CARROWMORE INVESTMENTS (PVT) LTD

versus

MOGOLA ENTERPRISES (PVT) LTD

and

JUSTIN SAMUDZIMU

and

THE OFFICER IN CHARGE BORROWDALE ZRP

and

THE DEPUTY SHERIFF, HARARE

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 25 September 2012

**Urgent Application**

*G.N. Mlotshwa,* for the applicant

*K. Chirenje* for the 1st & 2nd respondents

*T.O. Dodo*, for the 3rd respondent

For the 4th respondent In default

MATHONSI J: The applicant seeks a provisional order in the following terms:-

“TERMS OF THE FINAL ORDER SOUGHT

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

1. That it is hereby declared that the first and second respondents, and all those acting through them, restore all the gym equipment unlawfully removed from the gym at Shop 15, Borrowdale Brook Shopping Centre.
2. Further, it is hereby declared that the first and second respondents and all those acting through them, be and are hereby permanently interdicted from disturbing and or impending the applicant’s gym business in any way whatsoever.
3. Costs of suit shall be borne by the first and second respondents jointly and severally one paying the other to be absolved on a legal practitioner and client scale.

INTERIM ORDER GRANTED

Pending the determination of this matter, the applicant is granted the following relief:-

1. That all the gym equipment listed in Annexure “B” be and is hereby restored to the applicant at Shop 15, Borrowdale Brooke Shopping Centre by the first and second respondents.
2. That the first and second respondents, and all those claiming an interest through them are hereby interdicted from further hindering the applicant’s business through their actions.
3. To the extent that it becomes necessary or expedient, the applicant be and is hereby authorised and empowered to enlist the services of the third respondent and any other members of the Zimbabwe Republic Police Force to ensure that the provisions of this order are executed and implemented in full.
4. Costs of suit shall be borne by the first and second respondents jointly and severally one paying the other to be absolved on a legal practitioner and client scale”.

The circumstances giving rise to this application are that the applicant

and the first and second respondents are involved in a dispute over ownership and management of a gymnastic business at Borrowdale Brooke Shopping Centre in Harare. Until recently there was a pending case in this court namely HC 7264/11 between the parties in which the first and second respondents sought to enforce an agreement allegedly entered into with the applicant over ownership of the business. Significantly, that matter was withdrawn on 25 September 2012 the date of this application.

That the issue of ownership of the business was still in court did not deter the first and second respondents from divesting the applicant of control and management of the gymnasium sometime last year. This forced the applicant to approach this court on an urgent basis seeking spoliatory relief in HC 9682/11 arguing that by resorting to self-help, the first and second respondents had despoiled it of the gymnasium and equipment therein. Although that application was hotly contested by the respondents, MUSAKWA J found in favour of the applicant. The learned judge issued a provisional order on 11 October 2011 the interim relief of which reads thus:-

“INTERIM RELIEF

Pending determination of this matter, the applicant is granted the following relief:-

1. That the applicant, its representatives, employees or invitees’ possession, control and occupation of Shop no. 15 Borrowdale Brooke Shopping Centre (the gym) prior to 29th September 2011 be and is hereby restored. Pursuant thereto, all chains, locks and other impediments be removed so that the *status quo ante*  to the applicant’s possession, control and use of the gym is restored.
2. That the first and second respondents and all other persons claiming occupation and possession of the gym through them and/or all other persons not being representatives, employees or invitees of the applicant are ordered to forthwith vacate the said gym.
3. To the extent that it becomes necessary or expedient, the Deputy Sheriff is hereby authorised and empowered to attend to the removal of the respondents and all other persons not being representatives, employees or invitees of the applicant from the gym. Pursuant thereto the Deputy Sheriff be and is hereby authorised and empowered to enlist the assistance of any member of the Zimbabwe Republic Police force, whose members are directed to provide such assistance to the Deputy Sheriff so that the provisions of this order are executed and implemented in full.
4. That the first and second respondents and all other persons claiming an interest through them are hereby interdicted from impending the applicants their representatives, invitees and employees of free unimpeded access and use of the gym.
5. That the first and second respondents and all other persons acting through them or in association with them be and are hereby interdicted from in any way interfering with or threatening the applicant’s, their representatives, employees and invitees use and enjoyment of the gym.
6. The applicant pays the fourth respondent’s costs on a legal practitioner and client scale”.

The record before me shows that the first and second respondents noted

an appeal against that order to the Supreme Court prompting the applicant to bring another application, this time for leave to execute the provisional order under case no. HC 9682/11 notwithstanding any appeal. That order was granted by MAVANGIRA J on 8 December 2011 in Case no. HC 11660/11. In the present application, the applicant states in the founding affidavit of Otis Tavengwa Goredema that when the Deputy Sheriff gave the first and the second respondents notice to vacate the gym within 48 hours or face eviction, they removed all the gym equipment located at the premises and carried it away to an unknown place. It is alleged that in a clear effort to frustrate execution of the court order, the first and second respondents emptied the premises leaving it in a state where it can no longer be regarded as a gym at all.

I have been shown 2 returns of service issued by the Deputy Sheriff showing that on 10 September 2012, he served a writ of ejectment at Shop no. 15 Borrowdale Brooke Harare. He remarked thus:-

“Served writ of ejectment, court order, provisional order and notice of ejectment on Florence the receptionist. Hold for ejectment on 13/09/2012”.

When the Deputy Sheriff returned to the premises on 13 September 2012 intending to evict the first and second respondents he found that they had already vacated. He remarked in his return of service as follows:-

“Attempt to eject the first and second defendant (*sic*). The defendants (*sic*) moved out with the gym equipment before the date of ejectment. Vacant possession given to Mr Otis Goredema of the applicant”.

I am aware that after service of the notice of ejectment on 10 September 2012, a company known as Quoscan (Pvt) Ltd rushed to court with an urgent application which was incidentally filed on 13 September 2012 under case No. HC 10627/12 claiming to be the new occupant of Shop 15 and to have purchased the gym business from the first respondent. It sought an order staying the eviction. That application was rejected by MUTEMA J who remarked as follows:-

“No urgency other than self-inflicted urgency has been established. If the order in favour of the first respondent against Mogola Enterprises (Pvt) Limited and Justin Samudzimu was to evict the latter and all persons claiming occupation of Shop 15 Borrowdale Brooke through the latter, by buying the business from occupants who had been ordered to be evicted, the applicant assumed a conscious risk of claiming occupation of the premises through the evictees and should therefore be subject to eviction also. The matter cannot therefore be said to be urgent”.

I agree with those remarks.

The first and second respondents filed opposition to the application and raised 3 points of objection to the application namely that the provisional order sought is defective, the matter is not urgent and that there is a dispute of fact as cannot be determined on the papers.

Mr *Chirenje* for the first and the second respondents did not argue these objections *in limine* but as part of arguments on the merits.

It was argued on behalf of the first and second respondents that the interim relief sought is the same as the final order sought and that for that reason the application should be dismissed. I do not agree. Apart from the fact that the terms are significantly different what the applicant is seeking to do is to enforce an already existing court order.

On the urgency of the matter, Mr *Chirenje* took the view that the matter should not be accorded urgency status because the applicant obtained the court order sought to be executed in October 2011 and the order authorising execution pending appeal in December 2011. For that reason, the applicant should not be allowed to approach the court on an urgent basis now.

What that argument ignores is the fact that the circumstances giving rise to the application unfolded on 13 September 2012 when the Deputy Sheriff discovered, on attempting to evict the first and second respondents, that they had absconded with all the gym equipment to an unknown destination. It is even more curious to note that on the same day the equipment was found missing, another entity was approaching the court claiming ownership of it and seeking to block the eviction. If indeed that claim was meritable, why did it become necessary to remove the equipment to an unknown destination, a typical pre-emptive action taken ahead of the arrival of the Deputy Sheriff, the moment the application of Quoscan (Pvt) Ltd was thrown out by MUTEMA J. In my view, urgency has been established in this case.

It has also been argued that there are serious disputes of fact which cannot be determined on the papers. I disagree. This matter is simple and straight forward. The applicant obtained a court order allowing it to move into shop 15 Borrowdale Brooke and operate a gym business. It is the enforcement of the court order that is in issue now. I do not see any dispute of fact which cannot be determined on the papers.

On the merits of the matter Mr *Chirenje* argued that none of the court orders granted in favour of the applicant presented the first respondent, as owner of the equipment, from dealing with such equipment as it pleased. For that reason, the first respondent decided to sell the equipment to a third party and is therefore unable to return it to the applicant. Mr *Chirenje* conceded that the equipment was purportedly sold after the court order. He firmly argued further that if this is a spoliation application, it does not meet the requirements of such an application; *Botha & Anor* v *Barrett* 1996(2) ZLR 73(S) and *Kama Construction* (*Pvt*) *Ltd* v *Cold Comfort Farm Co-operative & Ors* 1992(2) ZLR 19(S).

I do not think it is necessary for the applicant to prove the essentials of a spoliation application. The applicant did that in the application made under Case No. HC 9682/11. The court granted the applicant spoliatory relief after satisfying itself that the requirements for such relief had been satisfied.

What we have is a situation where there is a court order restoring possession, control and use of the gymnasium to the applicant. In the process of execution of that order, the first and second respondents have acted in a manner defeating that order completely. In my view the applicant cannot enjoy the benefits of possession, control and use of a gymnasium which is an empty shell. The building itself-which belongs to Old Mutual Properties Investments (Pvt) Ltd, an entity which was exonerated by the court in HC 9682/11 as having nothing to do with the conflict between the parties – is useless without the equipment for the business.

What exists at the moment, especially after the first respondent withdrew its application in HC 7264/11 a short while before the hearing of this matter, is an order allowing the applicant to re-enter and run the business. That includes the right to control and use the equipment that has been listed in annexure ‘B’ to the founding affidavit of Goredema. I do not agree that there is a dispute as to what that equipment is as it was subject to an agreement of the parties before.

The first and second respondents have a duty to comply with the order of the court. Allowing them to flout that order by removing the gym equipment as they have done would amount to baby-sitting lawlessness and impunity.

I am therefore satisfied that the applicant has made out a good case for the relief that it seeks. The applicant is not entitled at this stage to an order for costs which should only be determined at confirmation or discharge of the provisional order.

Mr *Dodo* for the third respondent submitted that the third respondent was wrongly cited as he has no interest in the matter, does not enforce civil orders and should not have been put out of pocket for that reason. He sought a dismissal of the application against the third respondent with costs.

I do not believe it is necessary to decide that issue at this stage because all that the applicant seeks is an interim relief for the restoration of the equipment which relief also requires the involvement of the third respondent for purposes of enforcement. This is particularly so as started by Mr *Mlotshwa* for the applicant, an observation which I find meritable, that the first and second respondents appear not to respect the process of the court.

In the result, the provisional order is hereby granted in terms of the amended draft order, the interim relief of which reads:-

**INTERIM ORDER GRANTED**

Pending the determination of this matter, the applicant is granted the following relief:-

1. That all the gym equipment listed in Annexure ‘B’ should forthwith be restored to the applicant at Shop 15, Borrowdale Brooke Shopping Centre by the first and second respondents.
2. That the first and second respondents, and all those claiming an interest through them are hereby interdicted from further hindering the applicant’s business through unlawful actions.
3. To the extent that it becomes necessary or expedient, the applicant be and is hereby authorised and empowered to enlist the services of the third respondent and any other members of the Zimbabwe Republic Police force to ensure that the provisions of this Order are executed and implemented in full.

*G.N. Mlotshwa & Company*, applicant’s legal practitioners

*Chirenje Legal Practitioners*, 1st & 2nd respondents’ legal practitioners