

TOPWHEELS CAR MARKET (PVT) LTD
versus
MARKETING SALES AGENTS (PVT) LTD
and
CITY OF HARARE
and
LOVENESS MUTEPFA
and
KIMBENI BIBISHE
and
ROSSLYN MUCHERO
and
ALLAN CHOWA
and
DAVID JOSIAH
and
GEORGE MAZIWISA
and
FLEX BOTTLE STORE (PVT) LTD
and
VIRGINIA NJUNJIRA
and
LONGINA ZVASIYA

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 13, 19 and 20 December 2016

Urgent Chamber Application

J Mafume, for the applicant
D Matimba with *T A Musekiwa*, for the first respondent
C Kwaramba, for the 2nd respondent
G Madzima, for 3rd – 11th respondents

CHITAPI J: The applicant filed this urgent chamber application claiming the following relief which is quoted verbatim with its grammatical errors as set out in the draft provisional order:

“TERMS OF THE FINAL ORDER SOUGHT

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

1. The first Respondent ordered to comply with city by-laws relating to the business models required at the premises.
2. The second Respondent is ordered to ensure that the Applicant complies with city by-laws and build facilities that ensure the safety of patrons and neighbouring business before it can start operations and in a manner that do not block access to Applicant's operation and that there be consultations with the Applicant and other parties on that matter.
3. Costs on a higher scale.

TERMS OF THE INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicants are granted the following relief:-

1. The first Respondent and all those operating under be and are hereby ordered to cease operations in the manner described by the Applicant
2. The 2nd Respondent be and is hereby ordered to shut down the activities at 174 Kwame Nkrumah until the premises complies with city by laws
3. Costs on a higher scale.

SERVICE OF THE PROVISIONAL ORDER

1. A copy of this Provisional Order may be served upon the respondents by the applicant's legal practitioners or any member of the Zimbabwe Republic Police."

As can be noted from the wording of the draft provisional order above, the initial application when filed pitted the applicant and first and second respondents only. When I initially heard the application on 13 December, 2016, the first and second respondents raised a preliminary issue that the application was not urgent. I do not propose to deal with arguments presented before me principally because no useful purpose will be served by so doing since the application ended up being disposed of on the basis of a consent order. Suffice however to record that after arguments by the parties' legal practitioners, I ruled that the matter was urgent and dismissed the preliminary challenge.

I have decided to write a short judgment so that the nature of the dispute between the parties is ventilated as well as the process which led to the resolution of the application by consent. I will therefore set out the issues surrounding the application without going into great detail.

1. The applicant operates a licenced car sale business at stand number 19272, 8th Street/Samora Machel Avenue Harare. It has been operating at the stand for about 10 years.
2. The first respondent operates from or owns a property referred to in the papers as No. 174 Kwame Nkrumah Avenue. The applicant's occupied premises and that of the first respondent are adjacent to or overlook each other.

3. The second respondent, City of Harare is the local authority for the area under whose jurisdiction the applicant and first respondent falls. It is the licencing authority for the area and its by-laws govern the operations at the two premises.
4. The applicant is affected in its business by the activities taking place at the first respondent's premises. The activities pertain to food vending and open fire wood cooking of sadza and other starches, roasting of meat and cooking of other relishes. The food is sold at prices ranging from US\$1 making the outlet popular and a frequented place by people wanting to buy food. The result is uncontrolled human traffic of people coming to buy the food, traffic congestion, blocked or open drainages, smoke pollution and restricted human and traffic flow to name a few of the complaints raised by the applicant.
5. The applicant and its customers cannot easily access its business premises on account of the congestion which is caused by the human and vehicular traffic resulting from the presence of people who come to the first respondent's place to buy and eat the food prepared thereat. The applicant alleged that it has to employ a 24 hour gateman to clear the gate of people and traffic and has erected a temporary fence with spikes in a bid to try and keep clear its outside perimeter area. It has also moved boulders to the drive way to stop vehicles which have no business at its premises from accessing it and blocking the gate.
6. The applicant deposed to the fact that the presence of many people coming to buy the cooked food at the first respondent's premises has in turn caused vendors with their trinkets to also invade the area. The applicant also deposed to cases of illicit drug sales and use, liquor consumption and people relieving themselves in the open and unmitigated noise. The applicant feared a disease outbreak because of the unhygienic conditions now obtaining in and around the area.
7. The applicant significantly averred that the persons engaging in the food business were not licenced to do so and that it could not claim damages from any of them as it was not known what their particulars were.
8. The applicant had on 8 November, 2016 written a letter to the second respondent alerting it to hazardous conditions now prevailing around the area in issue. The letter was quite detailed and consisted of 10 paragraphs each detailing the hazardous activities taking place. The letter according to the applicant was neither acknowledged nor acted upon. The applicant deposed to seeing the second respondent's officials or employees also coming to the place and being offered free meals.

9. The applicant produced photographs of the place or area complained of to buttress its submission as to the activities which take place thereat. The photographs were taken on 15 December, 2016 at 1:33pm after the applicant and the first and second respondents had appeared before me and presented their submissions on urgency on 13 December, 2016. Indeed the pictures presented an unsightly scene with open pots on open braai stands and sadza being prepared. Traffic congestion was also evident with puddles of water dotted around the road area. Vehicles are parked haphazardly. The road in between the applicant and the first respondent's premises is potholed with water filling the potholes. There are broken down vehicle bodies on wheels which clearly show that there is some car breaking activities going on.
10. The second respondent apart from taking up the issue of urgency much as the first respondent had done in their opposing affidavits appeared to question the *bona fides* and sincerity of the applicant in its allegations which it brushed off as unsubstantiated.
11. The first respondent for its part raised the issue of joinder and urged that the application was defective and should be dismissed for non-joinder of the affected person. I then referred the second respondent to the admitted fact that the persons whose activities were being complained of were subtenants or invitees of the first respondent. Further the applicant had pointed out it did not know the particulars of the offenders and could not have cited them by name other than refer to them as people operating from stand 174 Kwame Nkrumah.
12. I was however in agreement that it would be improper for me to determine people's rights without hearing them. I then asked the first respondent's counsel to provide me with the names of the persons carrying on business at the stand other than the first respondent. The first respondent's counsel and the first respondent's representative did not readily/by name know all the persons occupying the stand. I then postponed the hearing to 19 December 2016 and directed the applicant's counsel to provide me with the names of the persons likely to be affected by the order sought by the applicant.
13. On 14 December, 2016, the applicant's counsel by letter provided the names of the persons likely to be affected by the relief sought. I then issued an order indicating that I had dismissed the first and second respondent's point *in limine* on urgency. I also made an order that the persons listed as interested parties should be served by the applicant with all the papers filed of record pertaining to the application. This is how the 3rd to 11th respondents came to be parties in this application.

14. On 19 December, 2016 the hearing resumed with the 3rd to 11th respondents being represented by a legal practitioner. The legal practitioner applied for a postponement of the application to enable him to take instructions from the said respondents. Although the legal practitioner had sought a postponement to 23 December, 2016, I granted a shorter period to the following day, 20 December 2016 at 3:30pm. I did not want the application to lose its urgency lustre by allowing the case to drag on unresolved. Secondly, it did not appear to me that a lot of work was involved since the interested parties were all tenants of the first respondent through whom they relied for their rights if any to be operating at the first respondent's premises. They most likely had similar defences if any to the relief sought. In granting the postponement I also encouraged the parties to try and discuss a solution. I indicated then that my reading of the papers presented a problem best suited for resolution by the second respondent as the responsible local authority which under the law reposed powers and duties to licence businesses and superintend them through enforcement of applicable by-laws.
15. At the resumed hearing, the second respondent's counsel advised me that his instructions were to withdraw the second respondent's opposition to the application. He however indicated that the second respondent wanted the order sought varied by specifying the respondents by name because some of them were licenced to operate at the premises and had a right to continue operating.
16. Mr *Madzima* for the 3rd to 11th respondents submitted that whilst the respondents appreciated the second respondent's withdrawal, he was applying that the respondents who did not have licences to operate on the premises be allowed a time within which to apply to be licenced to operate within the confines of the second respondent's by-laws applicable to the nature of their business. Such a request could not be granted because as I pointed out to counsel, the duty of the judge or a court is to uphold the law. It would be remiss to allow a further or continued contravention of the law. The third to eleventh respondent's legal practitioner then requested for an adjournment to consult with the said respondents and the other legal practitioners. I granted the adjournment.
17. The hearing resumed and the legal practitioners advised that the parties had resolved that a consent order be issued in the form of a final order disposing of the application. The terms of the final order were dictated by the second respondent's counsel and confirmed by the applicant and the 3rd to 11th respondents counsels. The parties agreed that I tidy up the wording to reflect the agreement they had reached. The effect

of the order was to spare a few licenced respondents to remain on the premises and to operate only their licenced businesses or operations whilst the unlicenced respondents had to be ordered to stop their operation.

I accordingly issued the following order:

BY CONSENT OF THE PARTIES;

It is ordered as follows:

1. The third, fifth, sixth, tenth and eleventh respondents be and are hereby interdicted from carrying out operations of whatsoever nature at the premises called 174 Kwame Nkrumah Avenue, for which they would be required to be licenced by the second respondent or any other lawful authority without first obtaining the requisite licences and any other authorities as the law relating to such operations may provide.
2. On or before 31 December, 2016, the third, fifth, sixth, tenth and eleventh respondents shall wind up their operations and remove their operating utensils including removing braai stands or knocking down and removing such rubble as may result from the demolition of built up fire-places which they have been using to cook food on open fires and further, they shall remove the shades under which they had built or were operating the fire places or braai stands as the case may be.
3. The first respondent shall not permit the carrying out of any food operation or catering business on stand 174 Kwame Nkrumah unless such business or operation has first been licenced and passed by the second respondent.
4. The third, fifth, sixth, tenth and eleventh respondents jointly and severally the one paying the other to be absolved shall pay the costs of this application.

Mafume Law Chambers, applicant's legal practitioners

Matipano & Matimba, first respondent's legal practitioners

Mbidzo Muchadehama & Makoni, 2nd respondent's legal practitioners

Zvimba & Madzima Law Chambers, 3rd – 11th respondents' legal practitioners