**DISTRIBUTABLE (30)**

**MARTIN C. NHAPATA**
**v**
**(1) CHRISTOPHER MASWI (2) MAIDEI MASWI**

**SUPREME COURT OF ZIMBABWE**
**HARARE,** JULY 4, 2016 & JULY 20, 2016

*M Chimwamurombe*, for the Applicant
*N Mugiya*, for the Respondents

Before **GWAUNZA JA**, in chambers in terms of r 5 of the Rules of The Supreme Court, 1964.

This is an application for condonation of the late filing of, and extension of time within which to note, an appeal against a decision of the High Court, Harare. The impugned decision ordered that the eviction of the applicant and all those claiming occupation through him, from a part of the land in question, which was allocated to the respondents by the Government under the land reform programme. In addition, the applicant was:

i) ordered to return certain farming equipment to the respondents;

ii) ordered to surrender a portion of the respondents' farm that he "unlawfully took" and

iii) interdicted from going to the respondent's two plots of land.

The disputed premises include a farm house, other structures like barns, and some farming equipment.

The factual background to the matter is as follows:

The respondents were allocated Plot numbers 15 and 16 at Earling Farm, Mvurwi in 2001 and 2009 respectively. The plots were consolidated and the respondents are now holders of a 99 year lease in respect of the consolidated plots. The applicant was allocated Plot number 19 on the same farm, that is, Earling Farm. Although the disputed farmhouse and premises are situated on a piece of land which the applicant calls 'the communal land' it is now common cause that the house is located on the respondents' plot of land. A bitter struggle ensued between the parties over access to and control over this property. This resulted in numerous court actions and applications with both sides seeking to secure the right to occupy and use the house, structures and equipment in dispute. In 2014 the respondents sued the applicant for eviction from the farm house and its premises on the basis that it was located on their plot and therefore belonged to them. They also claimed tractors and equipment which were on the same land. The applicant having filed an appearance to defend the action, the respondents proceeded to apply for summary judgment against him. The application was determined in their favour. Upon the realisation that the Sheriff was going to evict him from the disputed premises and that he was out of time in terms of noting an appeal against the order which the Sheriff meant to execute on the respondents' behalf, the applicant filed the present application. This was on the 1 September 2015. As he was waiting for the set down of this application, he made an urgent chamber application before this court for stay of execution in a bid to stop the eviction. The urgent chamber application was placed before Chidyausiku CJ, who dismissed it, with the result that there remained no legal bar to the respondent's execution of the order of eviction

against the appellant. Accordingly the respondents proceeded to instruct the Sherriff to execute the order.

At the hearing before me, the respondents raised a point *in limine,* to the effect that the appellant should not be heard, since he was approaching the court with dirty hands. This was because, they allege, the applicant had failed, refused and/or neglected to comply with a lawful order of the court and had on several occasions successfully resisted the execution of the same order by the Sheriff. Realising that the applicant was being obstinate by resisting the Sheriff's efforts to execute the eviction order and interdict, the respondents filed an application before the High Court seeking an order directing the relevant police authorities to assist the Sheriff in executing the order in question. They were successful in this application, which was granted by Makoni J under case no. HC 4585/16. The respondents submit that when the Sheriff went back to execute the order, the applicant and his agents again resisted his efforts, prompting the Sheriff to seek the assistance of the police, as ordered by the High Court. The police for some unknown reason, refused to offer the assistance sought. The respondents submit that to date the applicant has not complied with the order of the court of the 22 January 2015. They charge that instead, he has been in and out of court trying to find legal ways to justify his failure to comply with the court order. He filed an urgent chamber application before the High Court under case no. HC 10414/15 and the matter was held not to be urgent. As if that was not enough the applicant filed another urgent chamber application under case no. HC 3648/16 which was dismissed by Mafusire J on the basis that he had dirty hands after failing to comply with a lawful order of the court through resisting execution of the order by the Sheriff. The respondents aver that even though the applicant was ordered to purge his contempt by complying with the order of the court, he remains obdurate to this day.

The applicant does not deny that he has not complied with the order of eviction as alleged, although before me, his counsel Mr *Chimwarombe*, submitted that his instructions were to the effect that the applicant had, that very morning, vacated the house and premises in question. However, his workers were still there working at and around the premises. Besides this averment being vehemently disputed by the respondents, it also clearly amounts to an admission that, even if he himself had truly vacated the farm house, he had still not fully complied with the order. The order of eviction compelled both the applicant and "all those claiming occupation through him" to vacate the premises. His workers clearly fall into this category.

The applicant contents that the doctrine of dirty hands was inapplicable in this matter because there was no law which required him to comply with an order of the court before approaching the court for redress. This contention in my view is fallacious, besides being devoid of any legal basis. As indicated above, the effect of Chidyausiku CJ's dismissal of the applicant's application for stay of execution pending the appeal in question, was to remove any legal barrier to the execution of the impugned High Court decision notwithstanding the pending appeal. To the extent that a court order has the force of law, it is the 'the law' that requires the applicant to comply with the order in question before approaching this court for the type of release that he seeks.

Accordingly, the failure of the applicant to comply with or allow the Sheriff to fully enforce a lawful order of the court has the effect of tainting his hands with legal dirt. Such dirty hands can only be cleansed upon his compliance with the court order in question. It hardly needs emphasizing that, even if one may not agree with a court order and as long as it is extant, and execution thereof has not been stayed, one is obliged to comply with it before

seeking to pursue other legal remedies. This is a point emphasized in the case of *Econet Wireless (Private) Limited v The Minister of Public Service Labour and Social Welfare and Others*,[1] where Bhunu J (as he then was) correctly explained the rationale for a party to obey the law (court order) pending the determination of its validity. It is simply that the impugned court order enjoys a presumption of validity until declared otherwise by a competent court of law. This has not happened *in casu*. Further rationale for applying the dirty hands doctrine is succinctly articulated by Chidyausiku CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity & Ors*, as follows:

> "This court is a court of law and, as such, cannot connive at or condone the applicant's open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. . . For the avoidance of doubt the applicant is not being barred from approaching this court. All that the applicant is required to do is submit itself to the law and approach this court with clean hands on the same papers." (my emphasis)

The same principle is persuasively stated thus, *albeit* in different words, in the case of *Naval Phase Farming (Pvt) Ltd and Ors v Min of Lands and Rural Resettlement and Ors*:

> "…. (the dirty hands principle) … is a principle that people are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. The kind of conduct which the court penalizes by withholding its protection is conduct involving moral obliquity……" (*my emphasis*)

I find all these statements of the law to be eminently apposite to the circumstances of this case. The applicant has openly and with impunity demonstrated disdain for the High Court and the order it made against him. Directly or through the assistance of others like the police, he has thus openly subverted due process of the law. Despite this, he has the temerity to turn to this court for relief that would result in the court effectively

[1] SC 31/2016. See also L. Munyikwa v L. Jiri HH338-15

'condoning' or turning a blind eye to this open defiance of an order of the court. The appellant's conduct in my view smacks of double standards as it amounts to an attempt by him to close the door to justice against his opponents, while expecting the same door to be opened widely for him. It is in short, and on the basis of the authorities cited above, conduct that attracts serious censure from this court.

Against this background, I find that the doctrine of dirty hands was properly invoked against the applicant. This Court accordingly withholds its jurisdiction until such time as the applicant has purged his contempt by submitting himself to the law, in this case, the High Court order in case no. HC 14342/12.

It is in the result ordered as follows;

1. The point *in limine* raised by the respondents be and is hereby upheld.
2. The application be and is hereby dismissed with costs.

*Mberi Chimwamurombe,* applicant's legal practitioners

*Mugiya & Mucharaga,* respondent's legal practitioners