

**LIBERMAN NDLOVU**

**Versus**

**COWBELLS FARM (PVT) LTD**

**And**

**THE DEPUTY SHERIFF – BULAWAYO N.O.**

IN THE HIGH COURT OF ZIMBABWE  
NDOU J  
BULAWAYO 13 & 30 JANUARY 2003

*M Ncube* for the applicant  
*J Sibanda* for the first respondent

Judgment

**NDOU J:** This matter arises from the agrarian reform programme embarked upon by the government. Mr Freddy and Mrs Chipso Matonisa co-own the first respondent company. On 15 August 2002 they entered into an agreement of sale with the previous shareholders and directors of Cowbell Farm (Pvt) Ltd, being Rubaiyat Investments (Pvt) Ltd and Mrs L G Chillcot. Cowbell (Pvt) Ltd owned a farm called Dorcas Kopje Farm described in the title deed as “certain piece of land situate in the district of Umzingwane being the remaining extent of Dorcas Kopje measuring 103.6342 hectares” according to Deed of Transfer 814/92. The Umzingwane Land Identification and Resettlement Committee allocated a “self contained plot: Farm Name: Dorcas Kopje: Plot 1” to the applicant under the government’s fast track resettlement programme. There was no further description of this allocated piece of land. The letter of allocation was written on 16 July 2002 and signed and date stamped on 4 October 2002. It is clear that the allocation was done even before the piece of land was acquired by the state because, according to the

applicant's founding affidavit, the farm was gazetted on 25 October 2002 and subsequently acquired by the state by service of section 5 order on 20 November 2002. After the Matonisa couple had purchased all the shares in the respondent company and as required by section 47 of the Land Acquisition Act [Chapter 20:10], the land was offered to the state to purchase. On 14 September 2002, the Minister of Lands and Agriculture, who also happens to be the acquiring authority issued a certificate of No Present Interest (Certificate Number 7345) to the respondent company. The certificate was addressed to Cowbell Farms P/L and described the land as a "certain (sic) piece of land situate in the district of Umzingwane being the R/E of Dorcas Kopje measuring (sic) 103,6342 hectares." The Minister certified that as at the time of the offer, namely 9 September 2002, neither the President nor Government has any intention to acquire the rural land in question. According to Mr Matonisa, he took occupation of the farm at the beginning of September 2002. He started to repair the water systems and clearing up the farm. He moved two of the respondent company's workers into the farm. On 9 October 2002, out of the blue the applicant drove his cattle onto the farm. The said cattle number fifty (50). In his own affidavit the applicant did not touch on this aspect. Mr Matonisa addressed a letter to the applicant on 9 October 2002 in, *inter alia*, the following terms –

“Please be advised that the above farm was purchased after obtaining a Certificate of No Interest. The above has not been gazetted for compulsory acquisition. This has been confirmed with the local offices. Enclosed are copies of Share Certificates in the name (sic) Fredy Creven Matonisa and Chipso Matonisa being directors of the above company. I write this letter in my capacity as directors of Cowbells Farm (Pvt) Ltd.

I notice that you have today begun to move your cattle onto our farm. This is preventing us from carrying our farming (sic) operations for which we purchased the farm.” It is clear that, on the strength of the allocation letter alluded to above, the applicant moved onto the farm and claimed ownership. Factually, the farm had not

yet been gazetted and acquired by the state. The allocation was *ultra vires* the powers of the Umzingwane Land Identification and resettlement Committee. Assuming that the committee had the requisite powers to allocate land to the applicant, the legal position is that the committee can only allocate land that has already been acquired by the president or the government. It seems to me that as far as land that is not state land, all they can do is to identify the land and inform the acquiring authority if such land is required for resettlement. By allocating the land before the acquisition the committee was putting the cart before the horses. Be that as it may the farm was advertised for designation on 25 October 2002. All the descriptions in the advertisement match the farm in question save for the Deed of Transfer number. In the advertisement the Deed of Transfer is number 1878/94 and according to the Deed of Transfer filed of record the number is 814/92. This confusion has been made an issue by the first respondent company. The second issue is whether section 5 order was served on the respondent company. Mr Matonisa denies service of the order on him. The applicant produced a certified copy of the certificate of service by a P Chihambakwe of the Department of Lands. It is beyond dispute that Mr Matonisa or any person acting on behalf of the respondent company did not affix a signature on the certificate. There is no affidavit from P Chihambakwe confirming service of the order on Mr Matonisa. It, however, purports that it was served on Mr F Matonisa in his capacity as owner of Dorcas Kopje. On 19 December 2002 the respondent company sought and obtained (by default) a provisional order in the following terms –

**“Terms of Final Order Sought**

- (a) That respondent shall restore applicant into Dorcas Kopje Farm within 24 hours of this application being served in terms of this order. In this regard respondent shall remove all physical barrier receted on the property to enable applicant access into the farm.
- (b) That respondent shall cease forthwith whatever operations he is conducting at the said farm.

- (c) That respondent shall not telephone or make contact with the applicant, or threaten or harass the applicant or his workers stationed at Dorcas Kopje Farm.
- (d) That respondent shall not set foot at Dorcas Kopje Farm, except in pursuit of a legitimate court order, or other lawful authority.
- (e) That respondent shall move his cattle and property and implements from Dorcas Kopje Farm within seven(7) days of the service of this order on him.
- (f) That respondent shall pay the costs of this application.

### **Interim Order Sought**

Pending confirmation of the above order, or the discharge of the same, that this provisional order shall operate as a temporary order:

- (a) allowing the applicant to take possession of Dorcas Kopje Farm within 24 hours of this order being served in terms hereof;
- (b) directing respondent to remove all physical barriers, including the withdrawal of guards, erected or stationed at the farm to prevent applicant from having access to Dorcas Kopje Farm;
- (c) directing respondent to forthwith cease whatever farming or other operations are being conducted by him at Dorcas Kopje Farm;
- (d) in the event that respondent fails to restore applicant into the farm within 24 hours of service of this application, then the Deputy Sheriff of the High Court, Bulawayo, be and is hereby authorised to do all that is necessary to restore the applicant into Dorcas Kopje Farm, and at the same time ensure that respondent, his tools, equipment and effects, and all those who occupy the farm through him, be removed from the said farm within 24 hours of this order being served;
- (e) directing the respondent not to harass or make contact with applicant, or applicant's employer, stationed at Dorcas Kopje Farm.
- (f) Interdicting the respondent from setting foot at the said farm except in pursuance of a valid court order."

To counter this order, the applicant has now launched his own urgent application seeking, by way of a provisional order, the suspension of the execution of the provisional order granted in favour of the respondent company in HC 2936/02.

### **(a) Proof of service of the section 5 order**

It is common cause that this section 5 order was not served by the Sheriff. Where service has not been effected by the Sheriff or his deputy or by a legal practitioner (or a responsible person in his employ) proof of service shall be by affidavit – see order 5 rule 42B (c) of the rules of the High Court of Zimbabwe. This was not done in this case. But is a section 5 process? Does rule 42B (c) apply to a section 5 order? These questions have to be answered in order to determine whether there was good service of the section 5 order in this case.

This is not the appropriate stage to deal with these questions. On the return date these issues can be adequately with.

**(b) Wrong citation of the Deed of transfer number**

As alluded to above, all the descriptions in the advertised piece of land match those of the disputed land. The first respondent raised the issue of the confusion. I note that the first respondent, after the said advertisement appeared in the media, addressed a minute entitled –

“Letter of Appeal for being delisted ...” on 25 October 2002 . It is stated in the said letter –

“This letter serves as a sincere appeal to the Honourable Minister to delist our above mentioned farm which we own as a company”.

It is not clear why this issue was not raised at that early stage. It seems clear to me that if I determine that there was good service of the section 5 order, then the provisional order in case HC 2936/02 has to be discharged as this impacts on the question of ownership of the disputed land. If I find that the advertised preliminary land is materially defective then the respondent’s case will be strengthened thereby. These issues can be adequately determined on the return date of the provisional order. Confirmation proceedings afford the appropriate forum to deal with these matters.

In this case the applicant, on the other hand is already on the piece of land. He has moved his cattle and has five(5) hectares of maize crop. He did this on the basis of allocation of the land to him. The first respondent, on the other hand “took occupation of the farm at beginning of September 2002”. He started “to repair the water systems and clearing up the farm.” First respondent “moved two workers into farm.” One worker has since left. The balance of convenience in the circumstances favours the applicant. It is trite that the court will issue a provisional order with interim if the applicant has established a prima facie case. In this case I find that the applicant has established a prima facie case. I also find that interim protection sought is merited in terms of order 32 rule 246 of the rules. See also *Kuvarega v Registrar-*

*General* 1998 (1) ZLR 188 (H) and *Trustees of the Roper Trust v District Administrator, Hurungwe & 7 Ors* HH-192-01. In light of my finding that the applicant has established a prima facie case, I have no option but to grant the provisional order sought.

I therefore, grant the provisional order sought in terms of the draft.

*Cheda & Partners*, applicant's legal practitioners  
*Job Sibanda & Associates*, first respondent's legal practitioners