

PHILLIP S RANKIN
versus
SYLVESTER NYATSURO
and
VERONICA NYATSURO
and
THE MINISTER OF LANDS AND LAND RESTTLEMENT N.O.
and
MAGISTRATE SINGANO

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 31 December 2015

Urgent Chamber Application

Ms *N G Maphosa*, for the applicant
F Chimwamurombe, for the 1st & 2nd respondent
N Mupita, for the 3rd respondent
4th respondent in default

CHAREWA J: The applicant filed an urgent chamber application seeking the following order:-

- “1. Pending the outcome of the Applicant’s Application for Review in the matter No. HC12559/15 the 1st and 2nd Respondents be ordered as follows;
 - a) They and their agents and all those claiming occupation through them should;
 - i) Immediately leave Kingstone Deverill Farm and not be within 5km of it for any reason whatsoever;
 - ii) Should immediately return possession of 12ha of prepared land to the Applicant.
2. Should keep Peace with applicant, his family and farm workers and refrain from forcefully gaining entrance onto Kingstone Deverill Farm.
 - a) The 1st and 2nd Respondents shall pay the costs of this application.”

The first, second and third respondents opposed the application on the grounds that, firstly, *in limine*, it was not urgent, it failed to disclose material facts and therefore sought to mislead the court and finally that it was fatally defective for failing to comply with the rules. Secondly, on the merits, the respondents argued that the review being sought has no merit as the fourth respondent acted properly in dismissing applicant’s *ex parte* application, no act of

spoliation has in fact been committed as the first and second respondents have filed a complaint in terms of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28] under which the applicant is being prosecuted and liable to eviction if found guilty, and the applicant has been and is still in occupation at the farm.

The applicant is the former owner of Kingston Deverill Farm, which he held under Deed of Transfer 151/88 dated 14 January 1988. The farm was gazetted for acquisition by the government on 18 August 2000 and the title deeds were so endorsed on 8 June 2006. Such acquisition was confirmed in the Constitution of Zimbabwe Amendment No. 17 of 2005 (Schedule 7) and was further endorsed by Section 290 of the Constitution of Zimbabwe Amendment No. 20. The applicant claims that the farm was delisted from acquisition, but produced no evidence before me in that respect, nor was he able to produce any offer letters or authority to be on the farm.

The farm was in fact sub-divided for A2 resettlement. The first and second respondents are but some of the beneficiaries of the resettlement scheme at the farm.

The applicant contends that he has been dispossessed without due process and he, together with his farm workers, have been subjected to threats and intimidation, hence his filing an *ex parte* application at the magistrate's court in Bindura, the outcome of which he seeks review. And pending such review, he prays this court to grant him the order aforesaid.

On the other hand, the first, second and third respondents contend that, on the strength of an offer letter dated 13 July 2015 the first and second respondents, accompanied by lands officers and members of the police, to ensure peace, visited the farm on 18 September 2015, to show the applicant their offer letter and advise him of their intention to take up occupation. And on 9 October 2015, the first and second respondents' employees went to the farm to deliver inputs and took up occupation without disturbing the applicant. The first and second respondents assert that they await the outcome of the criminal prosecution of the applicant to lawfully evict him and all who claim occupation through him, from the farm.

At the conclusion of the hearing I ruled that the application was not urgent and that my reasons would be availed in due course. These are they.

WHETHER THE APPLICATION IS URGENT

Numerous decisions in our jurisdiction have established the benchmark for a claim to be heard on an urgent basis. I can do no better than to quote from *Musunga v Utete and Another* HH 90/2003, pp 2 to 3, which summarised the principle involved as follows:

“...no litigant is entitled as of right to have his matter heard on an urgent basis-the test provided by the Rules is that the matter must be so urgent and the risk of irreparable damage so great that the matter cannot proceed within the normal time frames provided in the Rules.”

It has therefore been held that 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 *Kuvarega v Registrar General and Anor* 1998 (1) ZLR 189).

The test whether a matter is deemed urgent was, in my view, correctly stated by Chigumba J in *Oscar Kurasha v Tsitsi Chipendo & 6 Ors* HH 538-15 at p 3 thus:

- “(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.”

The applicant submitted that the application was urgent because “the urgency of the relief sought in the *ex parte* application subsists”. That *ex-parte* application was filed on 16 December 2015, more than two months after the need to act arose when the first and second respondents had taken occupation at the farm. This was also long after, to avoid irreparable prejudice arising from being prevented from carrying out farming activities, any diligent farmer ought to have secured his land for farming in view of the fact that the official start of the rainy season had been announced as mid-November.

Prima facie, therefore, applicant himself does not appear to have treated the matter as urgent as, in his own words, he decided to follow other non-judicial avenues to resolve the issue.

I must note that applicant did not disclose before me that he had in fact filed a similar application seeking similar relief before my brother Mawadze J in HC 9796/15 on 12 October 2015 and which he withdrew on 15 October 2015. However, instead of rectifying whatever was wrong with that withdrawn application and immediately launching a fresh and proper application with the Court, he waited a couple of more months before filing the current application, thus negating any urgency to obtain the protection of the court.

I do not consider it to be sensible, rational and realistic to abandon judicial recourse to seek protection before the law for several months while “seeking assistance from the Police

and District Administrator” both offices of which would have been better utilised when one was armed with a court order.

Further, in the applicant’s own words, the first and second respondents’ employees are” mainly just sitting around and keeping an eye on all my family and employees’ activities” (See para 14 of the applicant’s founding affidavit in C1935/15). This imputes no evidence of unlawful dispossession or interference requiring urgent protection by resorting to a spoliation process and interdict as the only remedy available to applicant.

Assuming that he had not filed the application in HC 9796/15, (since he withdrew it and saw no reason to have revert to this court till now), if the applicant saw no urgency to seek recourse to this court from 9 October 2015 to date, and did not consider that he would suffer irreparable damage from that time till now, I see no reason why he cannot therefore wait for the review of his *ex-parte* application to be heard within the normal time frames provided for in the rules.

The applicant seems to have laboured under the misconception that the dismissal of his *ex-parte* application by the Magistrates’ Court created the urgency. However, this is not so, as the urgency ought to have been the basis for filing an *ex-parte* application, where a normal application would have rendered futile the remedy sought. In truth and in fact, the urgency arose when the first and second respondents took up occupation on the farm. That the applicant took no action then, renders this application to be a classic case of self-created urgency, where applicant waited for doomsday before he sought to protect his interests.

Having found that this application is not urgent I do not find it necessary to consider other points raised *in limine* or on the merits.

In the result, the application is dismissed with costs on the legal practitioner and client scale.

Messrs Sawyer and Mkushi, applicant’s legal practitioners
Mberi Chimwamurombe, 1st and 2nd respondent’s legal practitioners
Attorney General’s Office, 3rd respondent’s legal practitioners