

ZENZELE SIBANDA

Versus

PETER J. BUCKLE

And

PETER A. BUCKLE

And

ANDREW LANGA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 6 & 9 MARCH 2017

S. Tsumele for applicant
V. Majoko for 1st & 2nd respondents

Urgent Chamber Application

MAKONESE J: A legal practitioner who certifies a matter to be urgent must apply his mind to the averments in the certificate of urgency and ensure that it discloses urgency. The legal practitioner must be satisfied that the reasons advanced for urgency are clearly articulated in the certificate of urgency. Where an applicant alleges violent conduct against the respondents and alleges that conduct to result in spoliation, the legal practitioner preparing the certificate of urgency must ascertain that the founding affidavit does indeed reveal such perverse conduct. A matter cannot be urgent where the applicant himself does not disclose the reasons upon which the urgency is alleged and further the applicant must explicitly state without any ambiguity when such urgency arose. The court will be slow to allow a party who files an urgent application to postpone a matter for the sole purpose of filing an answering affidavit to rebut submissions made by a respondent which tend to show that urgency does not exist. An urgent application must stand or fall on the averments contained in the founding affidavit.

On the 24th February 2017 the applicant filed an urgent chamber application seeking the following relief:-

“Interim relief sought

Pending the hearing of the finalisation of this matter this honourable court it is ordered that:

- (a) That the respondents and all those acting on their instructions be and are hereby ordered at all times to maintain peace towards the applicant and his employees and desist from threatening, interfering with the activities at the applicant’s farm.
- (b) That the respondents immediately upon service of this order be directed to remove their cattle from applicant’s farm.”

This matter was only brought to me on 2nd March 2017 for reasons that have not been explained. I directed that the matter be set down for hearing on the 6th March 2017 to allow service on all the respondents. At the hearing of the matter the applicant’s legal practitioner sought to secure a postponement of the matter to enable him to obtain further instructions. The postponement was resisted by the respondents who pointed out that the matter was not properly before the court as there was no urgency disclosed in the papers. I dismissed the application for lack of urgency and for lack of merit. These are my full reasons.

Background

The applicant seeks what he says is interim relief. The relief that is sought is for respondents to remove their cattle from Blinkbonny Farm. What applicant seeks in effect is an order for eviction which cannot be obtained by way of an interim order. An interim order should not have final effect.

Blinkbonny Farm is registered in the names of Soundstone Properties (Pvt) Ltd. It is the company which at law is in occupation of the farm. The 1st and 2nd respondents are both directors and shareholders in Soundstone Properties (Pvt) Ltd. The company was not cited nor joined to these proceedings as a respondent. The respondents were not properly cited in their individual capacities as they derive their rights through the company. In February 2012 the applicant visited the 1st respondent and advised him that he was the new owner of Blinkbonny Farm. Applicant did not produce any document to show that he was the beneficiary of the land in question. The offer letter was only issued to the applicant in September 2012. Blinkbonny

Farm was initially listed for acquisition but was at some state delisted. Respondents subsequently made representations to the acquiring authority and a letter dated 19 December 2006 indicates that the District Lands Committee under Insiza District recommended that the decision to acquire the land for resettlement be reversed. On 18th June 2013, a meeting was held at the offices of the District Administrator, Filabusi to resolve this matter. A portion of the minutes of the meeting held on that occasion reads as follows:

“Blinkbonny Farm, had been agreed by the District Lands Committees, to be returned to Peter Andrew Buckle, but Mrs S. N. Ncube asked Mr Peter Andrew to please not confront Mr Z. Sibanda, as he was a nice fellow, if Mr Peter Andrew would allow the DA’s office time to find Mr Z. Sibanda another farm to relocate to, at which time they would inform Mr Z. Sibanda to vacate Blinkbonny Farm.”

The respondents aver that following assurances by the acquiring authority they were lawfully residing at Blinkbonny Farm, they set out to re-fence the internal and external boundary fences, complete with anchors, standards and droppers, refurbished two reservoirs, built and refurbished all water cribs and piping with Jojo water tanks, developments which they would not have undertaken if they had not been assured that Mr Z. Sibanda would be allocated another farm. Respondents further contend that in or about 31st October 2013 they were advised that applicant had been allocated Dandasi Farm in Shangani. The decision was confirmed when applicant was removed from the farm in dispute by officials from the Ministry of Lands and local councilors. Nothing further occurred until January 2015 when applicant returned to the farm in dispute. He came to the farm and took photographs of an old derelict farm house. On 1st February 2015, applicant arrived at the farm with persons he said would guard his assets. Respondents confirmed, once again, with the District Lands Office and were assured that nothing had changed since the last resolution made in 2013. It would seem that in January 2017 the applicant took occupation of portions Blinkbonny Farm, placing 22 head of cattle in one of the paddocks. On 25th January 2017 the respondents met with councilors and the ZANU (PF) Provincial Youth leadership who all confirmed that there were not aware of applicant’s allocation of the disputed farm. A report was made at Shangani Police to alert them of the applicant’s activities. It would appear that the present application for a spoliation order is in

pursuance of the applicant's fresh initiative to take occupation of Blinkbonny Farm by any means possible.

In his founding affidavit, the applicant avers that:

“In January 2017 I retook occupation of the farm and brought in part of my head of cattle. I have been in peaceful occupation of the farm from the beginning of the year until Wednesday 15th Of February 2017 when 1st respondent visited the farm and made threats against my employees to the effect that the farm belongs to his son and he was going to chase everyone from the farm, lockup the gates and confiscate my cattle. The 1st respondent stated that he was authorized to remove me from the farm by the 3rd respondent whom he said is well connected politically. The 1st respondent has already put his cattle in my farm and refused to remove them.”

The applicant goes on to aver that since he is based in South Africa as soon as e received information of the 1st respondent's visit to the farm he travelled to Zimbabwe where he made efforts to gather and verify the full details of what had transpired. 1st respondent does not explain how and when precisely he was deprived of possession of the farm by unlawful means. It is a requirement in cases of spoliation to allege and prove that the applicant was in possession and that he was despoiled of possession by unlawful means. In this matter, the applicant does not allege that he was in peaceful possession. He does not deny that the respondents have since 2012 been in possession of the farm. Curiously, the applicant does not set out the background to the dispute. The applicant does not disclose the material facts that led to his purported occupation of the farm in January 2017. The applicant does not openly inform the court that in 2013, the Lands Committee at Filabusi resolved to relocate him to an alternative farm in Shangani. What is crucial, however, is that applicant does not allege when precisely he was dispossessed and how this happened. As a final order applicant seeks that the court declares him the lawful owner of Blinkbonny Farm. This prayer is patently incompetent and in violation of the Constitution of Zimbabwe in that all agricultural land belongs to the State, and all rights are vested in the State.

Whether the matter is urgent

This application is not urgent and the applicant himself does not, in his affidavit claim that the matter is urgent. The events leading to the filing of this application have not been set out by the applicant. In any event, since 2012, the parties have been involved with the Land Committee at Filabusi, and the local political leadership and no new offer of land has been made to the applicant.

The duties of a legal practitioner in relation to certificate of urgency have been expounded in a number of cases. In *UZ-UCSF Collaborative Research Programme v Husaiwevhu & Ors* 2014 (1) ZLR 634 (H), MAFUSIRE J, dealt with this issue extensively and pointed out that a legal practitioner who certifies a matter to be urgent must apply his mind to the matter. I have no doubt that the scant detail in both the certificate of urgency and the founding affidavit, reflects that the legal practitioner who prepared the certificate of urgency would have easily observed that the matter is not urgent at all had he bothered to apply his mind to the matter.

In *Graspeak Investments (Pvt) Ltd vs Delta Operations (Pvt) Ltd & Anor* 2001 (2) ZLR 551 (H), NDOU J, at page 555A stated as follows:

“An urgent application is an exception to the general rule and as such the applicant is expected to disclose fully and fairly all material facts known to him or her. Legal practitioners should always bear this in mind before certifying that the matter is urgent.”

In the well known case of *Kuvarega v Kuvarega* 1998 (1) ZLR 188, the principle was well established that what constitutes urgency is that a matter is urgent if when the need to act arises the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws nearer is not the type of urgency contemplated by the rules.

As I have already stated, this application is premised on events which occurred in 2012 and cannot after 4 years ground urgency. The background I have narrated above clearly shows that applicant has always been aware of the dispute between the parties. The matter does not

become urgent because the applicant perceives it to be urgent. The averments in the application must disclose urgency. I easily conclude that this matter could be easily disposed of for lack of urgency.

Whether the order sought is competent

It is apparent from the application that applicant does not allege any adverse conduct on the part of the respondents either in 2012 or in 2017. The applicant has not satisfied the court on the papers filed that he was in peaceful occupation of the property and that he was unlawfully dispossessed by any one of the cited respondents. It is not sufficient in my view, to allege that a party has been dispossessed of lawful occupation without giving any details. The applicant has not taken this court into its confidence.

The application purports to be an application for an order for spoliation. A closer look at the provisional order reflects that there is nothing provisional about the order sought. Applicant seeks, in what he says is interim relief, that the respondents remove their cattle from applicant's farm. In the final order sought, applicant prays that the court declares him the owner of Blinkbonny Farm. In terms of the Constitution of Zimbabwe all agricultural land is vested in the State. The final order is for applicant to be declared the owner of Blinkbonny Farm. This is not competent as the applicant seeks that the court divests the State of its ownership of land which vests in it and bestow such ownership upon the applicant. The Acquiring Authority, the Ministry of Lads has not been joined in these proceedings. It is not competent to grant the order sought. If the applicant intends to enforce any beneficial rights in respect of land offered to him under the land reform programme, he must do so in terms of the legal instruments that deal with Gazetted Land specifically, the Land Acquisition Act (Chapter 20:10) and the Gazetted Land (Consequential Provisions) Act (Chapter 20:28).

In the result, this court rules that this matter is not urgent and that the relief sought is incompetent. The requirements for spoliation have not been met and the application itself, though purporting to be one for spoliation seeks a final order.

It is for the foregoing reasons that I make the following order.

1. The application be and is hereby dismissed.
2. The applicant shall pay the costs of suit.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Majoko & Majoko Legal Practitioners, 1st & 2nd respondents' legal practitioners