GILBERT JONGA
versus
NYASHA CHABATA
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 3, 10 & 20 April 2017 & 3 May 2017

Urgent Chamber Application

R Peters, for the applicant
T S T Dzvetero, for the first respondent
No appearance for the 2nd respondent

CHATUKUTA J: The applicant and the first respondent are fighting over who should occupy subdivision 3 of Farm 45, Glendale, Mashonaland Central (the farm), which is State land. The first respondent obtained on 9 December 2016 a *mandament van spolie* under case number HC 12380/16. On 13 December 2016, the applicant appealed against that order under case number SC 771/16. Subsequent to the noting of the appeal, and on 22 December 2016, the first respondent destroyed 3 ha of the maize crop that the applicant had planted. On 14 March 2017 and under case number HC 78/17, I granted an order interdicting the first respondent from interfering with the applicant's farming operations pending the determination of the appeal in case number SC 771/16. Dissatisfied with the judgment, the first respondent noted an appeal to the Supreme Court on 23 March 2017. The appeal is currently pending under case number SC 180/17. This is an application for leave to execute the order granted case number HC 78/17 pending the determination of that appeal.

In bringing his application on an urgent basis, the applicant contended that the first respondent has noted the appeal under SC 181/17 for the purposes of buying time and frustrating the applicant from enjoying the benefits of the judgment under HC 78/17. It was further contended that the first respondent does not have any prospects of success on appeal.

The background facts to the dispute between the applicant and the first respondent are outlined in detail in the judgments handed down under case numbers HC 12380/16 and HC 78/17.

At the commencement of the hearing of this application, the first respondent raised a number of preliminary issues in countering the application. It was contended that as result of the preliminary points taken, the application was fatally defective and should not be heard on an urgent basis.

The first issue was that the application does not comply with r 241 of the High Court Rules in that the notice of the application did not contain a summary of the grounds upon which the application is sought. It was contended that the notice merely stated the nature of the application. The first respondent referred to the case of *Marick Trading (Private) Limited* v *Old Mutual Life Assurance Company of Zimbabwe (Private) Limited & Anor* HH 667/15 as authority for his proposition.

The applicant's response was that there was adequate compliance with the rule.

Rule 241 requires that where a party proceeds by way of a chamber application, the notice of the application must be on Form 29B. Form 29B indeed requires that a summary of the grounds for the application be set out in the notice.

I am in agreement with the applicant that the contents of the notice are in fact in compliance with Form 29B. The notice sets out that there was a judgment issued by this court. It further sets out that the first respondent had appealed against that judgment necessitating the filing of the present application. I am not persuaded that there was anything else that the applicant should have included in the notice other than what is contained therein. This notice is clearly distinguishable from the notice criticised in *Marick Trading (Private) Limited* v *Old Mutual Life Assurance Company of Zimbabwe (Private) Limited & Anor*. The notice in that case was completely bare. The contents of the notice were reproduced by my brother MAFUSIRE J at the bottom of p 2 as follows:

> "*In casu*, the applicant's urgent chamber application was one to be served. Indeed it was served. So it had to be in Form No. 29. But it was not. It was also not in Form No. 29 either. It read like this:
>
> > 'TAKE NOTICE that the Applicant hereby makes an Urgent Chamber Application for an order in terms of the draft order annexed to this application and the accompanying affidavits and documents will be used in support of the application."'

Nothing was contained in that notice other than that there was an application with accompanying affidavits and documents. The criticism of the notice by my brother was therefore warranted.

The second point taken *in limine* was that the applicant did not disclose material facts. It was submitted that the applicant did not disclose in his founding affidavit that his contract with government under the Command Programme had been varied and that the crop he had planted on the farm had been handed over to the first respondent for management. He therefore no longer had any obligations under the Command Programme and did not require the protection of the court. He had further failed to disclose that he no longer owned Revielle farm. The farm had been sold to Mesolite Investments through a public auction. It was contended that failure to disclose these facts disclosed that the applicant was dishonest and had sought to mislead the court.

The applicant submitted in response that that there was no material non-disclosure of any facts.

The first respondent seemed to have misunderstood what is meant by "material non-disclosure". Material non-disclosure is in my view the failure to disclose those facts that would assist the court in arriving at a determination of the application before it. The fact the first respondent had taken over the crop, presumably with the blessing of the Ministry of Lands was common cause. It is a fact that the first respondent alluded to during submissions under HC 78/17 and which I had discounted in my judgment. The fact that the applicant may no longer have been the owner of Revielle farm was inconsequential. The court was not concerned with his ownership of Revielle farm. It was concerned with the interference of the applicant's farming operations on Subdivision 3 of farm 45, Glendale.

It is therefore my view that the applicant did not withhold any material facts necessary for the determination of the matter at hand.

The first respondent further contended that the applicant did not have the *locus standi* to bring the application for leave to execute. The submission was premised on the fact that the Minister of Lands had deposed to an affidavit stating that the applicant did not have a 99 year lease.

I failed to comprehend the first respondent's submission given the fact that the question of the lease has been the subject of the dispute between the parties in HC 12380/16 and was also raised in HC 78/17. Further, the applicant has an order granted in his favour

which order is the subject of this application. It was therefore not clear at what stage he had lost the *locus standi.*

The last point *in limine* was that the order sought was not competent in two respects. The first respect was that the interim relief and the final relief sought are similar and therefore the interim relief is final in effect. The second objection to the relief sought was that interdict granted under HC 78/17 was not executable because the order did not require of the first respondent any positive conduct which if not complied with would result in applicant obtaining a writ of execution.

The applicant conceded that the orders were indeed similar. He however submitted that the court had inherent powers to grant an appropriate order. The similarity of the orders was therefore not fatal. Regarding the second objection to the relief sought, it was contended execution of the order for leave would be by way of instituting contempt of court proceedings. The noting of appeal by the first respondent in SC 180/17 against the order granted under HC 78/17 deprived the applicant that remedy. It is that remedy he sought to recover.

I am in agreement with the applicant's submission on this point that because the nature of this application it is unavoidable that the relief sought in the interim would be the same as the final relief. This will be more apparent when the wording of the order is determined later in the judgment. In any event, as will appear later, the wording of an order is within the discretion of the court.

Turning to the question whether or not the interdict was executable, it is correct that the noting of an appeal automatically suspends the judgment appealed against. (see *Founders Building Society* v *Mazuka* 2000 (1) ZLR 528 (HC) and *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149). Both parties were in agreement that in the event that the first respondent did not comply with the interdict and continued interfering with the applicant's operations, the applicant would be entitled to apply for contempt of court. That remedy was no longer available to the applicant because of the appeal under SC 180/17. The first respondent's assumption that execution would only be by attachment of movables or ejectment was misplaced.

The first respondent accordingly fails in all the preliminary points raised.

Turning to the merits of this application, the parties are agreed that it is trite that the noting of an appeal has the effect of suspending the operation of the judgment appealed

against. Such judgment can only be executed with the leave of the court that granted it. The main guiding principle for the court in determining such an application is to grant leave where real and substantial justice requires such leave or conversely, where injustice would otherwise be done if the leave is not granted. The court would also have regard to the prospects of success on appeal, the potentiality of irreparable harm or prejudice to the applicant if leave is not granted, the potentiality of irreparable harm to the first respondent if stay is granted and where there is the possibility of irreparable harm to both parties, the balance of hardship or inconvenience. These requirements have been elaborately set out in the remarks of CORBERTT JA in *South Cape Corporation (Pty) Ltd* v *Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at p 545 that:

> "In exercising this discretion (to grant leave to execute pending appeal), the
> court should, in my view, determine what is just and equitable in all the circumstances, and in doing so, would normally have regard, inter alia, to the following factors:
> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute was were to be granted;
> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute was refused;
> (3) the prospects of success on appeal, including more particularly the question of whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg to gain time or harass the other party; and
> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

(See also *Zimbabwe Mining Development Corporation* v *African Resources plc & Ors* 2010 (2) ZLR 34 (S), *Kawa* v *Muzenda & Ors* HB 108/14, *Founders Building Society* v *Mazuka* 200 (1) ZLR 528 and *Econet (Pvt) Ltd* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (HC) 154 H.)

The applicant contended that he would suffer irreparable harm if leave is refused. Mrs *Peters* submitted that the relief sought by the applicant in case number HC 78/17 was of great importance to the applicant and the fact that it was granted on an urgent basis bears testimony to the importance. The first respondent had not only ploughed under the applicant's maize crop but has continued to this date to manage the remaining crop. The first respondent will not be prejudiced with the granting of leave as the applicant is the one who planted the crop. This is a case of *volenti non fit injuria* where the first respondent chose to invest into the crop well aware that she did not have lawful authority to do so. The question of balance

of convenience was adequately addressed in HC 78/17 resulting in the court granting the application.

The first respondent countered by submitting that the applicant was excused from his obligations under the Command Agriculture Programme when the Ministry of Lands and Resettlement handed over the management of the maize crop to her. She produced two affidavits to support her contention that the applicant has been excused from his obligations. One is an undated affidavit by the Minister of Lands and Rural Resettlement in which the Minister deposes that he did not issue a 99 year lease to the applicant. He further states that the applicant unlawfully annexed the farm to Reivelli farm, a property he no longer owns. The person who commissioned the affidavit is unknown. The other affidavit is by one Charles Murongazvombo, the Provincial Team Leader for Mashonaland Central Command Agriculture Programme dated 19 April 2017. He deposed that they are in the process of transferring the inputs allocated to and used by the applicant to the first respondent.

The first respondent further submitted that she has since invested resources on the management of the crop and would suffer irreparable harm is leave is granted. She would have lost an opportunity to use the land that she was allowed to occupy when she was issued with an offer letter. The applicant would not suffer irreparable harm because the Minister has taken a position to excuse him from his contractual obligations under the Command Programme by transferring the management of the crop to her. The balance of convenience was tilted in her favour because the applicant is likely to face criminal prosecution under the Gazetted Lands (Consequential Provisions) Act [*Chapter* 20:28] for occupying state land without authority. In this regard, the first respondent referred to *Five Streams Farm (Pvt) Ltd & Ors* v *Francis Pedzana Gudyanga & Anor* SC 13/2016, *N & R Agencies & Anor* v *Thabani Ndlovu* HB 198/11, *Hudson Zhanda & Anor* v *I J Greaves (Pvt) Ltd & Ors* HH 185/11, *KHB Estates (Pvt) Ltd & Anor* v *Felix Pambukani & Ors* HH 209/11.

The issues raised by both parties were in my view adequately determined in my judgment under HC 78/17. It still remains my view that both parties have extensively invested in the maize crop. The applicant has done so in terms of a legally binding agreement which remains extant. The first respondent has done so in terms of an arrangement whose legality is questionable. The affidavits produced by the first respondent do not, in my view, amend the agreement entered into by the applicant under the Command Agriculture Programme. Further, according to the Provincial Team leader, the Ministry is in the process

of transferred inputs to the first respondent yet as far back as the beginning January 2017 the first respondent was alleging that the crop had already been transferred to her.

I regard it unnecessary to extensively reconsider the balance of convenience in this matter. In granting the interdict, which is the subject of the appeal, I applied my mind to the balance of convenience. I believe that I adequately addressed the issue in my decision in case number HC 78/17. It however, suffices that I mention that I am in agreement with the applicant that the balance has been heightened with the passage of time and that if leave is not granted, the interdict would be rendered *brutum fulmen*, more so if the first respondent were not to succeed on appeal. This would clearly be undesirable. As rightly submitted by the applicant this is a case of *volenti non fit injuria*. The first respondent opted to assume the risk of suffering harm by managing a crop which she has no lawful authority to manage. She cannot now seek to benefit from her conduct.

It is necessary to comment on the two affidavits that the first respondent sought to rely on. The affidavits were filed after the filing of this application. They were sourced by first respondent after the parties had agreed to a postponement of the application in a bid to amicably resolve the dispute as to who has the lawful authority to occupy the farm. The documents were not part and parcel of the documents placed before the court in arriving at its decision. They should not, in my view and as rightly submitted by the applicant, influence me in determining the present application as to the rights of the parties. Assuming that I can take them into account, they are of no probative value as they relate to issues that were, in my view, adequately considered under HC 78/17 and raise no issues that would otherwise influence me to accept that I erred at the time the decision was taken. The issue before me was, as indicated in HC 78/17, that pending the resolution of the dispute as to who should be in occupation, the applicant be granted protection from the unlawful conduct of the first respondent.

Turning to the question of prospects of success on appeal, in determining the first respondent's prospects of success, I am enjoined to take into account the grounds of appeal filed by the first respondent under SC 180/17. The main ground of appeal is that the court erred in granting a final order without having satisfied itself that the applicant had a clear right. The second ground is that it was erroneous to subject the granting of an interdict to a determination of *mandament van spolie.*

Mrs *Peters* submitted that the order granted under HC 78/17 is interim because it is pending the determination of the appeal under SC 771/16. It was submitted that the first respondent consented to the granting of the order in its form well aware that all that the applicant had established was a *prima facie* right as opposed to a clear right. It was further submitted that the court had inherent powers to grant an interdict subject to the determination of the appeal under SC 771/16.

Mr *Dvetero* submitted that the first respondent had prospects of success on appeal. This court erred in granting a final order and depriving the first respondent the opportunity of opposing the application on the return date. Although the order was granted by the consent of the respondent, the court ought to have satisfied itself that the applicant had a clear right. It was not competent for the court to subject the granting of an interdict to the determination to an appeal against a *mandament van spolie* where an interdict is concerned with an applicant's ownership rights and a *mandament van spolie* is concerned with the determination of possessory rights. Further, the court erred by entertaining the application for an interdict following the appeal in HC 771/16. It was contended that the only course of action available to the applicant was to seek stay of execution of the judgment under HC 12380/16. She persisted with her argument that she was lawfully on the farm as the applicant had been lawfully ejected by the Deputy Sheriff on 21 December 2016. She sought to rely on the return of service issued by on 21 December 2016 by the Deputy Sheriff to that effect. She submitted that the return of service was *prima facie* proof that the applicant had been lawfully ejected.

The first issue for determination is therefore whether or not the order under HC 78/17 is final or temporary. An order is interlocutory if it does not resolve the main dispute between the parties. (See *Mwatsaka* v *ICL Zimbabwe* 1998 (1) ZLR 1 (HC) & *Blue Rangers Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 376 (SC)). Whilst the order under HC 78/17 was granted without a return date as is the practice in urgent matters, it remains interlocutory in that it does not resolve the issue between the parties as to who has the lawful right to occupy the farm. The order is not a final order in the ordinary sense. It is only "final" in so far as the parties agreed that it would not provide for a return date. It is a temporary interdict that prevents further harm to the applicant pending the determination of the main dispute which in my view is resolvable with the determination of the appeal under SC 771/16. It is linked to the outcome of the appeal against the *mandament van spolie.* The life of the order will inevitably be extinguished with the determination of that appeal.

The court therefore only needed to satisfy itself, as it did, that the applicant had established a *prima facie* right. Both parties were in agreement that the applicant had indeed established a *prima facie* right and the first respondent consented to the granting of an interim order pending the determination of the appeal.

Further, the first respondent is clearly mistaken that an interdict must relate to the determination of a right of ownership. Neither party in this application would have such a right as ownership of the farm vests in the State. The applicant seeks to assert his right of occupation (in essence a possessory right) arising from the alleged 99 year lease. The first respondent seeks to assert her right of occupation arising from the offer letter. There is therefore nothing that would have precluded me from subjecting the granting of the interdict to the determination of the appeal under SC 771/16.

The next issue for determination is whether or not the applicant had an alternative remedy. It was difficult to comprehend the first respondent's argument that the applicant should applied for stay of execution when was stating that execution had already been effected. However, the question of the availability of any other alternative remedy can be resolved by determining the lawfulness of the first respondent's continued stay on the farm despite the applicant's appeal under SC 771/17 given the fact that the noting of an appeal automatically suspends the execution of the judgment appealed against.

The first respondent relied heavily on the Deputy Sheriff's return of service. In order for the Sheriff's process to be legitimate it must have been preceded with the issuance of a writ. In *Mhlanga* v *Sheriff of the High Court* ZLR 1999 (1) 276 GWAUNZA J (as she then was) remarked at 283 C-F that:

> "In as much as the Deputy Sheriff cannot attach property in execution unless there is a judgment that has to be satisfied, he cannot attach the property in question without a writ of execution. In this respect, r 322 of the High Court Rules provides:
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> "**Process for execution of judgment: Writ of execution**
> The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, or for ejectment, shall be by writ of execution signed by the registrar and addressed to the Sheriff or his deputy, in accordance with one or other of forms No. 34 to 41."

It appears from the papers filed of record that no writ of execution was issued authorising the Deputy Sheriff to eject the applicant from the farm on 21 December 2016. The only Writ of Execution placed before the court, and at the instance of the applicant, is dated 6 February 2017, more than one and a half months after the alleged ejectment. The first

respondent submitted, not only in this application, but also under HC 78/17, that another writ was issued before the ejectment. Such writ was not produced by the first respondent in HC 78/17 despite the first respondent being given the opportunity to do so and neither was one produced during the hearing of the present application. What is of greater concern is that if indeed there was such an earlier writ, why was it necessary to have another writ issued on 6 February 2017. The confusion is compounded by the fact that the only proof of payment of the costs paid by the first respondent, and in cash, to the Deputy Sheriff (Bindura) for his attendance to the ejectment is dated 23 December 2016 a day after the alleged ejectment. This would mean that the Deputy Sheriff allegedly proceeded to eject the applicant not only without a writ but before the first respondent had paid the necessary costs for such ejectment. For this reason, I remain fully persuaded to accept the argument by the applicant that the first respondent acted on her own accord and has remained on the farm unlawfully well aware that there is an appeal against the judgment under HC 12380/16.

After destroying part of the maize crop planted by the applicant, the first respondent has in fact taken over the crop to the detriment of the applicant. The only urgent remedy available to the applicant to prevent the first respondent from causing further harm was the application for the interdict.

The applicant has failed to move back to manage his crop. The first respondent became aware of the appeal under SC 771/16 and has remained on the farm. She has continued to manage and has assumed ownership of a maize crop that she did not sow. The maize crop, having planted in November 2016, is near harvesting at any time now. If leave is not granted the first respondent will harvest the maize crop and the order granted under HC 78/17 will be of no value to the applicant and more particularly if the appeal under SC 180/17 is dismissed. Proverbially, the first respondent will reap where she did not sow. All these factors prove *mala fides* of the first respondent's appeal under SC 180/17.

The submission by the first respondent that the applicant is likely to face criminal prosecution under the Gazetted Lands (Consequential Provisions) Act flies in the face of the applicant's constitutional right to the presumption of innocence until proved guilty. There is no indication that the State has initiated any prosecution and that he will in fact ever be prosecuted. Denying the applicant the fruits of the order in his favour on the basis that he may be prosecuted and if prosecuted he may be convicted would be irresponsible of me in light of the applicant's constitutional right. In any event, the cases cited by the first

respondent do not support her proposition that the court should consider the likelihood of such prosecution in determining the balance of convenience. The cases only provide that one needs to have lawful authority in order to remain on state land. The issue whether or not the applicant has lawful authority is still to be resolved with the determinations of the appeals under SC 771/16 and 180/17.

The first respondent does not have, in my view, any prospects of success on appeal. It is therefore in the interest of justice that the first respondent be allowed to execute pending appeal.

I now turn to the wording of my order. The power to grant leave to execute pending appeal is a common law exercise of the power that inheres in this court to regulate its own proceedings. I am of the view that I am therefore at large in terms of the order that I can grant. This application would have proceeded as an ordinary court application had it not been for the exigencies of the relief sought. The very nature of the dispute between the parties and the nature of this application is such that, it serves no purpose to grant a provisional order as in an ordinary urgent application. It is within my powers to grant leave of execution pending the determination of the appeal in SC 180/17.

The applicant did not, as in HC 78/17 ask for costs in the final order sought. None will be awarded in this case. It is accordingly ordered that:

1. The applicant be and is hereby granted leave to execute the judgment granted in case number HC 78/17 pending the determination of the appeal under SC 180/17.
2. There is no order as to costs.

J Mambara & Partners, applicant's legal practitioners
Antonio & Dzvetero, first respondent's legal practitioner