

FORBES & THOMPSON (BULAWAYO) (PVT) LTD

Versus

THE ZIMBABWE NATIONAL WATER AUTHORITY

And

TIMOTHY KADYAMUSUMA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 2 & 8 JUNE 2017

Opposed Application

W. Ncube for applicant
Dondo for the respondents

MAKONESE J: This matter came before this court by way of an urgent chamber application held on 6 May 2016. The applicant sought and obtained urgent relief against 1st and 2nd respondents directing them to immediately reconnect the pipes and restore water supply from Blanket Dam in Gwanda to Vumbachikwe Mine which respondents had disconnected. The applicant additionally sought an order interdicting respondents from terminating the water supply without a court order pending the return date of the provisional order.

On the 26th May 2016 the respondent filed opposing papers in which they confirmed the essential facts which had been placed before the court by the applicant but disputed applicant's entitlement to the relief sought. The terms of the order sought are in the following terms:

“Terms of final order sought

1. The disconnection by the first and second respondents of the applicant's water supply from Blanket Dam, Gwanda, without a court order amounted to self help and was unlawful.
2. That first respondent, its employees or assigns, including second respondent be and are hereby interdicted from interfering with or terminating applicant's water supply from Blanket Dam without a court order.

3. The first and second respondents jointly and severally the one paying the other to be absolved, shall pay the costs of suit of this application.

Interim relief granted

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

1. The first and second respondents be and are hereby ordered to immediately reconnect the pipes and restore the supply of water from Blanket Dam in Gwanda, by interfering with or terminating the water supply without a court order.
2. The first and second respondents, jointly and severally the one paying the other to be absolved, shall pay costs of suit of this application.

The admitted facts surrounding this matter are that the applicant had been drawing water from Blanket Dam long before the contractual relationship between the parties, and had provided all the equipment for the pumping of the water from the dam. Once pumped the water is then purified by the applicant and reticulated to the employee's compound at the Vumbachikwe Mine and for the applicant's mining operations. Applicant and first respondent entered into a written agreement for the period 1st of April 2015 to 31st March 2016. I shall not comment further, regarding the authenticity and validity of the written contract as both parties appear to have been content to be bound by the terms of the written agreement. However, I need to point out as I must that parties to written agreements must take seriously how such contracts are signed, by whom, they are signed, when and where they are signed. Parties who append their signatures to written documents signify their desire to be bound by the contractual terms appearing above their signatures. In this matter it would appear that applicant signed the written agreement and was not handed the document signed by the first respondent. It appears to me that the document presented in court by the first respondent was signed after the fact. This is not desirable. By the time the disconnection was effected the written water supply agreement had expired and has not been renewed. However, the disconnection was not on the grounds of the expiration of the written agreement but was on ground of alleged non timeous payment of water bills. The respondent contends that the disconnection of water supplies was occasioned by a breach of section 22 of the water supply agreement which provides as follows:

“... notwithstanding the foregoing, in the event of the customer failing to pay the charges due in terms hereof by the due date and not having rectified such a breach within thirty (30) days receipt from ZINWA or committing any breach of any of the terms and conditions of this agreement, or failing, in the opinion of the Chief Executive Officer, whose decision shall be final, to make beneficial use of such water, then and in such event ZINWA shall have the right summarily to cancel this agreement, or to discontinue the supply of water to the customer for such period as it may think fit. Such cancellation or discontinuance shall be without prejudice to the right of ZINWA to recover from the customer such sums as may be due by way of charges, damages or otherwise and ZINWA shall not be responsible for any loss or damage direct or consequential arising out of such termination or suspension ...”

The respondents aver that the disconnection of water supplies to the applicant without a valid court order is permissible in terms of the water supply agreement. The respondents contend that the disconnection of water supplies without recourse to court process is lawful and does not amount to self help and is not unconstitutional.

The respondents concede, however, that section 77 of the Constitution of Zimbabwe (Amendment No. 20/2013) provides that every person has a right to safe clean and portable water and sufficient food, and that the state must take reasonable legislative and other means within the limits of the resources available to achieve the progressive realization of this right. In the same breath and context the respondents deny that they violated the relevant provision of the Constitution by “merely disconnecting” water supplies for reasons of non payment for water already consumed by applicant. The respondents contend that the water supply agreement provides that the first respondent would supply applicant with water for a charge to the consumer and the applicant was obliged to pay for the water supplied. I must point out here that the precise provisions of the agreement provided for payment of a water levy and council tax. Section 4 of the Water Supply Agreement provides as follows:

“Charges for water

...

The water charge shall consist of:

(a) Water Levy

That the customer shall pay a water levy based on its consumption of water in accordance with the provisions of Statutory Instrument 95 of 2000 or any amendments thereto, \$0,25/m³.

(b) Sub-catchment Council Rate

That the customer shall pay as stipulated by the sub-catchment council, a rate set from time to time by the said council –

(c) VAT

...”

Respondents aver that a party who is in default by reason of non-payment cannot invoke the provisions of section 77 of the Constitution to support the argument that the disconnection of water supplies was unlawful and unconstitutional. It is contended on behalf of the respondents that such an argument would be tantamount to saying that businesses must give away their products such as water and food for free since every person has a right to water and sufficient food. It is important to observe, however, that the application before the court is not predicated on the assumption that goods and services should be given away for free. The analogy given may not serve to illustrate the respondent’s argument because the respondents do not in fact sell water as a commodity in the strict sense of the word. In terms of the water supply agreement the respondents levy its consumers and impose a council rate for the consumption of water.

I must now determine whether the conduct of the respondents is contrary to the provisions of the Constitution. There is no dispute that the respondents are constitutionally bound to ensure that applicant’s constitutional right to clean and portable water is respected. The respondents’ actions in disconnecting water supplies quite clearly, in my view, violates the applicant’s right to safe, portable and clean water. It is a basic principle of our legal system that the law should serve the public interest. It follows therefore, that it is not in the public interest that an institution or agency of the government can deny its citizens water arbitrarily without recourse to the law and the courts. In this regard, the remarks in the case of *City of Cape Town v*

Strumpher (104/11 (2012) ZASCA 54 are relevant. In this matter reference to section 27 (1) of the South African Constitution which is similar to section 77 of the Constitution of Zimbabwe is made and it was stated thus:-

“It follows from the above statutory and constitutional provisions that the right to water claimed by the respondent when he applied for a spoliation order, was not based solely on the contract which he concluded with the City, but was underpinned by the constitutional and statutory provisions discussed above. This view was fortified by the decision of this court in Impala Water Users Association v Lourens NO and Others 2008 (2) SA 495 SCA.”

In *Mushoriwa v City of Harare* 2014 (1) ZLR 515, BHUNU J (as he then was), in coming to the same conclusion stated that:

“It is a basic principle our legal policy that law should serve the public interest. As we have already seen, every person has a fundamental right to water. It is therefore, clearly not in the public interest that a city council can deny its citizens water at all without recourse to the law and the courts. While the City Council has a right to collect its debts it cannot be so by resorting to unlawful means for every person including the City Council is subject to the law.”

I would, in this event, associate myself with the views expressed in these cases. As a matter of law resort to self help without the authority of a court order is *ipso facto* unlawful moreso when such resort has the effect of infringing a constitutionally guaranteed right.

The respondents have largely placed reliance on the cases of *Augustine Runesu Chizikani v Agricultural Finance Corporation* SC-1234-95. In the *Nyamukusa v AFC* SC-174-94 matter the court had this to say:

“In the circumstances where the provisions of the said clause 6 are incorporated in the loan agreement as was in this case, the respondent is entitled to proceed in terms of s40 (2) and 22a of the said Act. It is worthy of note that these powers are in addition to those under s40 (1) of the Act.”

It is not in doubt that the cases cited by the respondents are distinguishable from the facts of this matter. The Supreme Court in those decisions was dealing with loan agreements and the rights of parties to take possession of the property hypothecated without recourse to the law. The

circumstances in this case are covered and governed by the provisions of section 77 of the Constitution. In my view, the cases referred to by the respondents related to seizure of property in terms of a loan agreement, and whether such seizure without recourse to a court order violated the provisions of section 16(1) and 18(a) of the old Constitution. The cases cited by respondents are not relevant to the facts of the present matter.

In respect of the issue of spoliation it is fairly well established in our law that for a party to succeed it must show that:

(a) the party was in peaceful and undisturbed possession.

See *Wino Bonino v De Longe* 1906 TS 120 at 122, where the principle was laid down in the following terms:

“it is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to an inquiry or investigation into the merits of the dispute.”

See also *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 284

(H)

It seems to me that it is not open to doubt that when respondents disconnected water they did so without any valid court order. The disconnection was carried out to compel the applicant to settle outstanding bills. The applicant does not dispute owing some amount to the respondents.

In disconnecting the pipes from the dam, 2nd respondent's intention was to deprive the applicant access to the water in the dam. 2nd respondent clearly and unlawfully disconnected water supply to Vumbachikwe Mine which is operated by applicant. Applicant has been drawing water from Blanket Dam in Gwanda for several years without disturbance and has provided all the equipment for the pumping of water from the dam. 1st respondent, through 2nd respondent, unlawfully interrupted that *status quo*, thereby leading to these legal proceedings.

2nd respondent placed locks on the pump house preventing applicant from accessing and reconnecting the water in order to carry out its operations and to service its employees in the mine compound. The disconnection of water supplies led to the creation of a possible health hazard and is in direct violation of the fundamental right to clean, safe and portable water as provided under section 77 of the Constitution.

The second paragraph of the final relief sought by the applicant is for an interdict prohibiting the respondents from interfering with or terminating applicant's water supply from Blanket Dam, Gwanda, without a court order. The practical effect of the interdict sought is to prohibit the respondents from interfering with applicant's possession of access to its pump house at Blanket Dam, Gwanda by interfering with or terminating the water supply without a court order. The requirements for an interdict in our law are well settled and can be summarised thus:

- (a) the existence of a clear right which must be established on a balance of probabilities.
- (b) Irreparable injury actually committed or reasonably apprehended.
- (c) The absence of an alternative satisfactory remedy available to the applicant.

See *ZESA Staff Pension Fund vs Mashambadzi* SC-57-02 and *Setlogelo v Setlogelo* 1914 AD 221

The facts of this matter show that applicant has a clear right to water that is enshrined in the Constitution under section 77. Moreover, there is a statutory obligation for 1st respondent to supply water to the applicant. The 1st respondent is entitled to levy the applicant for the consumption of water supplied and consumed. Applicant has evidently suffered irreparable harm as a result of respondents' actions. The disconnection has impacted negatively on the health of thousands of applicant's workers and their families who reside in the compound. Production at the mine has been severely affected. There could be no suitable remedy to prevent the respondents from unlawfully disconnecting water. The respondents have asserted in several communications with the applicants that they will resort to the disconnection of water supplies "as a tool" of compelling settlement of their bills.

I am satisfied that the state and quasi state institutions cannot abrogate their constitutional obligations and duties by alleging that by entering into a water supply agreement, the applicants contracted themselves out of constitutional provisions.

In the circumstances, the applicants are entitled to the final order sought and I accordingly make the following order.

1. The disconnection by first and 2nd respondents of the applicant's water supply from Blanket Dam, Gwanda, without a court order amounted to self help and was unlawful.
2. First respondent, its employees or assigns, including second respondent be and are hereby interdicted from interfering with or terminating applicant's water supply from Blanket Dam, Gwanda, without a court order.
3. First and second respondents, jointly and severally, the one paying the other to be absolved shall pay the costs of suit.

Messrs Dube-Manikai & Hwacha c/o Mathonsi Ncube Law Chambers, applicant's legal practitioners

Dondo & Partners c/o Moyo & Nyoni, respondents' legal practitioners