

IRIE VIBES THYLO (PVT) LTD  
versus  
CITY OF HARARE  
and  
TOWN CLERK (CITY OF HARARE)  
and  
DIRECTOR OF PLANNING SERVICE (CITY OF HARARE)  
and  
DIRECTOR OF PUBLIC SAFETY (CITY OF HARARE)  
and  
MINISTER OF LOCAL GOVERNMENT AND RURAL  
AND URBAN PLANNING

HIGH COURT OF ZIMBABWE

MATANDA-MOYO J  
HARARE, 14 October 2015

### Civil Trial

*A Mugiya*, for the plaintiff  
*B Chokowero*, for the defence

MATANDA-MOYO J: This is a claim for the following relief;

- 1) That defendant be barred from evicting and demolishing the plaintiff and its members' structures.
- 2) That the defendant be ordered to issue a long lease to the plaintiff in terms of their agreement.
- 3) That the defendant pay costs of suit on a higher scale.

Plaintiff is a company incorporated in terms of the laws of this country and carrying on business in Zimbabwe. The plaintiff represents the interests of disabled persons in Zimbabwe especially those who seek to empower themselves by creating employment. In its declaration the plaintiff alleged that its members approached the defendant for vending spaces sometime in 2011. The plaintiff's members were advised to approach the then Mayor Masunda. Plaintiff alleged that an oral agreement was reached between plaintiff and the then Mayor for the plaintiff to occupy Fourth Street and Mbudzi vending sites. The plaintiff has

refurbished toilets at Fourth Street bus terminus and has also constructed a Police Post at Mbudzi to the tune of \$23 000-00. In fulfilment of the terms of the agreement with the defendant the plaintiff alleged that the structures were approved by the defendant.

The defendant is alleged to have failed to honour its part of the agreement and has now threatened to evict and demolish the plaintiff's and its members' structures, resulting in plaintiff instituting this claim.

The defendant on the other hand denied ever entering into any agreement with plaintiff and its members. The defendant is of the view that if talks were held between the then Mayor and the plaintiff, such talks, without defendant's ratification are a nullity and unenforceable. The defendant denied ever authorising the plaintiff and its members to occupy any vending sites. The defendant submitted that plaintiff and its members are in illegal occupation of defendant's land. The defendant also disputed ever approving the erection of any structures by plaintiff at the sites. Defendant prayed for the dismissal of plaintiff's claim with costs on a higher scale.

After hearing evidence from both parties I am of the view that there are no facts in dispute. The facts which came out during trial were that the plaintiff and its members are in occupation of defendant's land from as far back as 2009. Plaintiff and its members approached the then Mayor of Harare Mr Masunda in January 2010 and presented a petition. In that petition plaintiff and its members appealed to a stop from harassment by municipal police, who they claim were seizing their goods and evicting them from the stalls they were illegally operating from. They also claimed equal business and housing opportunities with their able bodied counterparts. At the meeting they discussed with the Mayor to be allowed to operate from their stalls without harassment by the municipal police. The then mayor allowed them to continue doing business at Fourth Street, Charge Office and Mbudzi. The plaintiffs continued to conduct their business during Mayor Masunda's tenure in office. Problems started after Masunda exited office. The respondent has threatened to evict plaintiff and its members from the premises they are operating from. This court is now being called upon to bar the defendants from doing so and to order defendant to perform its part of the contract.

Firstly this court must determine the powers of the then Mayor in allocating vending stalls to plaintiff and its members. Did the then Mayor have such powers? Section 274 of the Constitution provides for the conferment of executive powers on the mayor and chairperson of an urban local authority. The mayor's functions are detailed under s 64 of the Urban Councils Act [*Chapter 29:15*]. In terms of that section the Mayor has no powers to alienate

council land. Section 152 of the Urban Councils Act provides for alienation of council land. In terms of that section it is only council which can alienate council land. That section also sets out the procedure to be followed in so doing;

Section 152 (2) provides

“Before selling, exchanging, leasing, donating or otherwise disposing of or permitting the use of any land owned by it the council shall by notice published in two issues of newspaper and posted at the office of council, give notice –

- (a) Of its intention to do so, describing the land concerned and stating the object, terms and conditions of the proposed sale, ... lease ...”

From the evidence adduced before the court no such procedure was followed. It is my view that the above procedures are mandatory and should be followed. Once there is proof that the provisions of s 152 were not followed in alienating council land, then such alienation becomes unlawful and unenforceable.

Section 153 excludes certain cases from complying with s 152. In terms of s 153 it is still council which has the authority to lease council land without complying with s 152 of the Act. “Council” is defined in s 2 (1) of the Act as “municipal council or town council.” A Mayor is not a “Council” in terms of the Act.

The plaintiffs are seeking for an interdict, whose requirements are clearly spelt in the *Law of South Africa* Vol 11, 1998 and in Herbastein and Van Winsen: *the Civil Practice of High Court of South Africa*, Vol 12 Juta, 5 ed p 1456 as follows;

- 1) Plaintiff must establish a clear right;
- 2) Irreparable injury actually committed or reasonably apprehended and
- 3) The absence of a similar protection by any other remedy.

See also *Samachem (Pty) Ltd v Farmers Agricare (Pty) Ltd* 1995 (2) SA 781 (A). It is therefore trite that firstly the plaintiff must prove the existence of a clear right. In *casu* the plaintiff relies on an agreement entered into with the former Mayor. That the Mayor lacked capacity/authority to enter into such an agreement has been established above. Without being conferred with powers to alienate land, that purported act by the then mayor to allocate land to the plaintiff is unlawful. Once a finding is made that whatever agreement reached with the mayor is illegal, it follows that plaintiff lacks a clear right.

Since the plaintiff has failed to surmount the first hurdle of establishing a clear right, I am unable to grant the interdict sought. This court cannot stop a defendant from carrying out that which it is permitted to do by law.

The plaintiff also sought the defendant to be ordered to issue a long lease to the plaintiff in terms of the agreement. I have already made a ruling that there never existed any agreement to lease the land in question between the plaintiff and the defendant. The defendant can therefore not be ordered to do anything in terms of a non-existent agreement.

In the result, the plaintiff has failed to show on a balance of probabilities that there existed any agreement for the lease of the land in question. It is accordingly ordered as follows;

That the plaintiff's claim is dismissed on its entirety with costs.

*Mugiyia & Macharaga*, plaintiff's legal practitioners  
*Gutu & Chikowero*, 1<sup>st</sup> – 4<sup>th</sup> defendants' legal practitioners