TONBRIDGE ASSETS LIMITED
and
CUT RAG PROCESSORS (PRIVATE) LIMITED
versus
LIVERA TRADING (PRIVATE) LIMITED
and
SIMON GEORGE WILBURN RUDLAND
and
SARAH LEIGH RUDLAND
and
THE SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
MWAYERA J
HARARE, 14 September 2016

Urgent Chamber Application

A B C Chinake, for the applicant
T I Gumbo, for the respondents

MWAYERA J: The applicant approached the court through the urgent chamber book on 7 September 2016. I directed that the parties be served for hearing on 13 September 2016. After being addressed by both parties and having considered papers filed of record, I ordered that:

1. The noting of the appeal by the respondents jointly and severally for any one of them, in respect of the provisional order granted under High Court judgment HH 517-16 shall not suspend the operation of the interim order.
2. Any appeal by any of the respondents against this order can only be made with the prior leave of this court.
3. That the costs of this application shall be borne jointly and severally by the first, second and third respondents, the one paying the others to be absolved.

The reasons for the disposition are laid out herein.

The brief background of the application has to be put into perspective. The applicants successfully sought an interdict prohibiting the respondents from *inter alia* selling, wrongfully and unlawfully "RG" branded cigarettes in the Zimbabwean market. The judgment in favour of the applicants under case No. HC 8318/16 refers "Pursuant to this order the respondents filed and served the applicants with a notice of appeal on 5 September 2016. The effect of the notice of appeal would suspend execution of the interim order." Upon being served with the notice of appeal the applicants then approached the court on urgent basis seeking to execute pending appeal.

At the hearing, Mr *Gumbo* for the respondent sought for postponement of the matter, which application was opposed by Mr *Chinake* for the applicant. Mr *Gumbo* argued that the main application was opposed and as such the respondents needed time to put their house in order so as secure counsel to appear. Further, Mr *Gumbo* argued that the appeal which occasioned the urgent matter had been withdrawn and another appeal filed. He argued that a postponement would be fair for both parties given the circumstances of the case. Mr *Chinake*, on the other hand, argued that the respondent had ample time to put their house in order from 7 to 13 September late in the afternoon. He argued that the postponement sought was calculated to prejudice the applicants. The postponement would mean the respondents would continue to infringe on the applicants' rights despite the extant High Court order interdicting them, as they evidently continued to advertise in the press under "RG". The application for postponement was viewed as abuse of court process to the prejudice of the applicants.

The issue of whether or not a matter should be postponed lies in the discretion of the court. The court faced with the application for postponement is duty bound to exercise its discretion judiciously. A postponement is not granted for mere asking but the party seeking such postponement ought to show good cause why the court should accede to the postponement and grant the part the indulgence. Where the application is disruptive and meant to prejudice the other party while at the same time putting the part so seeking at an advantage over the other party, then in the exercise of its discretion the court, ought not to grant such a postponement. *In casu* the respondent would be given a favour if the postponement were to be granted. This is moreso when one considers the totality of Mr *Gumbo*'s submissions that they have filed a notice of appeal and withdrawn it and thereafter filed another notice of appeal. By allowing the

postponement of the matter in the face of a pending appeal the respondents would continue to benefit by putting at abeyance the hearing of an application for execution pending appeal. In fact I must mention that Mr *Gumbo* just sought a postponement of the matter for an indefinite time since he never specified when the matter was to be postponed to. This further buttresses the fact that an application for postponement was calculated to the prejudice the other party. Mr *Gumbo* in an ingenuine fashion, also argued that the respondent was not aware of the set down but he did not seek to explain his attendance. From the return of service by the sheriff, the respondent was properly served for the hearing on 13 September 2016 at 3pm. The request for postponement was not clear cut as it was prefixed by the argument of not being aware of the set down date. The latter's argument in the face of proper service effected, could not hold water.

The request for postponement, given the impression created that the urgent chamber application was premised on an appeal that was withdrawn by the respondents and yet replaced by another notice of appeal, smacks of desire to take advantage of the other party. Mr *Gumbo*, by mentioning that the appeal which formed the basis of the urgent chamber application was withdrawn made a central concession as regards the matter before the court. He suggested that the applicant ought to withdraw the application while at the same time pointing out the respondents have filed another notice of appeal in respect of the same facts. The suggestion of withdrawal and postponement of the matter would occasion prejudice to the applicants. The request for postponement under the circumstances of this case appears to have been calculated without genuiness but with desire to buy time at the expense of the other party. In the circumstances of this matter, the application for postponement is viewed as dilatory and vexatious to the extent that it is meant to favour one party and prejudice the other party. In exercising discretion in face of whether or not to accede to the request for postponement, the court has to consider whether or not the interest of justice will be met by the postponement of the matter. *In casu*, given the proper service effected, ample time given and circumstances of the case, it is my considered view that the application for postponement is not justified and it is accordingly dismissed, see *Maybring Transport* v *Botha* 1991 (3) SA 310. Both counsels then addressed the court on the main application for leave to execute pending appeal.

Upon being served with a notice of appeal on 5 September 2016 the applicant sprang to action on 7 September 2016 prompting the set down of the matter for hearing. The law on

urgency is fairly settled in so far as the requirements of urgency are concerned. Court process by nature entails some delays and in order to assist where a matter meets the requirements of urgency then the matter can be entertained on an urgent basis. One can briefly sum up that a matter is viewed as urgent under the following circumstances.

1. Where delay in dealing with the matter may occasion irreparable harm.
2. Where a party sprouts to action when the need to act arose, in other words, where the party treats the matter as urgent.
3. Where the party has no other remedy available and the balance of convenience favours the grant of relief sought.
4. Where waiting and dealing with the matter later would render hollow the relief sought.
5. Where the party seeking relief will not have created the urgency.

See *Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188 H. See also *Madzivanzira and 2 Ors* v *Dexprint Investments (Pvt) Ltd and Another* HH 245-02 and *Dexprint Investments (Pvt) Ltd* v *Ace Property and Investments (Pvt) Ltd* HH 120-02.

In the case of *Document Support Centre (Pvt) Ltd* v *Mapuvire* 2006 (2) ZLR 240 MAKARAU JP as she then was made pertinent remarks when she stated:

> "… It appears to me that the nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications. … Some actions, by their very nature, demand urgent attention and the law appears to have recognised that position."

In the present case the applicants successfully applied for an interdict interdicting the respondents from trading, marketing, distributing or selling cigarettes bearing the packaging likely to deceive or cause confusion on or in relation to any goods for which the applicants mark No. 1710/2000 in class 34 are registered without the leave of the court. The order so obtained sought to protect the applicant's intellectual right and minimize the potential pecuniary injury of high magnitude. The precise terms of the order HC 8318/16 being that:

1. The first, second and third respondents and any person acting through them are interdicted with immediate effect from carrying out any launch of RG brand in Zimbabwe on any date until the matter is finalised.
2. The first, second and third respondents and any person acting through them be and are hereby interdicted with immediate effect from trading in or otherwise marketing, distributing or selling any cigarettes bearing the packaging likely to deceive or cause

confusion on or in relation to any of the goods which the applicant mark No. 1710/2000 in class 34 are registered without the leave of this honourable court.

3. The first, second and third respondents and any person acting through them be and are hereby directed to immediately recall all goods bearing the packaging RG identical thereto or resembling the applicant's registered mark No. 1710/2000 in class 34 from any of the outlets or its sales distribution agents to whom it may have sold or delivered such products to.
4. The sheriff of Zimbabwe or his lawful deputies be and are hereby authorised to search for and remove to storage facility all goods bearing RG mark or identical to or resembling the applicant's registered trade mark No. 1710/2000 in class 34 from the first respondent's premises. No. 40 Van Praagh Avenue Miton park, Harare respectively or from wherever such goods are located.
5. The first, second and third respondents jointly and severally the one paying the other to be absolved including the sheriff's fee for removal and storage.

The noting of an appeal by the respondents would automatically suspend the effect of the provisional order. Regard being had to the cause of action and relief sought by the applicants this is a matter which calls for urgent intervention for waiting would entail irreparable harm. The suspension of the provisional order would cause serious pecuniary loss while at the same time occasioning infringement of the applicant's rights.

The applicants did not waste time upon receiving the notice of appeal. They approached the court seeking redress on urgent basis. The remedy of a temporary interdict granted under HC 8318/16 was in clear recognition of the strong *prima facie* case for vindication of its patent right. An infringement of or threatened infringement of the patent by the respondents and the absence of any other adequate remedy, is the relief occasioned by the provisional order which is what the applicants sought to enforce on an urgent basis. The application is properly before the court through the urgent book as it reveals the type of urgency contemplated by the rules of the court. Upon considering the merits of the case, it was abundantly clear the balance of convenience favoured the granting of the relief sought.

As highlighted by the applicant in the founding affidavit of Marine Cynthia Anne Ganda the respondents have, despite the interim order, proceeded to launch in the market "Gold Leaf

Tobacco" and they continued to engage in unlawful competition with the applicants violating the Remington Golf trade mark and brand of the applicants despite the supposed registration of the trade mark. In a move to "regularise" the infringement of the applicant's intellectual rights, the respondents then so filed a notice of appeal which has an effect of suspending enforcement of the provisional order. The net effect of the notice of appeal in the circumstances would mean continued infringement of the applicant's right thereby occasioning irreparable harm. The respondents on realising the grounds of appeal initially filed were defective and devoid of merit withdrew the appeal but in its place filed yet another appeal with more grounds. The effect of the filing of another notice of appeal would be to suspend execution of the provisional order HC 8316/16.

Effectively, the respondents have filed a notice of appeal. Requesting the applicants to abandon the urgent application for execution pending appeal, when there is a notice of appeal on the same facts is tantamount to denying the applicants the right to be heard. The applicants, in their urgent application, referenced HC 5171/16 which forms the basis of the appeal. It is my considered view that it would not be proper for the court to pretend that there is no existing notice of appeal. What falls for consideration is whether or not there are prospects of success on appeal. The applicant argued that in the face of a registered trade mark, Remington Gold and logo including RG the appeal by the respondents is unassailable. Further, it was argued that the respondents did not place evidence before the court to oppose the applicant's evidence on alleged infringement of applicants' rights. This left the applicant's version as expounced in the judgment HC 8316/16 solid. The notice of appeal in the circumstances is exposed as lacking merit while the applicants continue to suffer irreparable harm and prejudice. The order which the applicants seek to execute does not occasion irreparable harm to the respondents moreso when one considers that the goods are to be retrieved and stored while the respondents pursue their appeal. The reverse cannot be said about the applicants if the judgment is not executed. The perverse conduct of marketing, distribution and sale offending against the registered trade mark, would occasion immense injury to the applicants and would negate the protection offered by law to holders of trade marks. The circumstances of the case, in the light of the proper approach by the applicants on an urgent basis, calls for the applicants being given a chance to vindicate their trade mark rights. This is moreso when one considers the totality of the circumstances of this

case and the fact that the appeal filed does not seem genuine but calculated to harass the other party as there are no prospects of success. See *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149. The respondents had ample time to file opposition and substantiate opposition but they sought to rely on a technicality that the initial appeal was withdrawn and another one filed. No evidence, oral or written was presented to show that the application was not urgent and that the appeal was not doomed and destined to fail.

Argument was advanced in passing that leave to appeal against the provisional order had to be sought as a matter of law. The law is clear that interlocutory decisions are appealable with the leave of this court. However s 43 of the High Court Act is worded in a clear manner that does not give rise to doubt in respect of appeals against an order of an interdict. Section 43 of the High Court Act reads:

> "(1) Subject to this section an appeal in any civil case shall lie to the Supreme Court from any Judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction.
>
> (2) no appeal shall lie,
> (a) from an order allowing an extension of time for appealing from a judgment;
>
> (b) from an order of the Judge of the High Court in which he refuses an application for summary judgment and gives unconditional leave to defend an action.
>
> (c) i) an order of the High Court or any Judge thereof made with the consent of the parties ; or
> ii) an order as to costs only which by law is left to the discretion of the court, without the leave of the High Court or of the Judge who made the order, if that has been refused, without the leave of a judge of the Supreme Court;
>
> (d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court, without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court, <u>except in the following cases</u>:
>
> i) where the liberty of the subject or the custody of minors is concerned;
> ii) <u>where an interdict is granted or refused</u> (underlining my emphasis)
> iii) in the case of an order on a special case stated under any law relating to arbitration ….."

There is no need for leave to be sought for an appeal noted in respect of HC 8318/16. Wherein a temporary interdict was granted.

This however is not what was before me for determination.

An appeal was noted and the effect is suspension of execution of the provisional order. What was before me for determination was whether or not the application for leave to execute pending appeal was urgent and premised on good cause warranting such indulgence. From the foregoing, the requirements of urgency were met and the balance of convenience favoured granting of the relief sought.

I accordingly granted the application as prayed for.

Atherstone & Cook, applicant's legal practitioners
Kantor & Immerman, respondent's legal practitioners