DOUGLAS STUART TAYLOR-FREEME
versus
THE PROSECUTOR GENERAL
and
THE PROVINCIAL MAGISTRATE CHINHOYI

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 18 June 2015, 14 July 2015 & 22 July 2015

Urgent Chamber Application

Ms. *F. Mahere,* for the applicant
E. Makoto, for the 1st respondent
D. Manwe, for the 2nd respondent

CHIGUMBA J. This is an urgent chamber application in which the applicant seeks an order for the suspension of his conviction and sentence in the magistrate's court of Chinhoyi pending the hearing and determination of the final relief, and an interdict against the respondents from evicting him from Romsey Farm before the determination of the final relief. The final relief sought is a declaratur that the appeal noted against the applicant's conviction and sentence in case number CRB CHN 126/2008 suspends the operation of the conviction and sentence, and a final order that applicant be not evicted until the appeal has been heard and determined to finality.

The background to this matter is that, on 25 February 2009 the applicant was arraigned before the Chinhoyi Magistrates Court, it being alleged that on 4 February 2007, at Romsey Farm Chinhoyi, without lawful authority to occupy, hold, or use gazetted land after the expiry of the 45 day period stipulated in s 3(2) (a) of the ***Gazetted Land (Consequential) Provisions) Act*** **[*Chapter 20:28*]**, the applicant occupied gazette land and continues to do so. The applicant raised

various defences; that the farm was owned by a juristic person, that the farm was not gazetted land because the SADC Tribunal had ruled that its acquisition was unlawful, that he was given authority to occupy the land by a Vice President and other officials from the Ministry of Lands, that he operated under a misapprehension of the law, and that s 2 of the Gazetted Lands Act is invalid.

The court *a quo* found that the delay in bringing the applicant's prosecution to finality was largely due to his own tactics of constantly challenging every stage of the proceedings and appealing against the rulings of the court from 2009 to 2011. From 2011 to 2015 the presiding magistrate was on manpower development leave and during each school break, would continue with the partly heard matter but never finalized it. The applicant's approach to the Constitutional Court resulted in judgment number CCZ 10-14. On the essential elements of the offence the court *a quo* relied on the definition in CCZ10-14 and concluded that none of the applicant's defences held any merit because they had been considered and rejected by the Constitutional Court. In assessing sentence the court *a quo* took into consideration the fact that the applicant had been in unlawful occupation of this land for 13 years, and was alive to the principle that the sentencing jurisdiction must be tempered by all the relevant circumstances peculiar to this case. The court took into account the evidence on record that high ranking officials colluded with the applicant and assisted him to evade the law for all that time. He considered that the applicant had crops currently under cultivation.

The applicant was sentenced on 10 June 2015, to 5 months imprisonment which was wholly suspended for five years on condition that he does not commit an offence involving illegal settlement on any land. The court ordered that the applicant and all those claiming ownership, occupation or use of Romsey Farm through the applicant, vacate the farm on or before 15 July 2015, and directed that the Minister of Lands facilitate the nurturing and harvesting of any wheat in the field at Romsey Farm. Applicant appealed against conviction and sentence. The grounds of appeal against conviction were that the court *a quo* erred in its interpretation of the expression 'lawful authority' when it assessed the applicant's defence that he had been given lawful authority to remain in occupation of Romsey Farm by the Vice President of Zimbabwe, amongst other grounds, including the alleged disregarding of the provisions of s 291 of the Constitution.

The appeal against sentence was premised on the averment that the sentence is excessive in the circumstances in view of the failure to take into account the history of the prosecution which has resulted in applicant having crops in the field because he was encouraged to continue to occupy the land. The relief sought on appeal is that the conviction be overturned and set aside, or that alternatively, the applicant be given a fair period within which to harvest his current crop. The applicant sought a review of the criminal proceedings, which application was opposed by the first and the second respondents on 1 June 2015. An application had been made that the second respondent recuses himself which application was dismissed and the review sought was in respect of the dismissal of that application.

Mr. *David Peter Drury*, in the certificate of urgency attached to this application, stated that in his twenty five years of practicing law, he has had considerable experience in land matters, which are often highly charged politically and emotionally. He stated that the courts have encouraged the police and officials from the Ministry of Lands to be proactive in assisting the holders of offer letters to take occupation of land offered to them without further court authority. In his opinion, the common law rule whereby an appeal suspended the effect of a conviction by a lower court had been modified by statutory exceptions for sentences of imprisonment and fines to such an extent that many officials regard all penalties to remain fully effective despite the noting of an appeal. There was a danger that the applicant's order to vacate would be unlawfully effected, and he would lose his home and his livelihood. The constitutionally protected presumption of innocence which operated until litigation was brought to finality justified the continuation of farming operations until finality was reached.

The Prosecutor General, the first respondent, filed a notice of opposition on 30 June 2015, after being served with the application on 22 June 2015. The application was opposed on the basis that there were no prospects of success on appeal, and that accordingly the applicant did not have a clear right though open to doubt to qualify for the interdict that he sought. It was submitted that applicant has known since 2009 that his eviction was being sought so the matter was not urgent. The opposing affidavit was deposed to by the second respondent, the trial magistrate who stated that the issue before the court *a quo* had been determined on the basis on an interpretation of the meaning of 'lawful authority' in terms of the Gazetted Lands Act. He said that the applicant had petitioned the Constitutional Court following the court *a quo's*

dismissal of his application for discharge at the close of the state case. The Constitutional court in its judgment CCZ10-14 made findings in regards to the meaning of 'lawful authority' which the second respondent was bound by. It was my preliminary view that this matter did not meet the requirements of urgency because the applicant had other suitable alternative remedies, which were correctly alluded to in the opposing affidavit of the trial magistrate. I had endorsed this view on the record. I was petitioned quite aggressively to allow an address on the merits of the question of urgency. I acceded to this petition; being a firm believer in the age old adage that justice must be seen to be done, and out of sensitivity to the sentiments expressed in the certificate of urgency about the emotive nature of land issues.

At the hearing of the matter no fresh or new submissions were made except to highlight the averments in the certificate of urgency and the founding affidavit. The respondents' stance was that there were no prospects of success in either the review or the appeal therefore the applicant lacked a *prima facie* right and was not entitled to interim relief. They relied on the case of ***Douglas Stuart Taylor-Freeme* v *Senior Magistrate, Chinhoyi and the Attorney General*[1],** in which the applicant had approached the Constitutional Court (ConCourt) in terms of s24 of the former Constitution alleging that his rights to protection of the law and to a fair trial guaranteed unser s18 of the Constitution had been violated by the court *a quo* when it put him to his defence. The ConCourt considered the applicant's defence that he had authority to occupy gazetted land in the form of a letter from the late Vice President and other officials from the Ministry of Lands. The ConCourt set out the essential elements of the offence that the applicant was charged with at p17-18 of the cyclostyled judgment. The ConCourt considered whether the definition of 'lawful authority' complied with s16B of the Constitution and at p 23, lawful authority was defined as an offer letter, a permit or a land settlement lease. The ConCourt determined that the letter from the Vice President did not constitute lawful authority to occupy gazetted land and referred to its previous judgment of ***Commercial Farmers Union & Ors* v *The Minister of Lands and Rural Resettlement & Ors @ p 19***

Before considering the merits of the application before the court, let us look at whether the requirements of urgency have been met in this matter. The test for urgency is settled.

It has been held that:

[1] CCZ10-14

> "Applications are frequently made for urgent relief. What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent if, at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules". See [2] .

It has also been held that:

> *"*For a court to deal with a matter on an urgent basis, it must be satisfied of a number of important aspects. The court has laid down guidelines to be followed. If by its nature the circumstances are such that the matter cannot wait in the sense that if not dealt with immediately irreparable prejudice will result, the court can be inclined to deal with it on an urgent basis. Further, it must be clear that the applicant did on his own part treat the matter as urgent. In other words if the applicant does not act immediately and waits for doomsday to arrive, and does not give a reasonable explanation for that delay in taking action, he cannot expect to convince the court that the matter is indeed one that warrants to be dealt with on an urgent basis…" See [3] and[4], and[5].

In my view, which I previously expressed in the case of **Finwood Investments Private Limited & Anor v Tetrad Investment Bank Limited & Anor [6]**,in order for a matter to be deemed urgent, the following criteria, which have been established in terms of case-law, must be met:

A matter will be deemed urgent if:

(a) The matter cannot wait at the time when the need to act arises.

(b) Irreparable prejudice will result, if the matter is not dealt with straight away without delay.

(c) There is *prima facie* evidence that the applicant treated the matter as urgent.

(d) Applicant gives a sensible, rational and realistic explanation for any delay in taking action.

(e) there is no satisfactory alternative remedy.

I am unable to agree with the submission made on behalf of the respondents that the need to act arose in 2009 when the applicant was arraigned before the criminal court. Given the convoluted history of multiplicity of litigation in land matters, it cannot be said that the matter could not wait in 2009. I find that the need to act arose in 2014 when the ConCourt handed down

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[2] *Kuvarega* v *Registrar General and Anor* 1998 (1) ZLR 189
[3] *Mathias Madzivanzira & @ Ors* v *Dexprint Investments Private Limited & Anor* HH145-2002"
[4] *Church of the Province of Central Africa* v *Diocesan Trustees, Diocese of Harare* 2010 (1) ZLR 364(H
[5] *Williams* v *Kroutz Investments Pvt Ltd & Ors H*B 25-06, *Lucas Mafu & Ors* v *Solusi University* HB 53-07
[6] An unreported HH-2014 case. See also *Denenga* v *Ecobank* HH 177-14

its judgment in which it clearly stated that the applicant had no 'lawful authority' to remain in occupation of Romsey Farm. There is no *prima facie* evidence that the applicant treated the matter as urgent in October 2014 when the need to act arose. In fact applicant went on to plant winter wheat in the 2015 season, a fact which is inconsistent with a conclusion that he treated the matter as urgent. No rational or sensible explanation has been proferred as to why applicant did not treat the matter as urgent in October 2014. The only realistic explanation is that the applicant assumed that his usual delaying tactics would buy him time. I have no doubt that irreparable prejudice and loss of livelihood would result if the applicant were to be evicted today. Applicant has another remedy, he can apply for bail pending review or appeal, which if granted, would have the effect of suspending the operation of his sentence. The requirements of urgency are not met. Out of abundance of caution I will proceed to deal with the merits of the matter.

On the merits the issue that falls for determination in my view is whether the applicant can be said to have a clear right though subject to some doubt for the purposes of being entitled to an interim interdict in circumstances where the Constitutional Court has pronounced that he has no lawful authority to occupy gazette land. Put differently, does the right to appeal constitute a clear right which is subject to some doubt which would constitute a cause of action in an application for an interim interdict in circumstances where the noting of the appeal appears not to suspend the operation of the conviction and sentence? The factors to be taken into account in considering the grant of interim relief are now well settled. These are:-

(1) Whether or not the party seeking the relief has a *prima facie* right, *in casu*, a *prima facie* right to pursue his appeal to finality.

(2) Whether or not the applicant, will suffer irreparable harm if he is evicted.

(3) The balance of convenience. It is common cause that the applicant has wheat in the fields which is due to be harvested and that the trial court gave him two weeks within which to do so. See ***Zimbabwe Open University* v *Magaramombe***[7]

It is my view that the right to appeal is constitutionally protected as part of the right to fair trial, and that, a litigant who wishes to pursue such a right to finality ought to be allowed to do so barring exceptional circumstances. The applicant in this case has a *prima facie* right, though open to some doubt (he might lose the appeal), to pursue his appeal to finality. The fact

[7] SC20-12

that the ConCourt has pronounced on most of the issues covered by the grounds of appeal is not a bar to the applicant approaching it on the basis of other grounds which have not been canvasses. A case in point is the submission that the ConCourt did not consider the provisions of section 291 of the current Constitution and the effect that this section may have on the definition of 'lawful authority' as it is currently formulated. Clearly applicant will suffer irreparable harm if evicted, and the balance of convenience favors maintenance of the *status quo ante* until the appeal is finalized. The factors which must be taken into account when granting interim relief are all squarely in favor of the applicant. Let us consider whether applicant is entitled to an interdict.

An interdict is a judicial order in terms of which a person is prohibited from committing a threatened wrong or from continuing an existing one. The interdict granted may be final or temporary. In an application for a temporary interdict, the applicant need not establish a clear right, but a prima facie right, though open to some doubt. See ***Silberberg & Schoeman p308.*** Turning to the requirements of an interdict, they are equally trite. They are;

1. A clear or definitive right- a prima facie right, though open to some doubt-this is a matter of substantive law.
2. An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.
3. The absence of similar protection by any other ordinary remedy-the alternative remedy must be; adequate in the circumstances; be ordinary and reasonable; be a legal remedy; grant similar protection. See ***Tribac (Pvt) Ltd* v *Tobbacco Marketing Board***[8]***, Setlogelo* v *Setlogelo***[9]***,Flame Lily Investment Company (Pvt) Ltd* v *Zimbabwe Salvage (Pvt) Ltd & Anor***[10]***, Boadi* v *Boadi & Anor*** [11]***, Diepsloot Residents' and landowners' Association & Anor* v *Administrator Transvaal .***[12]

Bearing in mind that at the interim stage these requirements need only be established on a *prima facie* basis, it is clear that the applicant has no prima facie right to remain on gazette land. He has no 'lawful authority' to do so until such time as the ConCourt accedes to his argument that s291 of the current Constitution may open up the definition of 'lawful authority' to a wider

[8] 1996 (2) ZLR 52 (SC) @56
[9] 1914 AD 221 @ 227
[10] 1980 ZLR 378
[11] 1992 (2) ZLR 22
[12] 1994 (3) SA 336 (A) @ 344H

interpretation, which may or may not include his letter from the Vice President and other officials of the Ministry of Lands. Having found the absence of a prima facie right which is open to some doubt the inquiry will end there, because such a right is the cornerstone of the requirements of an interdict. The rest of the requirements cannot hang onto nothing. Clearly there is no legal basis on which this court can interdict the respondents from evicting the applicant pending the determination of his appeal, unless and until he applies for bail pending appeal. See ***Commercial Farmers Union & 9 Ors* v *The Minister of lands & Rural Resettlement & 6 Ors***[13]**,** where the Supreme Court said that:

> "…I have no doubt in my mind that s 18(1a) of the Constitution does not impose a duty on the Ministry officials, magistrates, public prosecutors, court officials, the police and the military to assist former owners of acquired land in breaking the law by remaining in unlawful occupation of acquired land…. And at page 26;

Having said that in relation to an interdict, whose requirements were not proved, it is my considered view that there is nothing that precludes this court, in the exercise of its inherent jurisdiction, from acceding to the other interim relief sought by the applicant, in view of the above findings that the applicant has successfully established the requirements of interim relief. Applicant seeks an order suspending the operation of the conviction and sentence pending the determination of the final relief. That power may be exercised as part of this court's jurisdiction on bail pending appeal. In the interests of justice there is no reason why the operation of the sentence alone cannot be suspended for a reasonable period to enable the applicant to make the appropriate application to the bail court.

Accordingly is be and is hereby ordered that the operation of the sentence granted against the applicant, in so far as it relates to the date of his eviction, be and is hereby suspended for a ninety day period, from 15 July 2015 to 15 October 2015. Thereafter, the operation of the sentence will come back into effect, unless an appropriate court makes an order to the contrary. There shall be no order as to costs.

Messrs Coghlan,Welsh & Guest, applicant's legal practitioners
Civil Division of the Attorney General's office, 1st and 2nd respondents' legal practitioners

[13] SC31-10