COUNTRY CLUB TWENTY-TEN (PRIVATE) LIMITED
versus
THE COUNTRY CLUB
and
MARGOT KENEE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 8 and 17 May 2017

Urgent Chamber Application

T Magwaliba, for applicant
K Kachambwa, for respondents

TAGU J: On 28 September 2010 the applicant and the first respondent entered into a Management Agreement. In terms of the Agreement the first respondent appointed the applicant as the executive management of the Club for fifty years enduring until the 30th of September 2060. All risk and rewards in respect of the operation of the club as a commercially viable entity passed to the applicant. On 11 January 2016 the first respondent wrote to the applicant and purported to unilaterally terminate the Management Agreement on account of alleged breach by the applicant. The applicant denied being in breach and consequently did not recognise the purported cancellation by the first respondent. Subsequently, and unbeknown to the applicant the first respondent's new Executive Committee held a meeting on 23 February 2016 and resolved to open a CABS account into which members would pay their subscription fees. On 27 April 2016 the first respondent instituted action against the applicant out of the High Court of Harare under Case Number HC 4362/16 seeking principally that its declaration that its aforesaid purported termination of the agreement was lawful and a declaration that the applicant's refusal to hand over control and management of the club was unlawful and illegal and consequently, the applicant and all claiming through it must be evicted from the club. The action in HC 4362/16 is still pending before this Honourable Court and is yet to be finalised. On 28 April 2016 the applicant wrote to the second respondent demanding the remittance of all membership monthly subscriptions

paid to the account in her custody and control by 1st May 2016. The second respondent who is the Treasurer of the first respondent failed and or ignored the demand from the applicant. It was only up until the 24th of April 2017 that it came to the attention of the applicant that the first respondent was collecting membership monthly subscriptions from members and keeping such funds in an account managed and controlled by the second respondent at Central African Building Society ("CABS").

On 3 May 2017 the applicant then instituted the current urgent chamber application for an interdict interdicting the first and second respondents and persons claiming through them from interfering with applicant's business operations at The Country Club located at Number 1 Brompton Road, Highlands, Harare. The relief being south is couched in the following terms:

"TERMS OF FINAL ORDER

1. That 1st and 2nd Respondents and all the people acting through them be and are hereby interdicted from acting in a manner which interferes, obstructs and disturbs in any manner whatsoever Applicant's business operations at The Country Club.
2. That the 1st and 2nd Respondent and all people acting through them be and are hereby interdicted from collecting membership monthly subscriptions payable to the Applicant by the membership of the Club.
3. That 1st and 2nd Respondent and all people acting through them be and are hereby ordered to remit all monthly subscriptions paid to them by members to the Applicant within five (5) days of service of this order.
4. That Respondents pay costs on the scale of legal practitioner and client.

TERMS OF INTERIM ORDER GRANTED

1. That the 1st and 2nd Respondent and all the people acting through them be and are hereby interdicted from acting in any manner which interferes, obstructs Applicant's commercial activities at The Country Club pending the finalisation of the matter.
2. That the 1st and 2nd Respondents and all people acting through them be and are hereby interdicted from collecting membership monthly subscriptions payable to the Applicant by the membership of the Club pending the finalisation of the matter."

At the hearing of the matter the respondents raised three preliminary points. The first point was that the application was defective because it was not in Form 29 which provides for some procedural rights to the respondent. Counsel for the applicant opposed the point *in limine* and submitted that the application was in Form 29B with some modifications. A look at the Form used clearly shows that the applicant used Form 29B with some modifications. The authorities cited by the counsel for the respondent are only applicable where a totally

different Form than either Form 29 or 29B had been used. See *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Company Zimbabwe Ltd & Anor* 2015 (2) ZLR 343. I found no merit in the first preliminary point raised and it is dismissed.

The second preliminary point raised by the counsel for the respondents was that the matter was not urgent. According to him the need to act arose in 2016 when the applicant was told that the agreement was cancelled. According to the counsel for the applicant the need to act arose on or about the 24th of April 2017 when they realised that the respondents were interfering with the running of the Club and that an account into which subscription money was being deposited by the first respondent. They said when the first respondent instituted case HC 4362/16 there was no need for them to rush to court. They were jolted into action when they discovered that the second respondent was administering funds on behalf of the first respondent through CABS account. This was supported by an e-mail dated 26th April 2017 by Mr Misheck Pondaponda to one Mr Sithole.

What constitutes urgency has been resolved in a number of cases such as the famous *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 at 193 where it was said:

> "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 dead-line draws near is not the type of urgency contemplated by the rules."

In *casu* the applicant acted as soon as it realised that money was actually being deposited into a separate CABS account which was an administrative issue affecting the operations of the applicant. In my view the need to act only arose on or about the 24th April 2017 and the papers were filed on 3 May 2017. For these reasons I dismiss the second point *in limine* and rule that the matter is extremely urgent.

The last point *in limine* was that of misjoinder of second respondent. In my view the second respondent is properly cited since she has an interest in the matter and she is the one who is managing and has custody of the CABS account into which the subscriptions are being paid. The last point is again dismissed.

AD MERITS

This is an application for an interim interdict to restrain the first and second respondents and all other persons acting through them from continuing with their unlawful acts of interference with the applicant's business operations at The Country Club. The

applicant is a company duly incorporated in accordance with the laws of Zimbabwe. For an application of this nature to succeed four requirements have to be met. These are:

a. A *prima facie* right, though open to doubt;
b. The imminence of irreparable harm, and
c. The absence of any other ordinary remedy.
d. Balance of convenience.

A PRIMA FACIE RIGHT

The applicant and first respondent entered into a Management Agreement on 28 September 2010 at Harare. In terms of the agreement the first respondent appointed the applicant to manage the Club in terms of clause 1 of the agreement. In terms of clause 3.1 of the agreement the applicant's appointment as the executive management of the Club is for fifty years enduring until the 30th September 2060. Further, in terms of clause 2 of the agreement the first respondent's Constitution was amended to align it with the applicant's aforesaid appointment. In terms of clause 4.1 of the agreement all risk and rewards in respect of the operation of the Club as a commercially viable entity passed to the applicant on the 1st September 2010. As a result of the operation of clause 4.1 mentioned above the applicant took over first respondent's known existing liabilities, agreements and obligations. This included taking over the first respondent's employees and assuming liability to meet their wages and other benefits. To that extent the applicant has prima facie rights in the management of the Club until such rights have been lawfully terminated.

THE IMMINENCE OF IRREPARABLE HARM

On 11 January 2016 the first respondent wrote to the applicant and purported to terminate the Management Agreement on account of alleged breach by the applicant. The applicant on 27 January 2016 through its legal practitioners denied the alleged breach and the purported cancellation of the agreement which was unilaterally and illegally made. Then on 27 April 2016 the first respondent instituted action against the applicant out of the High Court of Harare under case number HC 4362/16 seeking among other things an order declaring the Management Agreement duly terminated and the eviction of the applicant from the club premises. The first respondent has since held a Special General Meeting and appointed a new Executive Committee to run the affairs of the Club. Without an order of the court the first respondent opened a new bank account with CABS where the members' subscriptions are

now being deposited and managed by the second respondent. In my view all this was done while case HC 4362/16 is still pending hence the actions of the first respondent are illegal and are affecting the operations of the applicant. If this is allowed to continue there will be irreparable harm to the applicant. There is need to restore the *status quo ante* until case HC 4362/16 has been decided. The respondents have to be interdicted.

ALTERNATIVE REMEDY

The only alternative remedy that the applicant has is to sue for damages. This however, is no longer possible since there is case HC 4362/16 which is pending before the court. The respondents cannot be allowed to continue with their illegal activities while case HC 4362/16 is still pending. The status quo ante has to be restored until case HC 4362/16 has been finalised. It does not make sense for the respondents to argue that the applicant's rights have been terminated by their letter dated the 11th of January 2016 notifying the applicant of the termination yet they instituted case HC 4362/16 on 27 April 2016 seeking confirmation of the termination and eviction. What would happen in the event that they lose case HC 4362/16? Clearly the applicant has no other alternative remedy.

BALANCE OF CONVINIENCE

In my view the balance of convenience favours the applicant. The position the parties have been before instituting case HC 4362/16 has to be maintained until the respective rights of the parties have been decided.

In the result the provisional order is granted as prayed for by the applicant.

Mutamangira & Associates, applicant's legal practitioners
Dube Manikai & Hwacha, respondents' legal practitioners.