

GILLDER FOODS (PVT) LTD  
versus  
PARKSTREET PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 26 October 2017

### **Opposed Application**

*Mr M Dodzo*, for the applicant  
*Mr G Ndhlovu*, for the respondents

MAKONI J: At the conclusion of the hearing of this matter, I delivered an *ex tempore* judgment. The applicant has requested for the reasons of the judgment. These are they.

The applicant approached this court seeking an order in the following terms:

- “1. The respondent shall make available for inspection, by the Applicant’s legal practitioner in terms of Order 24 of the High Court Rules, the documents requested in the notice to produce documents for inspection filed under case No. H.C. 4372/15, within five days of the date of service of this order upon the Respondent.
2. The Respondent shall pay the applicant’s costs of suit.”

The background of the matter is that in HC 4372/15 the respondent (Plaintiff) is suing the applicant (Defendant) for ejection and other consequential relief. Pleadings in the matter closed and the parties appeared before TSANGA J for a pre-trial conference (PTC). At the conclusion of the PTC, the matter was referred to trial on a joint PTC minute whose issues were captured as follows:

#### “1. ISSUES

- 1.1 Whether or not these proceedings should be stayed in order for the dispute between the parties to be referred to arbitration.

- 1.2 If the answer to 1.1. above is in the negative, whether or not the Plaintiff requires the premises for the purposes or rebuilding, modernizing and redeveloping.
- 1.3 Whether or not the Plaintiff gave lawful notice to terminate the lease agreement.
- 1.4 Whether or not the Plaintiff is entitled to holding over damages and if so, quantum thereof.
- 1.5 Whether or not the Plaintiff is entitled to payment of operating costs from 1<sup>st</sup> May 2015 to the date of Defendant's ejection. If so, quantum thereof.
- 1.6 Whether or not Plaintiff is entitled to costs of suit on the legal practitioner and client scale."

After the PTC and on the 18<sup>th</sup> of December 2015, the applicant filed a Notice to produce documents for inspection in terms of rr 161 and 162 of the High Court Rules 1971. The respondent did not discover the documents. Parties exchanged correspondence on the issue culminating in the applicant filing the present application. The Notice requests 50 items and is four pages long.

It is the applicant's contention that the documents it requested are necessary for discovery before trial as it is of the view that the refurbishments being contemplated are for the purposes of accommodating a new lessee.

It is also the applicant's contention that there has been some change in respondent's shareholding structure which has motivated the ejection of the applicant. The respondent must therefore discover documentation relating to past and present shareholding structure of the respondent's company, recent list of directors of the respondent, any and all agreements or contracts between the respondent and third party's concerning the property in dispute. As the respondent's claim is for ejection on the applicant on the basis that they want to undertake renovations on the premises. It is relevant and material for the respondent to furnish documentation relating to the list of items to be refurbished, planning certificates for the refurbishment, engineers plans for and approvals of renovations, proof of finances for the proposed renovations and contracts between any concerning renovations of the property.

The respondent contends that the information requested by the applicant is mainly irrelevant with part of the request being premature in that some of the documents are not yet available. The applicant was advised of the position through its loyal practitioners. The respondent might lead viva voce evidence at the trial if the documents are not secured prior to commencement of trial. The respondent further contends that the applicant was furnished with the documents requested in paragraph 50.

The procedure for discovery of documents is provided for in order 24 of the High Court rules. It sets out inter alia:

- i) What should be discovered.
- ii) The effect of non-disclosure of documents.
- iii) Further discovery of documents.
- iv) Failure to give discovery or permit inspection.

The applicant based its application on r 164(1) which read as follows:

**“164. Failure to give discovery or permit inspection**

(1) If a party fails to make discovery under this Order or, having been served with a notice under rule , fails to give notice of a time for inspection or fails to permit inspection as required by that rule, the party desiring discovery or inspection may make a chamber application for an order compelling such discovery or inspection, and the judge may grant or refuse the order as he thinks appropriate.”

Rule 162 provides:

**“162. Effect of non-disclosure of document**

A document not disclosed as aforesaid may not, save with the leave of the court granted on such terms as to it may seem just, be used for any purpose at the trial by the party who was obliged but failed to disclose it, but any other party may use such document.”

The learned authors Hebblethwaite and Van Winsen in *The Civil Practice of the High Courts and Supreme Courts of Appeal of South Africa* 5<sup>th</sup> Ed Vol 1 at p 777, say the following about discovery:

“The term ‘discovery’ is used to describe the process by which the parties to a civil cause (action, application or proceeding) are enabled to obtain, within certain defined limits, full information of the existence and the contents of all relevant documents or (tape) recordings relating to any matter in question between them and which are, or have been, in their possession, custody or power or in the possession of their agents, attorneys or nay other persons on their behalf.

The function of discovery is to provide the parties with the relevant documentary or recorded material before the hearing so as to assist them in appraising the strength or weakness of their respective cases, and thus to provide the basis for a fair disposal of the proceedings before or at the hearing. Each party is therefore enabled to use before the hearing or to adduce in evidence at the hearing documentary or recorded material to support or rebut the case made by or against him or her, to eliminate surprise at or before the hearing relating to documentary or recorded evidence and to reduce the costs of the litigation.”

The issue at hand was examined in *Tsvangirai v Registrar General and Another* 2003 (1) ZLR 167 (H) at p 175 D-E where GUVAVA J (as she then was) stated:

“I am in total agreement with then learned authors that the purpose of discovery is to ensure that no party to any proceedings is taken by surprise at trial as all documents relating to the matter between them would have been disclosed. It is also clear from the passage quoted above that a party is entitled to request that the other party disclose the nature of documents in their possession as long as they are relevant to the dispute between them. The requesting party need to know the form of the documentation or the content of such documents. It is also for the other party who has been asked to effect discovery to swear on oath in an affidavit whether or not he does have such documents, whether he had them but no longer has them and whether they are protected in any way.”

Further down on p 175 at H and p 176 at A-D she stated:

“In respect to para 5 of the schedule, the request is crafted too widely as it requires discovery of memoranda, documents and correspondence received from specified persons and also from “any other person and body”. This, in my view, is too vague. There must be some identification with respect to the persons to whom the communication was made. Documents requested must be described in such a manner that they are identifiable otherwise it will be impossible for the respondent to comply with the order. The court too would not be able to determine whether there has been compliance with its order, in the event that an application is thereafter made in terms of r 165.

In respect to paras 7 and 8, it is clear that these documents are the same items which were discovered by the respondent in his discovery affidavit and to which an order will be made in case No. HC 469/2003. They should accordingly not be subject to further discovery.

In para 13, the applicant seeks full provisional list of results of the Presidential election in March 2002. It is difficult to ascertain the basis upon which the applicant seeks further discovery of this document when it is conceded in the paragraph that the document is already in the possession of the applicant. The applicant further seeks that the respondent provides a breakdown of the votes cast at each of the polling stations in each of the constituencies. The respondent objected to this request and in my view the objection was properly made. It is not the purpose of discovery to provide information to a party which has been synthesised. As already stated the purpose of discovery is to make available documents in the possession of the party so that the requesting party can deal with the information as it deems fit, including doing a breakdown of the information once it is in its possession.”

The issue before me is whether the documents requested by the applicant are relevant. One of the main issues for determination at trial is “whether or not the Plaintiff requires the premises for the purposes of rebuilding, modernizing and redeveloping the area”. Some of the documents requested by the applicant in the Notice relate to this issue. The applicant’s contention is that the

respondent does not require the premises for refurbishments. The onus is on the respondent (plaintiff), to place before this trial court, evidence to establish that issue. If it fails to adduce evidence either viva voce or through documents, then its case will be dismissed. It has not been disputed that the respondent does not have some of the documents required by the plaintiff. This is due to the fact that the third party financing the re-development became reluctant to invest further funds to ensure that all the relevant information relating to the re-development is procured. This position was explained to the applicant in a meeting and in correspondence.

It is impractical for the respondent to be expected to produce matters such as all minutes whether formal or informal of the members of the board of directors of the respondent, all agreements or contracts between the respondent and any third party concerning the property in question just but to give a few examples.

Some of the documents are irrelevant to proving the main issue. It is for the above reasons that I dismissed the application.

The respondent prayed for costs on a higher scale. I see no reason why I should not grant the prayer. The applicant was advised in meetings and in correspondence of the respondent's position and went ahead to file the present application. One gets the impression that the applicant wants to delay the day of reckoning by filing frivolous applications.

In the result I will make the following order:

- 1) The application is dismissed.
- 2) The applicant to pay the respondent's costs on a legal practitioner client scale.

*G N Mlotshwa & Company*, applicant's legal practitioners.  
*Gill Godlonton and Gerrans*, respondent's legal practitioners.