

ETO ELECTRICALS AND REWINDS (PVT) LTD
versus
ZESA HOLDINGS (PVT) LTD
and
THE OFFICER COMMANDING MINERALS UNIT, ZIMBABWE REPUBLIC POLICE,
HARARE
and
THE COMMISSIONER GENERAL, ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 11 and 17 June, 2015

Urgent Chamber Application

N. Mashizha for the applicant
M. Baera for the 1st respondent
L. Mutambisi, with him *K. Maodzwa* for the 2nd and 3rd respondents

ZHOU J: The applicant is a company which is in the business of dealing in scrap metal. It holds a licence issued to it in terms of the provisions of the Copper Control Act [*Chapter 14:06*]. The licence entitles it to, among other things, acquire, sell or otherwise deal in copper. Its business offices are at 50 Lytton Road, Workington, Harare. It has a warehouse at 102 Willowvale Road, Harare, at which it keeps some of its copper.

On 5 June 2015 two officers of the Zimbabwe Republic Police accompanied by an employee of the first respondent attended at the applicant's warehouse and advised that they intended to search for certain materials which were suspected to have been stolen from the first respondent. The applicant's directors, Elliot Zhuwawo and Nathan Mnaba, were taken to Southerton Police Station where they were advised of an intended search of the applicant's warehouse. When they returned to the warehouse they found a security guard of the first respondent stationed at the premises. Two officers of the Zimbabwe Republic Police were also brought in to guard the warehouse. The applicant was advised that the intended search would commence on the following day. The applicant states that later that evening the private security guard engaged by it to guard the warehouse was asked to leave by the two police officers and the guard placed at the premises by the first respondent. On 6 June 2015 more employees of the first respondent and additional police officers were brought onto the

applicant's premises. The applicant states that its directors and legal practitioner queried the presence of the first respondent's employees and police officers and the proposed search on the ground that the police officers had not exhibited a search warrant to them. The respondents were not deterred by the threat of litigation. On 9 June 2015 the applicant instituted the instant application under a certificate of urgency for a provisional order in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. 1st, 2nd and 3rd respondents be and are hereby ordered to desist from interfering with the applicant's lawful business operations by not putting its armed security onto applicant's premises at Number 102 Willowvale Road, Harare or searching applicant's premises or seizing any of applicant's copper scrap without a warrant of Search and Seizure to that effect.
2. 1st and 2nd respondents be and are hereby jointly and severally, the one paying the other to be absolved, ordered to pay the costs of this application on an attorney-client scale.

INTERIM RELIEF GRANTED

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

1. 1st, 2nd and 3rd respondents be and are hereby ordered and directed to immediately remove their armed security personnel from applicant's premises being Number 102 Willowvale Road, Willowvale, Harare.

SERVICE OF PROVISIONAL ORDER

This provisional order be served on the respondents by the applicant's legal practitioners.”

The matter was heard on 11 June 2015. Mr *Mashizha* for the applicant submitted that the respondents' conduct contravened the applicant's right to privacy enshrined in s 57 of the Constitution. The applicant had therefore established the existence of a right as well as an infringement thereof for the purposes of the interim interdict sought. He contended that there was no alternative remedy available to the applicant, and that the balance of convenience favoured the granting of the interdict. He submitted that the applicant was not so much worried about a search being conducted at its premises by the respondents' officers than about the presence of armed officers and the displacement of its own private security personnel. The respondents did not file opposing papers but elected to make submissions based on the papers filed. At the time that the matter was heard it was pointed out by the respondents that a search warrant had been obtained, and that the searches conducted so far revealed that the applicant had in its possession certain materials believed to have been stolen from the first respondent. By agreement of the parties a copy of the search and seizure

warrant was filed on 12 June 2015. The date stamp on the face of it shows that it was issued by the Provincial Magistrate at Harare on 11 June 2015, the date on which the matter was heard. The applicant accepted the existence of the warrant of search and seizure, but submitted that it was issued when the respondents had already placed their officers at the premises. The applicant does not, however, suggest that any searches or seizures of its property commenced before the warrant was issued. In fact, as noted above, the applicant did not object to the search being conducted at the premises.

The requirements for an interim interdict to be granted are settled in this jurisdiction. They are:

- “(1) that the right which is sought to be protected is clear; or
- (2) that (a) if it is not clear, it is *prima facie* established, though open to some doubt; and (b) there is a well-grounded apprehension of irreparable harm if interim relief is not granted and the applicant ultimately succeeds in establishing his right;
- (3) that the balance of convenience favours the granting of interim relief; and
- (4) the absence of any other satisfactory remedy.”

See *Nyambi & Ors v Minister of Local Govt & Anor* 2012 (1) ZLR 569(H) at 572D-E; *Econet (Pvt) Ltd v Minister of Information* 1997 (1) ZLR 342(H) at 344G-345B; *Watson v Gilson Enterprises & Ors* 1997 (2) ZLR 318(H) at 331D-E; *Nyika Investments (Pvt) Ltd v ZIMASCO Holdings (Pvt) Ltd & Ors* 2001 (1) ZLR 212(H) at 213G-214B.

The existence of a right is a matter of substantive law. Whether that right is clearly or only *prima facie* established is a question of evidence. In the instant case the applicant clearly has a right to the warehouse and the property therein. The right to the privacy of its property and not to have the premises or property entered or searched without its permission is protected by section 57 of the Constitution, which provides as follows:

- “Every person has the right to privacy, which includes the right not to have –
- (a) their home, premises or property entered without their permission;
 - (b) their person, home, premises or property searched;
 - (c) their possession seized;
 - (d) . . .
 - (e) . . .”
 - (f)

Section 45(3) of the Constitution provides that juristic persons as well as natural persons are entitled to the rights and freedoms set out in Chapter 4 to the extent that those rights and freedoms can appropriately be extended to them. Put in other words, the applicant, which is an incorporated company, is entitled to the rights and freedoms set out in the constitution, just like a natural person. The right to privacy is one to which the applicant can lay claim, as it occupies the premises to which this application relates and has control over

the items warehoused at those premises. Given the fact that the applicant's right is clearly established I need not consider whether there is a well-grounded apprehension of irreparable prejudice if the interim relief is not granted. It is necessary, however, to consider the question of the balance of convenience.

In relation to the balance of convenience, the court is enjoined to weigh the prejudice to the applicant if the interim interdict is refused against the prejudice to the respondent if it is granted: *Nyambi & Ors v Minister of Local Govt & Anor (supra)* at 574G-H; *Knox d'Arcy Ltd v Jamieson* 1996 (4) SA 348(A) at 361D-F. The interim interdict sought by the applicant is for the respondents to forthwith remove the police officers and security officers of the first respondent placed at the applicant's warehouse. The purpose of placing those details at the premises is, no doubt, to secure the place, and ensure that no items are removed from the premises pending the investigations under way. If the relief sought by the applicant is granted then that protection will be lost. I cannot assume that the applicant which is the company under investigation would be entrusted with the responsibility to ensure that no items are removed from its warehouse. It clearly has an interest in the outcome of the investigation. On the other hand, I do not understand the applicant to be alleging that the security of the items in the warehouse is jeopardised by the presence of the police officers. No suggestion was made that they may conduct themselves in any manner that would irreparably prejudice the applicant's interests. Their interest is to ensure that the warehouse is secured during the period of the search. For those reasons, it seems to me that the balance of convenience does not favour the granting of the interim relief being sought by the applicant. I would have had no difficulty if the applicant had sought relief that its own security personnel be also allowed to be present during the search. But that is not what the applicant is asking for.

Dealing in copper is a closely controlled trade, as shown by the provisions of the Copper Control Act [*Chapter 14:06*]. A licence issued in terms of section 4 of that Act entitles the holder thereof to carry on the trade or business of a dealer upon the premises specified in the licence. The Act in s 7 imposes restrictions as regards the hours during which copper may be purchased or received in the course of trade or business, and prohibits the receipt or purchase of copper between the hours of nine o'clock in the evening and seven o'clock in the morning. Copper is a strategic metal as it is used by the first respondent which bears the primary responsibility to ensure that there is adequate supply of power in the country. This court must, therefore, be sensitive to the above considerations in considering

whether or not to order that the police officers should leave the applicant's premises in circumstances where there are reasonable grounds for believing that the applicant has in its warehouse stolen copper belonging to the first respondent. The fact that a warrant of search and seizure has been issued and that some copper has been recovered which is believed to belong to the first respondent are factors which I have also taken into account in this matter. Whether the materials are eventually found to have been properly in the possession of the applicant is a matter which will be established through the process of investigation. I do not believe that the applicant would be irreparably prejudiced by allowing the police officers and a security detail from the first respondent to remain at the premises while the investigations are underway.

The Copper Control Act requires the applicant as a dealer to keep proper records of the copper in its possession. It should, therefore, be easy to account for any loss which might be wrongfully occasioned by the processes being undertaken by the respondent. For that reason, the applicant is not without an alternative remedy which adequately protects its rights.

Even if all the requirements for the granting of an interim interdict cited above had been established, this would be an inappropriate case for the court in the exercise of its discretion to grant the interdict sought. The law reposes in the court a general and overriding discretion whether to grant or refuse an application for an interim interdict even in circumstances where the requisites for that relief are found to exist. That discretion must be exercised judicially based on the circumstances of each case. See *Nyambi (supra)* at 575D-E; *Watson v Gilson Enterprises & Ors supra* at 331E; *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382(D) at 383E. As pointed out above, an order for the removal of the police guards would not be in the interests of the proper execution of the search warrant.

I accept that properly the respondents should have sought and obtained the search and seizure warrant before they took guard of the premises in question, and will take that factor into account in relation to the question of costs. Ordinarily costs should follow the result. However, in view of the fact that the applicant moved onto the premises on 5 June and only obtained a search and seizure warrant some six days later on 11 June 2015, their conduct is unacceptable and should be penalised by a denial of costs. While the respondents did not conduct any search prior to obtaining the warrant that does not excuse their conduct of taking charge of the premises some six days prior to obtaining the search warrant in the circumstances.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. Each party is to bear its own costs.

Sachikonye-Ushe, applicant's legal practitioners

Baera & Company, first respondent's legal practitioners

Attorney-General's Office, second and third respondents' legal practitioners