NOBERT CHAWIRA
versus
CAPS UNITED FOOTBALL CLUB
and
ZIMBABWE FOOTBALL ASSOCIATION

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 21 and 29 July 2015

Urgent Chamber Application

O. Zimbodza, for the applicant
T.K. Hove, for the 1st respondent
J. Mashingaidze assisted by J. Mamutse, for the 2nd respondent

TAGU J: This is an urgent chamber application in which the applicant seeks a provisional order in the following terms:

> **"Terms of the final order sought**
>
> That pending the finalisation of the summons matter, 1st Respondent be and is hereby barred and interdicted from applying any clearance certificates from the 2nd Respondent.
>
> **Interim relief granted**
>
> That pending the finalisation of the dispute between the application between (sic) Applicant and 1st Respondent under the summons case, 2nd Respondent be barred and interdicted from issuing any clearance certificate in respect of 1st Respondent's players.
>
> **Service of the Provisional Order**
>
> Service of this Provisional Order shall be done by the Deputy Sheriff Harare or alternatively it shall be done by a clerk in Zimbodza & Mugwagwa Legal Practitioners."

The applicant is a football lover and a great fan of the first respondent which is a football club. To be precise the first respondent is CAPS UNITED FOOTBALL CLUB, a company duly incorporated in accordance with the laws of Zimbabwe, operating and trading as such at Office Number Y123 National Sports Stadium, Harare. The second respondent is Zimbabwe Football Association, a football governing body and an association mandated

among other duties, to issue clearance certificates both locally and internationally to players to enable them to pursue their professional football careers in other clubs.

In or about the year 2013, the first respondent was in dire financial distress and was at the verge of collapse and was unable to meet its Club responsibilities. In order for it to survive the harsh economic environment then prevailing, the first respondent entered into an agreement with the applicant the terms of which the applicant undertook to advance the first respondent sums of money for the first respondent's day to day operations. Pursuant to that agreement the first respondent caused to be drawn and signed by its Executive Chairman Twine Phiri, and Chief Executive Officer Joe Makuvire, a letter of Guarantee for the funds advanced to it. The letter of Guarantee dated 29 August 2013 reads as follows:

"LETTER OF GUARANTEE

a. This note serves as letter of guarantee and /or confirmation of surety of debt.
b. CAPS UNITED FOOTBALL CLUB hereby acknowledge indebtedness to Mr Norbert Chawira I D No. 631177267m42 Resident at 2B BARNES ROAD CHISIPITI HARARE for various amounts defined by various acknowledgments of debt notes.
c. CAPS UNITED FOOTBALL CLUB currently acknowledges lack of capacity to service such debts.
d. The creditor Mr Norbert Chawira also fully acknowledges the cash constraints facing the club and the resultant inability to immediately service the debts.
e. The creditor Mr Nobert Chawira further promises to continue to provide funds to the club in various quantities and availed from time to time on condition that such funds are fully acknowledged by the club and are subject to this guarantee.
f. The guarantee is for funds not exceeding USD 100 000 (one hundred thousand United States dollars).
g. CAPS UNITED FOOTBALL CLUB hereby cede the club's rights to any transfer earnings that may be realised for the local or international transfer of players currently in the club's books.
h. The club further cedes rights to any prize money that may be earned for the duration and quantum of indebtedness to the creditor.
i. The club hereby consents and expressly empowers the creditor to recover his debt in part or in full from any future transfer earnings.
j. The club undertakes to service all debts under this guarantee by 28 February 2014 and shall ensure a deliberate effort to export players so as to meet obligations covered by this guarantee by the due date.
k. The ceded rights are limited strictly to amounts owed by the club to the creditor and fully acknowledged by both parties.
l. The cession expires on full payment of all the funds owed.
m. The cession acts as a guarantee and entitles the creditor to future earnings in respect of the debt only and in no way does it communicate or translate to ownership of players and/ or their rights.
n. Both parties agree to this guarantee being supervised by the Zimbabwe Football Association (ZIFA).
o. This being the full guarantee and agreed on 29 August 2013 at Harare.

For and on behalf of CAPS United FC and duly empowered to do so.

(Signed) (Signed)

TWINE I PHIRI **JOE MAKUVIRE**

Executive Chairman Chief Executive Officer

For and on behalf of the CREDITOR
NOBERT CHAWIRA
CREDITOR"

In his founding affidavit the applicant stated that he channelled a total sum of US$ 55 000-00 to the first respondent which the first respondent duly acknowledged and that the debt remained outstanding and unpaid despite the undertaking in the letter of guarantee that the money would be paid by 28 February 2014, and despite numerous meetings and assurances that the amount due shall be paid. As a result of the first respondent's failure to honour the letter of guarantee he issued summons for the recovery of the money advanced, and the matter is still pending before this Honourable Court. What has jolted him into filing this application for an interdict is the fact that he stumbled upon the story carried in the media to the effect that the first respondent has sold two of its players namely Gerald Phiri to Bidvest Wits Football Club in South Africa and Ronald Pfumbidzayi to Hobro IK Football Club in Denmark without his knowledge, and without any payment of the transfer earnings being made to him in terms of the letter of guarantee. Further, the first respondent is at the verge of obtaining Clearance Certificates from the second respondent in respect of the two players. It is his contention that this development and the subsequent failure to advance to him the transfer earnings is clearly meant to deprive him of the transfer earnings duly ceded to him in accordance with the letter of guarantee. He therefore, said that should the clearance certificates be issued in respect of these two players, he would stand to suffer irreparable harm and prejudice in that he would not be able to get his transfer earnings and would not be able to have any compelling effect on the first respondent to release the money to him. Moreso, there are reasonable fears that by the time they call up the meeting all the money realised would have been used up. He therefore, has no other relief save for an order barring the first respondent from securing clearance certificates and an order barring the second respondent from issuing clearance certificates in respect of these two players until this matter has been finalized.

The application is opposed by the first respondent only. The second respondent told the court that it wished that the parties should settle their dispute amicably hence it would be bound by the Court's ruling.

At the hearing of the application Mr *Hove* for the first respondent took some points in *limine*, the chief ones being that Gerald Phiri and Ronald Pfumbidzayi should have been cited since they are free agents, that there should have been a distinction between Caps United Football Club (Pvt) Ltd and Caps United Football Club, that the applicant is not a football agent registered with the second respondent hence is not recognised by FIFA, that the requirements of urgency have not been established and lastly that other requirements of an interdict such as clear right and alterative remedy have not been pleaded. I directed the parties to address me on the points in *limine* as well as on the merits.

On the issue of non-citation of Gerald Phiri and Ronald Pfumbidzayi, Mr *Zimbodza* for the applicant argued that the two players belonged to the first respondent. He disputed the fact that they are free agents. The fact that they did not negotiate their transfer on their own but through the first respondent showed that they are not free agents. He argued that the rights to be affected are rights ceded by the first respondent to the applicant. The players are therefore not answerable to the applicant. The application is not premised on the basis that the applicant owns the players but that the first respondent ceded transfer earnings to the applicant. I therefore agree with the view taken by Mr *Zimbodza* that non- citation of the two players is not fatal to the applicant's application. The letter of guarantee is very clear that the agreement was entered between the first respondent and the applicant. The first point in *limine* is dismissed.

The second point raised by Mr *Hove* for the first respondent was that the application failed to make a distinction between Caps United Football Club (Pvt) Ltd and Caps United Football Club. I do not seem to see the relevance of that distinction since the applicant entered into an agreement with an entity that identified itself as CAPS UNITED FOOTBALL CLUB as per the letter of guarantee. This is the same entity that the applicant has cited. I find no merit in that argument. Equally the fact that applicant is not registered with the second respondent and is not recognised by FIFA does not take away the applicant's *locus standi* to sue the first respondent for money he lent to it. I therefore dismiss the second point in *limine.*

Thirdly, Mr *Hove* argued that the applicant failed to establish the requirements of urgency. He said the claim allegedly arose in February 2014 for a debt that accrued in 2013. He said there is no explanation as to why the applicant waited from 2013 to issue summons now which the first respondent is now in possession of, though it has not been formerly served by the Sheriff. Mr *Hove* referred this court to the case of *Tinofara Kudakwashe Hove* v T*he Commissioner- General ZIMRA* HB 29/11, on what constitutes urgency. On this point

Mr *Zimbodza* explained that the selling of these players is the event that triggered this application. Prior to that there were no happenings that caused applicant to act. Mr *Zimbodza* referred the court to the case of *Kuvarega* v *Registrar- General and Anor* 1998 (1) ZLR 188 (H) at 193 where it was stated that;

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

In *casu*, the applicant realised that the debt had not been paid by 28 February 2014, a date mentioned in the letter of guarantee. The applicant then issued a summons claiming a sum of $ 55 000-00. Although the Sheriff is still holding onto the summons for reasons not clear to this court, Mr *Hove* confirmed that the first respondent is now in possession of the copy of that summons. Ideally the summons should have been attached to this application. But be that as it may the applicant made reference to it. At the time the summons was issued the applicant had not seen it fit to proceed by way of an urgent application but by way of trial action. I agree with Mr *Zimbodza* that what prompted the applicant to institute this application is the sale of the two players which came to his attention through newspaper reports. Clearly this ignited urgency in this case because if he had not done so clearance certificates could have been issued without his knowledge. I therefore find this matter to be urgent and I dismiss this point in *limine.*

The last point raised by Mr *Hove* was that the requirements for an interdict have not been pleaded. He said the applicant has an alternative remedy and that the applicant does not have a clear right in this case, hence there is no basis for an interdict. While Mr *Hove* sought to raise this point as a point in *limine*, it is basically a point to be decided on the merits. Both counsels addressed me extensively on this issue. Since I dismissed most of the points in *limine,* it is my wish to now deal with the merits of the application and in doing so decide whether or not the requirements of an interdict have been pleaded and or proved.

The applicant wants the first respondent to be interdicted from applying for any clearance certificates from the second respondent, and the second respondent to be barred and interdicted from issuing any clearance certificates in respect of the first respondent's players until the dispute under the summons case is finalized. As I highlighted above the cause of action arose from a letter of guarantee signed between the applicant ant the first respondent.

The requirements of an interdict are well known. Mr *Hove* referred this court to the cases of *Eastview Gardens Residents Association* v *Zimbabwe Reisurance Corporation Ltd*

and Others SC90/02; *Chirenje* v *Vendfin Investments P/L and Others* HH 6/04; *Northern Farming (Pvt) Ltd* v *Egra Merchants (Pvt) Ltd T/A Vegra Commodities & Another* HH 328/13 and *Harland Brothers (Pvt) Limited and Another* v *Minister of Lands And rural Settlement and Another* HH6/10.

From the above authorities and the case of *Enhanced Communications Network (Pvt) Ltd* v *Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (H) at 343 it is trite that the requirements for the grant of a temporary or interim interdict are that:-

(1) The right sought to be protected is clear; or

(2) (a) if it is not clear, it is prima facie established, even though open to doubt; and

(b) there is a well-grounded apprehension of irreparable harm if the relief is not granted and the applicant ultimately succeeds in establishing his right;

(3) the balance of convenience favours the grant of the relief; and

(4) there be no other satisfactory remedy.

Mr *Hove* submitted that in this case the applicant does not have a clear right because he said he is owed money but has not said how much. Mr *Zimbodza* argued that the applicant, on the authority of *Bozimo Trade and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR 1 (H) has a *prima facie* right though open to doubt. He cited paragraph (g) of the letter of guarantee which he said gives the applicant a *prima facie* right to transfer earnings and that this must be read with paragraph (a). Paragraph (a) of the letter of guarantee says:

> "a. This note serves as letter of guarantee and / or confirmation of surety of debt", and paragraph (g) goes on to say-
>
> "g. CAPS UNITED FOOTBALL CLUB hereby cede the club's rights to any transfer earnings that may be realised for the local or international transfer of players currently in the club's books."

In my view it is clear that the applicant has a right in the transfer earnings of the first respondent's players registered in the first respondent's books who included Gerald Phiri and Ronald Pfumbidzayi. What is only open to doubt, which can be resolved by the summons case is whether or not the applicant advanced a total sum of US$ 55 000-00 or not to the first respondent.

As regards the requirement of irreparable harm, Mr *Hove* argued that if there was any harm suffered, it was suffered on 28 February 2014. However, Mr *Zimbodza* argued that once the transfer earnings are used up, his client would not be able to recover them as the first respondent is not financially stable. I agree with Mr *Zimbodza's* submissions because it is apparent that the first respondent sold the players without the knowledge of the applicant in order to avoid its obligations flowing from the letter of guarantee. Consequently the balance of convenience favours the applicant.

The last point raised by Mr *Hove* was that the applicant has an alternative remedy in terms of Order 4 r 20 of the High Court rules, that is, the applicant could proceed by way of summary judgment if there is a liquid document. However, Mr *Hove* seemed to be contradicting himself because earlier on he argued that the applicant cannot sue on the letter of guarantee because it is not a liquid document. Mr *Zimboadza* shot back to say indeed this remedy is not available to the applicant because the letter of guarantee is not a liquid document and that the applicant has to prove how much he advanced to the first respondent. I concur with Mr *Zimbodza* that no alternative remedy is available to the applicant in terms of Order 4 r 20.

In the result the application succeeds and the following provisional order is granted-

"TERMS OF THE FINAL ORDER SOUGHT

That pending the finalisation of the summons matter, 1st respondent be and is hereby barred and interdicted from applying any clearance certificates from the 2nd respondent.

INTERIM RELIEF GRANTED

That pending the finalisation of the dispute between 1st respondent and the applicant under the summons case, 2nd respondent be barred and interdicted from issuing any clearance certificates in respect of 1st respondent's players.

SERVICE OF THE PROVISIONAL ORDER

Service of this Provisional Order shall be done by the Deputy Sheriff Harare or alternatively it shall be done by a clerk in Zimbodza & Mugwagwa Legal Practitioners."

Zimbodza & Mugwagwa , applicant's legal practitioners
TK Hove and Partiners, 1st respondent's legal practitioners
J Mashingaidze and J Mamutse, for the 2nd respondent