MICHAEL BASIKITI
versus
CHIVERO STANELY MDOKWANI
and
MINISTER OF LANDS AND RURAL RESETLEMENT
and
DEPUTY SHERIFF, MARONDERA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 3 December 2014 & 14 January 2015

Urgent Chamber Application

B Makururu, for the applicant
E. Jera, for the 1st respondent
Ms *S. Chihuri*, for the 2nd respondent

NDEWERE J: The first respondent was offered land at Devon Farm on 24 November, 2009 and he says he took occupation on 27 November, 2009. When he got to the farm, he found the applicant there with a caretaker's letter signed by the Acting Chief Lands Officer. The first respondent and the applicant co-existed at the farm while waiting for the Ministry of Lands to confirm the lawful occupier of the land. The two had some disputes caused by this co-existence.

On 2 November, 2011 the applicant was issued with an offer letter in respect of subdivision 3 of Devon farm by the second respondent. The second respondent then withdrew its offer letter to the first respondent for the same farm.

Aggrieved by the second respondent's decision to withdraw his offer letter, the first respondent approached the High Court under case No. 5896/12. The first respondent obtained judgment in its favour on 23 July, 2013. It was a default judgment against the then first respondent who failed to appear in court.

The applicant (as first respondent in case no. 5896/12), did not apply for rescission of judgment. Instead, on 28 January, 2014, the applicant consented to the judgment in an affidavit. After consenting to the judgment, the applicant then made a written request on the

same affidavit to be allowed to reside at the farm while he harvested and graded his tobacco. The affidavit is attached to the first respondent's papers as Annexure B.

At that stage, in January, 2014, the first respondent had already issued a writ of ejectment. The applicant requested the first respondent not to enforce the writ of ejection until 15 April, 2014 so that he, the applicant, did not suffer great losses. The applicant went further in the affidavit,

> "I am requesting to stay on the farm until 15 April, 2014, with no extent. My default on this agreement shall compel the applicant to enforce the writ of ejection without any further notice and costs as a result of my breach of agreement shall be met by myself".

The applicant did not vacate the farm in terms of the above affidavit signed by him. Instead, on 15 April, 2014, the deadline for the applicant "without extent", the first respondent received a letter from the second respondent advising of his intention to withdraw its offer to him. The first respondent made representations to second respondent, outlining why the second respondent should not take away his land.

The second respondent still proceeded to write a "withdrawal of Land offer" on 21 May, 2014. On 17 June, 2014, the Minister then wrote an offer letter to the applicant offering him the land in dispute.

The first respondent then proceeded to instruct the third respondent to proceed to evict the applicant. The applicant was served with a notice of ejectment on 26 June, 2014, with 7 July 2014 being the date of ejectment.

On 30 June, 2014 the applicant filed this application on an urgent basis asking the court to interdict the first respondent from evicting him and secondly to set aside the High Court Order granted in case number 5896/12.

The first respondent opposed the application. He said the application was fatally defective and in addition the application was not urgent. He also said the application lacked utmost good faith. Both parties made submissions to the court with the applicant saying the matter was urgent while the first respondent said it was not urgent and should be dismissed.

Rule 241 requires a chamber application to be accompanied by Form 29B "duly completed". Form 29 B provides as follows:-

> "Application is hereby made for an order in terms of the order/draft order annexed to this application on the grounds that:
> (Set out in summary the basis of the application)

> The accompanying affidavit/s and documents are tendered in support of the application".
>
> The applicant did not use Form 29B. He left out "… on the grounds that": and did not proceed to give a "summary of the basis of the application".

The applicant's application is therefore defective. It did not comply with r 241. Yet r 241 is very instructive. The form includes the words "…. on the grounds that …" to remind a litigant to put the grounds. The form then says "summarise the basis for the application" again to remind the litigant to inform the court and the other party the basis of the application. The rule itself says the application "shall be accompanied by Form 29B duly completed" The use of the word "shall" shows that it is mandatory for a litigant to use Form 29B, but the rule does not stop there, it proceeds further and says "duly completed". Again a reminder that after adopting the Form, it must be completed e.g where it says summarise the basis for the application.

It actually makes sense for a litigant to summarise the basis of the application, especially if the litigant wants the court to deal with the matter urgently. How can a judge deal with the matter urgently if he/she has to plough through the Founding Affidavit and supporting documents to find out the basis of the application? Precious time will be spent before the judge knows the grounds of the urgent application if litigants do not give a summary of the basis on the face of the application as provided by r 241 and Form 29B.

The case of *New Vision Promotions* v *Ganya and Ors* HB 54/07 referred to by the first respondent's counsel is relevant to this case. In that case, the court said:-

> "An urgent chamber application accompanied by a certificate of urgency should be accompanied by Form 29B as stipulated by r 241".

The case of *Mandlenkosi Nhliziyo* vs *Greys Service and Ors* HH 194-10 is also a case in point. In that case, the applicant who had not used Form 29B argued that he had complied with the rules because the applicant had set out the grounds upon which the application was based in the founding and supporting affidavits. The judge stated on p 4 of the cyclostyled judgment:

> "Rule 241(1) clearly provides for two requirements, which are that the application shall be supported by one or more affidavits and secondly, be accompanied by Form 29B. The grounds upon which the application is based should be stated both in the supporting affidavits and in Form 29B".

The applicant, despite the repeated requirement for "grounds" and "basis" and a "duly completed" form ignored the provisions of r 241. He did so at his own peril. His application is therefore defective.

The second point *in limine* by the first respondent is whether the application is urgent.

After having regard to the *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 188 H, I am of the view that this case falls into the category of self-created urgency. The dispute between the parties has been on-going since 2009 because of a double allocation of a farm. There is nothing new which warrants urgent treatment by this court. The writ of ejectment has been there all along it is just that applicant temporarily stopped ejectment by signing an affidavit promising to vacate by 15 April, 2014, without extension, and empowering the first respondent to evict him without further notice. The order in case number HC 5896/12 has been there since July 2013 and the applicant has not done anything to have it rescinded.

The fact that applicant in its draft order is asking this court to set that judgment aside is confirmation that he has always been aware of the existence of that judgment and that it is valid because it has not been set aside or rescinded by a competent court. The applicant made the situation worse by signing an affidavit accepting that judgment way back in January, 2014. In fact the applicant betrayed the first respondent's trust when, instead of moving out by 15 April, 2014 he went and obtained an offer letter and then sought to evict the first respondent.

The applicant has been relying on the withdrawal letter sent by the second respondent to the first respondent. Suffice it to say that the validity of that withdrawal is a moot point given the sentiments expressed in the *Sigudu* v *Minister of Lands and Rural Resettlement N.O and Phineas Chihota* HH 11-13 referred to by the first respondent.

Even if the withdrawal is said to be valid, the mere fact of a withdrawal does not automatically set aside or suspend a valid court order. The court order continues to stand until rescinded or set aside by a competent court.

The first respondent has applied for costs on a higher scale. The court has noted that when the applicant signed the affidavit of 28 January, 2014, he undertook to vacate the farm by 15 April, 2014 failing which the first respondent could evict him at his own (applicant's) costs. Given such an undertaking, the court is of the view that the applicant should not have resisted the eviction to the extent that he did knowing that there is a valid court order, which he accepted and agreed to abide by its decision by 15 April, 2014. I am therefore of the view that costs on a higher scale are warranted in this case.

Accordingly, the court's ruling is as follows:-

(1) that the urgent application be and is hereby dismissed for the following reasons:

  (a) the application is defective for failure to comply with r 241, and Form 29B.

  (b) the application is not urgent.

(2) that applicant shall pay the first respondent's costs on a higher scale.

Musoni Law Chambers, applicant's Legal Practitioners
Moyo and Partners, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd respondent's legal practitioners