to Manyange

to remain in the tanks at the property until Manyange has paid for it. It cannot dispute its presence at the property when it insists that employees who work at the property must be dressed in clean, matching outfits, which are in accordance with its specific uniform requirements.

The court, it is trite, has in its power the ability to refer to its own records. This is a *fortiori* the case where the matter it is dealing with is substantially related to the one which it dealt with in the past: *Mhungu* v *Mutindi* 1986(2) ZLR 171(SC), *Netone* v *Econet,* SC 47/18.

In line with the accepted principle, I had occasion, in the recent past, to deal with an application which the first respondent filed through the urgent chamber book on 22 August, 2022 under HC 5571/22. It is the first applicant and Mr Manyange is the second applicant in the same. The application relates to the property which is the subject of the present application. The first respondent states in para(s) 3.1 and 3.2 of its founding affidavit (pp 22-23) as follows:

> "3. **THE APPLICATION**
> 3.1 This is an application for restoration of possession as an adjunct to a provisional order seeking the setting aside of the writ of ejectment issued in this court under Case No.HC2513/22 on the return date and further seeking specific declarations of invalidity made in terms of rule 60 of the High Court Rules 2021 (Statutory Instrument 202 of 2021) as read with s 14 of the High Court Act [*Chapter 7;06*].
> 3.2 The *remedy* sought in the interim is *rightly for the restoration of possession of Stand No.262 Muzarabani Growth Point,* Muzarabani *to the first and second applicant* (sic) which have been operating a functional, upgraded and compliant service station on the property."

It is axiomatic for the first respondent to allege, falsely as it is doing, that it is not in occupation of the property when the above-cited clauses as read with the above –quoted words which it made in its sworn statement under HC 5571/22 confirm its occupation of the property. The salient principle of the law is that no one is allowed to take up two positions which are inconsistent with one another. No one, in short, is allowed to approbate and reprobate or, as it is often commonly stated, to blow both hot and cold: *Hlatshwayo* v *Mare & Deas*, 1912 AD 242 at 259.

The first respondent was telling a falsehood when it denied its occupation of the property. It, in fact, acknowledged its occupation during its discussion with the applicant. It promised to move out of the same but did not. Its continued presence at the property and its continued operation of the same remained very prejudicial to the applicant which had no remedy other than to sue the respondents as it did. It is evident that the balance of convenience favours the applicant who stood to lose the investment which it made when it concluded the lease with the owner of the property.

It cannot be denied that the first respondent's continued occupation of the applicant's property prejudiced the latter in a very material way. It used the equipment and development at the property to the total exclusion of the applicant. It conducted business for which the applicant secured the lease. It enriched itself unjustifiably in the process.

However the first respondent found its way to the property is not the issue. The issue is that it took occupation in the presence of a subsisting lease which the second respondent did not cancel. Mr Manyange with whom it went into the fuel supply contract did not have the authority to deal with the property in the manner that the first respondent and him did. The first respondent should have conducted due diligence before it signed the lease. If it had done so, the probabilities are that it would have remained alive to the fact that Mr Manyange, not being the executor of the estate of the deceased, did not have the power or authority to deal with the deceased's property in the manner that he did.

It cannot ever be suggested that the applicant relinquished its right to possession of the property and/or the developments which it effected on to the property when it suspended its operations at the same with a view to complying with the law. An uncontemplated supervening impossibility had set into its operations. The second respondent and it had to address the issue which related to the new law. The second respondent who, it appears, did not quite appreciate the implications of the new law made matters worse than they really were when he refused to negotiate with the applicant as his predecessor had done prior to his demise. If he had done so, as he should have done, the situation which related to the new law would have been addressed and damage arrested in the process.

Going by the premise that the equipment which the first and fourth respondents were using at the property was/is that of the applicant, both had to be interdicted from continuing to use the same. Because both of them had no legal title or right to be at the property, their eviction from the same was not without merit. Because they occupied the property and used the assets of the applicant against the latter's will, the order which directs them to account to the latter all the money which they received, or would receive, is not out of place.

The applicant proved its case on a balance of probabilities. The application is, in the result, granted as prayed in the draft order.

Madanhe & Chigudugudze, applicant's legal practitioners
Saidi Law firm, first respondent's legal practitioners
Charamba & Partners, second respondent's legal practitioners