

THE CHIPINGE COFFEE COMPANY (PVT) LTD
and
BAREND DANIEL VILJOEN
and
ANNETTE LOUSIE VILJOEN
versus
NEVER MAKUYANA
and
MRS MAKUYANA
and
MAJOR SITHOLE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 23 December 2015, 28 December 2015 and 4 January 2016

Urgent Application

T Maanda, for the applicant
J Samukange & T C Hungwe, for the respondents

CHITAPI J: This urgent chamber application was set down on 23 December 2015, on which date *Mr Maanda* appeared in chambers with *Mr Mavuto* from the National Prosecuting Authority. *Mr Mavuto* indicated that his reason for appearing in the matter was that the notice of set down had been served upon the office of the Prosecutor-General. A quick check with the Sheriff's office revealed that there had been a mix-up at his offices and that service upon the Prosecutor General was done in error. It turned out that due to the mix up, the respondents had not been served with the notice of set down and accordingly were not in attendance. I excused *Mr Mavuto* after expressing my appreciation that the Prosecutor General had out of respect for court process deemed it appropriate to appear in answer to the wrongly served notice. Such conduct on the office of the Prosecutor-General is consistent with professionalism and is worthy of mention. Having excused *Mr Mavuto*, the matter was in consultation with *Mr Maanda*

postponed to 28 December 2015 to give time to the Sheriff's Office to effect service on the respondents.

On 28 December, 2015, after due service on the respondents who were represented by *Messrs Samkange and Hungwe*, the hearing of the application was further postponed to 4 January 2016 by request and consent of the parties legal practitioners who asked for time to engage with a view to settling the matter and to also afford the respondents time to file opposing papers if no settlement was reached. The legal practitioners were full of promise that the matter would be resolved amicably and I was assured to expect the filing of a consent paper.

On 4 January, 2016 at 11:25am with the hearing scheduled for 11:30am, the Registrar advised me of the parties arrival and at the same time passed over a twenty four paged typed notice of opposition with supporting documents. The hope that the parties had entertained of settling the matter had turned into a forlorn one. The hearing of the application had to proceed as opposed. Mr *Samkange* apologized for the late filing of the opposing papers and attributed the delay to the fact that he was awaiting feedback from the applicants on the proposals he had put forward on behalf of the respondents. He also lamented the fact that his offices were closed for the Christmas break and he had faced challenges with arranging for secretarial services. I allowed the hearing to proceed.

This urgent chamber application was filed by the applicants seeking the following order :

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:

- “(a) The threat to forcibly and unlawfully eject the applicants from their homestead on the Nest Farm in Chipinge by the respondents and all those acting in concert with them or under their instructions is unlawful.
- (b) The threat by respondents to physically or otherwise harm the applicants are unlawful.
- (c) The respondents shall pay the costs of this application.

INTERIM RELIEF GRANTED

Pending the finalisation of this matter, the following relief is granted;

- (i) Respondents and those acting in concert with them or under their instructions are interdicted from unlawfully evicting or threatening to unlawfully evict the applicants from their homestead.

- (ii) The respondents are interdicted from setting foot on the homestead of the applicants on the Nest Farm in Chipinge until after the appeal of the applicants is heard and dismissed.
- (iii) Applicants are entitled to remain in peaceful, quiet and undisturbed occupation of their homestead on a farm commonly referred to as The Nest in the District of Chipinge until applicants, should it become necessary or expedient, are lawfully removed from the property, after the appeal of the first applicant is heard, through an eviction order having final effect.”

The brief facts of the matter are that the second and third applicants are husband and wife and are co-directors of the first applicant. The second and third applicants occupy Nest Farm where they carry out farming activities. The farm is owned by the first applicant. They allege that the respondents on 11 December 2015 besieged their residence in the company of some army members whom they did not identify. The respondents are alleged to have claimed that they had an offer letter for the portion of the land on which the applicants’ residence is situate. The respondents are further alleged to have made various threats against the applicants and threatened to forcibly evict the applicants if they did not vacate the residence. As a result of the threats, the applicants alleged that their domestic workers had deserted them. The second and third respondents according to the applicants’ papers stated that they were acting on the instructions of the first respondent.

The applicants averred further that the first applicant had been convicted on 9 December, 2015 for contravening s 3 of the Gazetted Lands (Consequential Provisions) Act, [*Chapter 201:28*] and been ordered to vacate the piece of land in issue by 11 December, 2015. The first applicant had however appealed against the conviction to this court in consequence of which the judgment of the magistrate stood suspended. The applicants stated that they showed the respondents the notice of appeal but the respondents were not interested in listening to them or taking a copy of the notice of appeal when tendered to them. The third respondent is alleged to have threatened that they would return. The applicants fear for their personal liberty.

The respondents resisted the application and raised through Mr *Samkange* preliminary issues that the matter was not urgent because the applicant had waited for 6 days and only filed the application on 17 December, 2015 yet the conduct complained of happened on 11 December, 2015. He also submitted that the applicants were in the wrong court because since an eviction order had been granted by the court, the applicants should have gone to the same court to apply

for a stay of execution. He also argued that there had been a misjoinder of the first respondent because he did not set foot at the farm.

In response Mr *Maanda* argued that the matter was urgent because the applicants' peace and security were threatened in breach of s 52 of the Constitution. I was persuaded given the fact that the incident complained of took place in Chipinge some 500 kilometres from the court house to agree that the applicants acted with reasonable promptitude under the circumstances in approaching the court.

Before Mr *Maanda* proceeded to deal with the other points *in limine* raised as well as to address the merits of the application, I asked him to relate the present application to the urgent application filed by the second and third applicants against the first respondent in case No. HC 810/15. The applicants' in their founding affidavit averred that they had previously approached this court and obtained a provisional order against the first respondent following threats made against them that they should vacate the property the subject matter of the present application. The applicants attached as Annexure 'A' to their founding affidavit the provisional order granted by Hungwe J on 5 February, 2015 in their favour. The purport of the provisional order was to interdict the first respondent therein (the first respondent herein) and those acting in common purpose with him or under his instruction from evicting or threatening to evict the applicants from their homestead. The provisional order was confirmed by Makoni J on 9 July, 2015. The parties consented to the issue of the final order whose terms as appears from the said order of Makoni J attached as Annexure B to the founding affidavit read as follows;

"IT IS ORDERED BY CONSENT THAT

- (a) The threat to forcibly eject the applicants from their homestead on the Nest farm in Chipinge by the respondent and all those acting in concert with him or under his instruction is unlawful.
- (b) The laying siege of applicants by the respondent and all those acting in consent with him or under his instructions is unlawful.
- (c) Applicants are entitled to remain in peaceful, quiet and undisturbed occupation of their homestead on a farm commonly referred to as the Nest in the District of Chipinge until applicants, should it become necessary or expedient, are lawfully removed from the property through an eviction order hearing final effect.
- (d) Respondent shall pay the costs of this application."

Mr *Maanda* submitted that in case No HC 810/15 in which he was incidentally the second and third respondents' legal counsel, there was one respondent who is the first respondent

in the present matter but that in the present application there were two additional defendants. I drew his attention to the fact that in the present application, the founding affidavit averred that second and third respondent in making the alleged threats of a violent takeover of the property were acting on the instructions of the first respondent. For purposes of clarity, I asked Mr *Maanda* to read para 12 of the founding affidavit of the second applicant which I quote:

“12. On 11 December, 2015 at about 5pm second and third respondents came to our residence on the Nest Farm and ordered us to vacate our residence. They said they were acting in concert with or on instructions of first respondent and had come to take over the residence since first respondent had been convicted and ordered to vacate by the 11th of December.”

I then asked Mr *Maanda* whether he was not seeking a similar order as he had already done in HC 810/15. In fact an examination of the provisional order in the present matter shows that it repeats word for word what appears in the provisional order granted in HC 810/15. The same applied to the final order. Mr *Maanda* agreed.

I then pointed out to Mr *Maanda* that Makoni J had already issued a final order to the effect that the applicants were entitled to remain in peaceful, quiet and undisturbed occupation of their residence until lawfully removed therefrom through an eviction order and that the order was addressed to the first respondent and all those acting in concert with him or under his instructions. Since the second and third respondents indicated that they were acting under the instructions of the first respondent, it was clear that the order of Makoni J applied to them and that if they acted as alleged, then they were in contempt of Makoni J's order. Mr *Maanda* agreed with my interpretation. I then asked him whether it was competent to bring a fresh application seeking the same relief or whether he ought not to have filed a contempt of court application since the issue was *res judicata*. He agreed with me that this court through Makoni J's order had already determined the issue and declared that the applicants could only be removed from their residence by an eviction order having final effect and that I could not properly make a similar order. Mr *Maanda* graciously conceded that he had followed a wrong procedure and withdrew the application with a tender of costs.

Mr *Samkange* insisted that the costs should be awarded on a higher scale of legal practitioner and client because Mr *Maanda* had refused to accept a settlement after Mr *Samkange* had explained to him that he had no case and that at that moment Mr *Samkange* would have

accepted a withdrawal with a tender of costs on the ordinary scale. Mr *Maanda* responded that he had acted in good faith, in haste in order to protect his clients' constitutionally guaranteed right to security and had thought that he could file for contempt later. He indicated that he had been frank and candid with the court by producing the previous order and his failure to appreciate the correct procedure did not merit the award of costs on a punitive scale. I understood him and would have made a determination on the costs except that Mr *Samkange* requested to file heads of argument on the issue of costs, a request which was not opposed by Mr *Maanda*.

In view of the legal practitioners agreement that I grant them leave to file heads of argument on the question of costs, I endorsed the withdrawal of the matter and reserved judgment on the question of the scale of costs. I ordered that Mr *Samkange* should file his heads of argument by 4.00 p.m on 5 January, 2016 and Mr *Maanda* by 4.00 p.m on 6 January, 2016.

Instead of receiving the heads of argument, a notice of withdrawal with a tender of costs on the legal practitioner and client was filed of record by Mr *Maanda* on 5 January, 2016. I am not sure as to the reasons why Mr *Maanda* chickened out and capitulated. Without prejudging whether I would have been persuaded by heads of argument which unfortunately never saw the light of day, to determine otherwise, as I had found Mr *Maanda*'s explanation to be reasonable, my initial view on the appropriate level of costs shall forever remain my secret.

In view of the applicant's tender of costs on the higher scale, I accordingly endorse as my order that;

By consent of the parties, the application is hereby withdrawn with the applicants to pay the wasted costs on the scale of legal practitioner and client.

Maunga Maanda & Associates, applicants' legal practitioners
Venturas & Samkange, respondents' legal practitioners