

FORBES & THOMPSON (BULAWAYO) (PVT) LTD
versus
THE ZIMBABWE NATIONAL WATER AUTHORITY
and
TIMOTHY KADYAMUSUMA

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 11 MAY AND 16 JUNE 2016

Urgent Chamber Application

W. Ncube for the applicant
Adv. L. Nkomo for the respondent

MOYO J: This is an urgent application wherein the applicant seeks the following interim relief:

“Pending the return date, the applicant is granted the following relief:

- 1) The 1st and 2nd respondent be and are hereby ordered immediately to reconnect the pipes and restore the supply of water from Blanket Dam in Gwanda to Vumbachikwe Mine which they disconnected
- 2) Pending the return date, the 1st respondent, its employees and assignees including 2nd respondent, be and are hereby interdicted from interfering with applicant’s possession of and access to its pump house at Blanket Dam, Gwanda, by interfering with or terminating the water supply without a court order.
- 3) The 1st and 2nd respondents, jointly and severally, the one paying the other to be absolved, shall pay costs of suit for this application.”

I granted applicant the interim relief and stated that my reasons would follow, here are they:

The basis of the application was that the second respondent, representing first respondent, had entered the area where applicant’s pumps for water to the mine and its residents were, and had placed their own locks over the applicant’s locks, making it impossible for the applicant to pump water from the dam. The applicant had a long standing agreement with first respondent which was being renewed annually wherein applicant reticulated water supplies from a dam

under the first respondent's authority, and would pump water from there and pay levies to the first respondent. Currently the agreement they had expired but by conduct both parties continued in the spirit of the contract and were actually involved in negotiations on renewing that contract.

Second respondent allegedly disconnected water supplies to applicant and the mine as well as applicant's employees for outstanding levies that have not been paid as applicant is in arrears. At the hearing of the matter respondents presented the argument that the applicant was in arrears, and that they disconnected water supplies on that basis, as well as that applicant no longer had a valid contract to draw water from the dam, its contract having expired on 31 March 2016, with applicant dilly dallying on the issue of renewing the contract.

Applicant on the other hand presented the argument that whilst they were in arrears, they were in discussion with respondents on how to make good those arrears and that they were making frantic efforts to have the contract renewed and were not getting any joy from respondents. The application has attached to it various correspondence between the parties.

There is an email by second respondent addressed to applicant's representative and it reads as follows:

"We would like to inform you that Vumbachikwe mine owes ZINWA \$40000-00 and the authority intends to disconnect you on 5 May if the money is not paid in full. We are also advising you to avail the keys for your pump house so that we can gain entrance to it. Failure to comply to (*sic*) this may lead us to break through."

The wording of this email shows clearly that second respondent had decided to take the law into his own hands, instead of suing applicant for a debt he believes is owed to the first respondent, he in fact threatens to take the law into his own hands. The same date, applicant responded trying to show the unlawfulness of such conduct as was threatened by the respondents.

Applicant's case is that it has a right to water in terms of the Constitution of Zimbabwe. In fact section 77 of the constitution of Zimbabwe provides as follows:

"Every person has the right to

- a) Safe, clean and portable water, and
- b) Sufficient food, and the state must take reasonable legislative and other measures, within the limits of the resources available to it, to achieve the progressive realization of this right."

The state in terms of the constitution has a duty to provide water to citizens, applicant, has joined hands with the state in making the realisation of this goal by reticulating water supplies from the dam. On the face of it, it would not be constitutional for the state to neglect its duty in terms of section 77 of the constitution, simply because there are outstanding levies owed to first respondent. Respondents in my view should sue applicant for any dues rather than resort to self-help and in so doing abdicate their constitutional mandate.

A *prima facie* right has thus been established in my view, the right to water. The respondents resorted to self-help which cannot be allowed by this court and as matters stand, applicant has no water supplies to its mine and its residents, they have no alternative remedy except through an order of this court. The balance of convenience therefore favours the applicant. Applicant, in my view has satisfied the requirements for an interdict which are:

- 1) A *prima facie* right
- 2) A reasonable apprehension of irreparable injury
- 3) No other alternative
- 4) And the balance of convenience favouring the granting of the interdict.

Refer to *Zesa Staff Pension Fund v Mashambadzi* SC 57/02

I have not accepted respondent's contention that there is justification for the disconnection as applicant is in arrears and that currently there is no valid contract between the parties, for the following reasons:

- 1) Respondents are not allowed at law to resort to self-help. Refer to the case of *Mushoniwa v City of Harare* HH 195/14
- 2) The applicant was in peaceful and undisturbed possession of the pumps and the water supplies, they were thus despoiled by the respondents and all an applicant in an action for spoliation has to prove is that they were in peaceful and undisturbed possession of the property in question prior to being despoiled by the respondents. The lawfulness or otherwise of the possession is neither here nor there. Refer to the case of *Yeko v Qona*

1973 (4) SA 735 (A). Refer also to the case of *De Jager v Favah and Nestadt* 1947 (4) SA 28 (W) MILLIN J said the following at page 35;

“What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejection proceedings, cannot be interfered with in his possession except by due process of the law, and if he is so interfered with the court will restrain such interference pending the taking of action against him by those who claim that he in wrongful possession.”

At the beginning of the matter counsel for the respondent sought to object to the proceedings as not being urgent, I advised him that in my view the matter was urgent hence my decision to set it down. It cannot be said where mine or a community has water supplies cut off arbitrarily that matter is not urgent. Again, spoliation proceedings are by their very nature urgent. Refer to the case of *Willovale Estates CC and Another v Bryan More Estates Ltd* 1990 (3) SA 954 (W) at page 961 where KIRK-COHEN J stated thus:

“---- a spoliation must be adjudicated upon ante omnia and thus speedily. Speedy relief is given upon the simple facts of possession and dispossession.”

I accordingly formulated the view that applicant had indeed made a case for the relief sought and I thus granted the provisional order for the aforesaid reasons.

Dube-Manikai & Hwacha C/o Mathonsi Ncube Law Chambers, applicant’s legal practitioners
Dondo & Partners, C/o Moyo & Nyoni, respondent’s legal practitioners