ENGEN OIL ZIMBABWE (PRIVATE) LIMITED
(formerly) CHEVRON ZIMBABWE (PRIVATE) LIMITED)
((formerly CALTEX OIL ZIMBABWE (PRIVATE) LIMITED))
versus
CHARLESDALE SERVICE STATION (PRIVATE) LIMITED
and
ENDAKUVANHU INVESTMENTS (PRIVATE) LIMITED

HIGH COURT OF ZIBABWE
MATANDA-MOYO J
HARARE, 17 & 25 November 2015

Urgent Chamber Application

Ms *RTL Matsika*, for the applicant
R.M Mufuka, for the respondents

MATANDA-MOYO J: The applicant approached this court on an urgent basis for the following relief:

"TERMS OF THE FINAL ORDER SOUGHT

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

1. The cancellation of the agreement between the Second Respondent and Applicant be and is hereby confirmed.

2. Pending the finalisation of the arbitration proceedings between the parties the Applicant be and is hereby authorised to conduct the business of a garage and filling station from the premises in dispute, being 194 Main Street, Marondera, and to occupy the Kiosk, takeaway, forecourt, offices, toilets and showroom located at the site as stipulated in the lease agreement between the Applicant and the First Respondent.

3. The Respondents be and are hereby directed to desist from interfering with the Applicant's operations at the property in dispute.

4. The Respondent shall pay costs of suit.

INTERIM RELIEF GRANTED

The Applicant is granted the following interim relief.

1. The first and second Respondents are hereby directed to restore the Applicant's fuel pumps or any other property belonging to the Applicant which they may have removed

from the property in dispute being number 194 Main Street, Marondera pending the resolution of the arbitration proceedings which have been instituted by the Applicant against the first Respondent.

2. Pending the resolution of the above mentioned arbitration proceedings the Respondents and anyone occupying through them be and are hereby interdicted from conducting the business of a garage and filling station from the aforementioned premises or to occupy the Kiosk takeaway, forecourt, offices, toilets and showroom located at the site.

3. The Respondents shall pay costs of suit".

The brief facts are that on 15 August 2000 the applicant and the first respondent entered into a lease agreement whereby the applicant leased from the first respondent a garage or filling station comprising of garage, Kiosk, takeaway, forecourt, offices, toilets and showroom at 194 Main Street Marondera. Such lease agreement was for fifteen years from 1 November 2000. That meant the lease would terminate on 31 October 2015. Such lease was termed "Head lease".

Sometime in 2000 the second respondent was appointed by the applicant as its dealer on the site. As a dealer the second respondent would market and sell the applicant's products. The second respondent was responsible for paying rentals on the applicant's behalf to the first respondent. The second respondent has been operating at that particular service station selling the applicant's product since then.

On 12 October 2015 the first respondent sent a notice to applicant to terminate the lease agreement upon its expiration on 31 October 2015. The applicant did not accept the termination of the lease agreement. The first respondent had meanwhile leased the property to see the second respondent who intends selling another brand of products which are not the applicant's. The second respondent had on 1 October 2015 given the applicant notice to terminate the contract between the two, which termination was accepted by the applicant. The respondents have started removing the applicant's pumps and other property from the premises resulting in the applicant instituting these proceedings.

Whilst the first respondent admitted entering into a lease agreement with the applicant, it submitted that the lease never came into force. The applicant never took occupation of the premises neither did the applicant pay rentals to the applicant. The applicant has breached the conditions set out in the lease, in particular clauses 4(a) and 4b, 4d, 7e(i) and clause 14. The first respondent submitted that the second respondent has always been the tenant. The second respondent had a separate contract of agency with the applicant.

The first respondent is not party to that. The first respondent therefore argued that there was never a contract of lease between itself and the applicant. The first respondent prayed that the applicant's application be dismissed.

The second respondent admitted that it had an agency contract with the applicant which contract was terminated by it on 1 October 2015. Since the applicant accepted such termination the second respondent submitted that it could buy fuel and related products from other suppliers.

The requirements for granting on interim interdict are as follows: Applicant must show;

1. a *prima facie* right
2. a reasonable apprehension of irreparable harm if the interdict is not granted
3. there is no alternative satisfactory remedy available to the applicant and
4. the balance of convenience is in favour of granting the interim relief.

See *Flame Lily Investments Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd and Anor* 1980 ZLR 378, *Zesa Staff Pension Fund* v *Mushambadzi* SC 57/02 *Webster* v *Mitchell* 1948(1) SA 1186 (W).

The plaintiff contents that it has met all the above requirement. The lease agreement it signed with the first respondent confers upon it a *prima facie* right to be offered a renewal of the lease, upon expiration of the lease, before such garage is offered to another. The applicant relies of clause 5(c) of the lease agreement which provides;

> "That should the LESSOR at any time prior to or within six months after termination of this lease or any renewals thereof, receive a *bona fide* offer from a third party for the hire of the premises for a period commencing after this lease has terminated, which offer the LESSOR is desirous of accepting, the LESSOR undertakes to report same in writing to the TENANT and to forward a copy of such offer to the TENANT.
> Thereafter the TENANT shall for a period of sixty (60) days after receipt of such written report, have the option to hire the premises on the terms as offered……".

The first respondent attempted to argue that no lease agreement existed between itself and the applicant. I am not satisfied by such submission as late as 12 October 2015, the first respondent sent a notice of termination of the agreement. Obviously such submission is an afterthought by the first respondent. The conduct of the parties shows that indeed there was a lease agreement which existed between the two. Obviously such agreement conferred rights upon the applicant and one such right is pronounced under clause 5 (c) of the contract which I have quoted above. The applicant has therefore established a *prima facie* right of first refusal of tenancy in terms of the lease agreement.

The applicant submitted that the first respondent and the second respondent have in breach of clause 5(c) of the lease agreement entered into a new lease agreement between themselves. Should that be allowed to commence irreparable harm would be occasioned to the applicant. The applicant has been selling its fuel and other products at the garage in question. I am satisfied that if the respondents are not interdicted in removing the applicant's pumps, the applicant would suffer irreparable harm.

The applicant should show that it has no other satisfactory alternative remedy available. In almost all claims there is always the alternative remedy for a claim for damages for breach of contract. The question is whether such alternative remedy is a satisfactory remedy. The applicant herein intends to protect its right to continue trading at the premises. A claim for damages would not be a satisfactory alternative remedy in this matter as the only way to protect such right is by granting the interim relief. A claim for damages would not adequately compensate the loss. I have also looked at the balance of convenience. Obviously the first respondent does not suffer any prejudice should the interim relief be granted. It would still get whatever rentals it is entitled to from the applicant. The second respondent has already terminated its contract of agency. The applicant would lose a garage from where it could sell its products from and consequently lose money in the process. The balance of convenience favours the granting of the temporary interdict.

The granting or refusal of an interim interdict lies in the exercise of judicial discretion of the court. In exercising this discretion I must look at the applicant's prospects of success in proving a clear right as well as prejudice to third parties. I am satisfied that the applicant has already proved the existence of a lease agreement between the parties which first respondent has by conduct acceded to. That lease agreement gives certain rights to the applicant, which right I am satisfied the applicant would be able to show. I am also satisfied that there are third parties who derive benefits from the applicant selling fuel and its products in Marondera who would be adversely affected by the termination of services without adequate notice. This is a case where I should exercise my discretion in favour of granting the interim relief sought.

Accordingly the interim relief sought is granted with costs.

Wintertons, applicant's legal practitioners
Mufuka & Associates, 1st & 2nd respondents' legal practitioners