

REPORTABLE ZLR (29)

Judgment No. SC 32/07
Civil Appeal No. 12/05

NUMENT SECURITY (PVT) LTD v (1) SIMON MUTOTI (2)
ANTONY MUPFUNDE (3) RINOFLAVINO GWEREMWOZHE (4)
ABEL GOCHE (5) FLIT ON ENTERPRISES t/a KNIGHT
SECURITY

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE, JULY 10, 2006 & NOVEMBER 5, 2007

P Machaya, for the appellants

N Zwizayi, for the respondents

CHEDA JA: The history of this matter, which is common cause, is that a company known as Python Investments (Pvt) Ltd (“Python”) which was in the security business, using the name Knight Security, ran into financial problems.

The proprietor of the company wanted to close down and leave the country, but was unable to pay the company’s work force their benefits and gratuities.

The company decided to offer all the employees the company as a going concern. The employees accepted the offer in full and final settlement as set off against their claims and the agreement was put in writing.

Part of the agreement provided as follows:

“AND WHEREAS the company and the employees have agreed that in full and final settlement of a dispute concerning possible terminal benefits, annuities, retrenchment gratuities, pay in lieu of leave and the like and in full and final settlement of any claim each employee might have against the company, that the company in lieu of such claim does donate, hand over and grant to the employees who shall form a syndicate, the trade name, goodwill, current customers contracts, and assets as per the attached schedule as upon the following terms and conditions.”

The agreement was signed on 27 May 2002.

Persuant to the above agreement, two companies were formed. They were Flit-On Enterprises (Pvt) Ltd (“Flit-On”) and Nument Security (Pvt) Ltd (“Nument”)

According to Musiiwa’s affidavit, when Flit-On was formed he was appointed as one of the Directors.

He says Flit-On is the company that took over the goodwill, trade name, contracts and assets of Python. Its Directorship and shareholding was made up of the former employees of Python. It traded under the name Knight Security Services. He says Nument Security (Pvt) Ltd was incorporated with Mutoti, Mupfende, Gweremhezhe Goche and Moyo as its directors.

Nument also went on to trade under the style of Knight Security Services, the trade name used by Flit On.

According to him, this company has no authority to do so and infringes on the rights of Flit On. It is for that reason that Flit On wants Nument to be interdicted, restrained and barred from using the premises, assets, manpower and any bank account in the name Knight Security Services.

On the other hand, the opposing affidavit of Simon Mutoti, the Chairman of the Board of Directors of the appellant, says the former employees of Python set up a committee to negotiate the take over of Python.

He says the committee then proceeded to form and register Flit-On Enterprises (Pvt) Ltd on their own and without the mandate of the other employees.

A serious dispute emerged following which the workers formed their own company called Intensive Security (Pvt) Ltd.

The disputes resulted in the workers engaging in legal suits at the Magistrates Court where an order by consent was issued.

Part of the consent order provided that all the cases the parties filed at the Magistrates Court be withdrawn, and that an Ad Hoc Committee be formed with a specific mandate spelt out in writing, to replace the Management and Task Force Committees.

It should be noted here, that the effect of the Consent Order leaves out completely the existence of the companies concerned.

It seems this is the reason why the employees found themselves torn between two companies, that is, Flit-On Enterprises (Pvt) Limited and Nument Security (Pvt) Limited, both claiming to have taken over the assets, contracts and premises of Python Investments (Pvt) Ltd and decided to go to the High Court to have the dispute settled.

The High Court found that the dispute was “riddled with irreconcilable material disputes of facts”.

There were two rival companies and each claimed to be the authentic and legitimate successor to Python.

The High Court concluded, on the basis of papers, as follows:-

“On the papers it is clear that Flit-On Enterprises (Pvt) Ltd trading as Knight Security was the product of the joint will of the former employees of Python Investments in terms of the above agreement.

Nument Security (Pvt) Limited is a product of disgruntled employees who seek to break away from the original company by forming a rival company to take over the functions and assets of the original company.”

On the basis of this conclusion, the High Court granted a final order interdicting, restraining and barring Nument Security (Pvt) Ltd from trading under the style of Knight Security Services and ordering it to pay the costs.

This order by the High Court, does not seem to have taken into account the interest of those employees who were on the side of Nument Security Services.

Once the court *a quo* made the finding, that there were irrevocable despites of facts it should have been guided by the numerous authorities on interdicts, starting from *Setlogelo v Setlogelo* 1914 AD 221 which laid down the principles applicable to interdicts.

This case was followed by several judgments which laid down the requirements for the granting of an interdict as:

- (a) a right, which though *prima facie* established, may be open to some doubt;
- (b) a well grounded apprehension of irreparable injury;
- (c) the absence of any ordinary remedy.

See (1) *United Technical Equipment Co v Johannesburg City Council* 1987 (4) SA 343; (2) *Welcom Bottling Co. (Pvt) Ltd en 'n Ander v Belfast Minerals Waters (DFS) (Pvt) Ltd* 1967 (3) SA 45, where a rule *nisi* was discharged because the applicant had not

established a clear right; and (3) *Cresto Machines (EDMS) BPK v Die Afdeling Speur-Offisier, S.A. Polisie, Noord Transvaal* 1972(1) SA 376, where it was again held that:

“As the appellant had not proved in all the circumstances that it had a clear right not to be disturbed in its ownership or possession of the machines, that the appeal should be dismissed with costs.”

See also *Phillips Electrical (Pvt) Ltd v Rufaro Gwanzura* HH 374-88 (HC 1757/88),

where it was held that:

“Since there was a material dispute of fact, petitioner had not made out ‘a clear right’ to aninterdict.”

When parties first appeared in this Court, the matter was postponed as it was reported that they wanted to negotiate a settlement. Mr *Zvidzai*, for the respondents, conceded that the interdict was wrong as it gave a right to one party without hearing evidence. That concession was properly made.

Each side was claiming that their company is the legitimate successor to Python.

There is an allegation that the workers who formed Flit-On made themselves the Directors without the mandate of the other workers.

If this is one of the irreconcilable material disputes of fact, then the Court should have heard evidence to determine what the correct position was before granting a final interdict.

It was therefore, unsafe to resolve the matter on the papers without establishing a clear right on the part of the respondents.

For that reason I make the following order –

1. The order of the court *a quo* in case No. HC 955/05 is set aside.
2. The matter is referred to trial before a different Judge.
3. Costs be reserved for determination at the trial.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Mtombeni & Associates, appellant's legal practitioners

Chinyama & Associates, respondents' legal practitioners