KERSHELMAR FARMS (PVT) LTD

And

ZEPHANIAH DHLAMINI

And

SIPHOSAMI PATRICK MALUNGA

And

CHARLES MOYO

Versus

DUMISANI MADZIVANYATI

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 22 AND 26 OCTOBER 2021

Urgent Chamber Application

J. Tshuma, for the applicants
M Mahaso, for the respondent

KABASA J: This is an urgent chamber application in which the applicants seek the following relief:-

> "1. The applicants are hereby granted leave to carry into execution the judgment of this court granted on the 7th of October 2021 as judgment under HB 190-21 notwithstanding the appeal noted by the respondent to the Supreme Court on the 12th of October 2021 under SCB 53-21 or any other appeal that may be noted in respect of this matter.
>
> 2. The respondent to pay costs of this application on a legal practitioner scale. (sic).
>
> 3. The respondent shall pay the costs of this application on a legal practitioner-client scale." (repetition of 2)

The background to this matter is this: - The applicants have been in occupation of Esidakeni farm which they owned under Deed of Transfer 1980/90 and are engaged in farming activities thereat. The farm was acquired by the State and the respondent was subsequently issued with an offer letter for a portion of the acquired farm. The applicants have challenged

the validity of the acquisition and the offer letters issued following such acquisition. The respondent has in turn instituted eviction proceedings against the applicants in the Magistrates Court at Tsholotsho under case number MC 924/21. These proceedings are still pending.

The respondent subsequently moved onto the farm disrupting the applicants' farming activities and threatening the applicants' crops by tampering with borehole installations thus starving the crops of water. The applicants then sought spoliatory relief on an urgent basis, under case number HC 1315/21 and were successful.

The respondent was aggrieved by this judgment and noted an appeal on 12th October 2021 under SCB 53/21. The noting of the appeal meant that the order in HC 1315/21 was suspended. This prompted the filing of this urgent chamber application.

The application is opposed. In opposing it the respondent took points *in limine*. The first was on urgency. The second point was raised at the hearing of the application and was to the effect that this court has no jurisdiction to hear the matter.

On the merits, the respondent averred that he has not in any way acted in the manner complained of. He however has a valid offer letter issued by the Minister of Lands, Agriculture and Rural Resettlement which is extant and operational. The spoliatory relief which was granted to the applicants was not merited and so the appeal is not frivolous or meant to waste time.

The applicants will not suffer any irreparable harm if the relief they seek is not granted as their agricultural crops are flourishing. The appeal is due to be heard in the not so distant future and the order in HC 1315/21 is likely to be vacated.

At the hearing of the application I asked the parties to address me on both the preliminary points and the merits.

I propose to deal with the preliminary points first.

1. **Is the matter urgent**

Mr Mahaso argued that the matter is not urgent as the applicants did not act with haste when the need to act arose. (*Kuvarega* v *Registrar General and Another* 1998 (1) ZLR 188

(H)). Counsel argued that the appeal was noted on 12th October 2021 and the applicants only filed the present application on 19th October 2021.

A calculation of the days would give us 4 clear days, as the 16th and 17th fell on a week-end. Granted urgent chamber applications can be filed over the week-end but can it be said the applicants sat on their laurels and failed to act with haste? I think not.

It cannot be said there was a deliberate and careless abstention to act or that there was a delay in taking action.

Given the 4 day period between the upliftment of the order in HC 1315/21, the filing of the appeal on 12th October which was received by the applicants' counsel on 13th October 2021, it can be said the applicants exhibited urgency in the manner in which they reacted to the noting of the appeal. (*Gwarada* v *Johnson* 2009 (2) ZLR 159).

It is a fact that the applicants needed to consult with their legal practitioner, give instructions and the legal practitioner had to prepare the papers and subsequently file the application. To hold that the 4 day period is an unconscionable delay is to interpret urgency in a manner not contemplated by the rules of court.

I am inclined to say the applicants acted timeously and therefore hold that the matter is urgent.

The earlier spoliatory relief was brought on an urgent basis and was deemed urgent given the nature of the harm the applicants were seeking to avert. The urgency still subsists as this application is premised on precisely the same issue, that is ensuring the crop on the land matures and the yield is not affected by any disruptions.

The first point *in limine* has no merit and is accordingly dismissed.

I turn to the second point *in limine*. The argument is that this court has no jurisdiction to deal with this matter. Reference was made to the decision in *Mike Campbell (Pvt) Ltd & Others* v *Minister of National Security Responsible for Land, Land Reform and Resettlement & Another* 2008 (1) ZLR 17 (S) where MALABA JA (as he then was) had this to say:-

> "By the clear and unambiguous language of section 16 B (3) of the Constitution, the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of

> law from any of the cases, in which a challenge to the acquisition of agricultural land secured in terms of section 16 (6) (2) (a) of the Constitution has been sought."

Mr Mahaso submitted that this exposition of the law was confirmed in *Naval Phase Farming (Private) Limited and 2 Others* v *Minister of Lands and Rural Resettlement and 3 Others* SC 50-18.

It is important to note that this application seeks to execute the judgment in HC 1315/21 pending the hearing of the appeal. The judgment was rendered by this court and the applicants seek to enforce it pending the appeal noted by the respondent. How can it be said this court is handicapped by way of lack of jurisdiction to deal with an application to execute a judgment of this same court pending appeal?

The two decisions referred to clearly dealt with the challenging of acquisition of agricultural land. At page 8 of the *Naval* case (*supra*) HLATSHWAYO JA set out the first of the 2 issues which were to be determined by the court as follows:-

> "…….. it must first be determined whether the court had the jurisdiction to inquire into the legality of the compulsory acquisition of the farms."

The learned JA went on to quote, with approval, MALABA JA (as he then was) in the *Mike Campbell* case (*supra*) where MALABA JA spoke of the clear ousting of the jurisdiction of courts of law from any of the cases in which the acquisition of agricultural land was being challenged.

I am not seized with a matter where there is a challenge to the acquisition of the farm in question. I have already alluded to the fact that there is litigation pending on this but that is not what I am called to adjudicate on *in casu*.

The argument on jurisdiction is therefore misplaced and better saved for the matter wherein the challenge to the acquisition of the farm in question is to be determined.

The issue here only relates to a desire to enforce a spoliation order. That spoliation order was granted after the court held that the applicants were in peaceful and undisturbed possession of the farm and such possession had been disrupted through the means of self-help. There was no issue of whether the acquisition was lawful or whether the respondent's offer letter entitled him to be on the farm. It was simply meant to ensure the observance of the rule of law where a litigant follows due process in seeking remedy and not resort to self-help.

The second point *in limine* equally lacks merit and it too suffers the same fate as the first point *in limine*. It is dismissed.

I turn now to the merits. *Mr Tshuma* for the applicants submitted that the court must consider 2 issues, *viz:-*

1. whether there will be irreparable harm and prejudice to the applicants if leave to execute is refused.

2. Prospects of success of the appeal which has suspended the order granting the applicants relief.

The respondent filed some photographs which are said to show the applicants' crop. Such photographs were meant to show that the crop is thriving and so the applicants will not suffer any prejudice should the relief they seek be refused.

The respondent also contended that there is no disruption of the farming activities and so the crops were never in danger of wilting. This issue was in a way dealt with when the spoliatory relief was granted. The irreparable harm regarding the harm to the crop yield was ventilated when that spoliation application was argued.

It is the same harm the applicants seek to avert by asking that the order in HB 190-21 (HC 1315/21) be enforced pending the hearing of the appeal.

It is tantamount to reviewing the decision in HB 190-21 for this court to hold that the respondent did not despoil the applicants threatening the crops on the farm due to the disruptive conduct of interfering with borehole installations. That issue was as good as decided in the spoliation application and I do not intend to review the learned Judge's judgment.

In any event if the respondent is not and does not intend to interfere with the crops on the land and the agricultural activities thereat, what prejudice will he suffer should the relief sought by the applicant be granted? Is the respondent in essence saying 'Let me continue with the self-help I was ordered to stop in HB 190-21 until the appeal is heard?" That cannot be countenanced by any court of law.

As regards the issue on prospects of success, the court in HB 190-21 (HC 1315/21) made the finding that the applicants were in peaceful and undisturbed possession of Esidakeni

Farm and that the respondent did not dispute going to the applicants' farm on a number of occasions. The court also found that there was no explanation from the respondent as to why agents acting on his instructions had visited the farm and disrupted farming operations. The learned Judge went on to say:-

> "There can be no doubt that the respondent has sought to resort to self-help in attempting to assert what he perceives as his rights. Respondent has no right to resort to acts of self-help."

These observations were made on the back drop of findings to the effect that the matter before the court was not on ownership or the rights respondent had by virtue of an offer letter. The issue was on forcibly taking occupation and the case of *Forestry Estate (Pvt) Ltd* v *M.C.R Venganai and Minister of Lands in the office of the President and Cabinet* HH 19-10 wherein PATEL J (as he then was) stated, among other things, that an offer letter does not entitle the holder to occupy land allotted to him, before the current occupier has been duly evicted by due process of the law was made reference to. The reference to the Forestry case(supra) was emphasizing the need for due process to be followed when asserting one's rights.

I have already alluded to the fact that the respondent has instituted eviction proceedings and that is the due process referred to by PATEL J in the Forestry case (supra).

The respondent's appeal appears to zero in on the fact that the land has been acquired and the respondent has an offer letter and has therefore lawful authority to be on the land. Reliance was placed on the Naval case (supra) and Campbell case (supra) but as already stated, this matter is not about challenge to acquisition but to stop self-help and encourage the observance of the rule of law by following due process in order to assert one's rights.

It follows therefore that the argument that the Naval and Campbell cases tilt the prospects of success of the appeal in favour of the respondent is not a correct interpretation of the decisions in these two cases.

The 2 cases are certainly not authority for the proposition that one with an offer letter can force their way into the acquired land without following due process.

It can therefore not be said the appeal enjoys prospects of success.

In balancing the parties' competing interests, it is clear that the applicants stand to lose should the disruption to their farming activities continue and the respondent can await the outcome of the appeal without being unduly inconvenienced. The applicants are not asking for anything more than that they be allowed the peaceful and undisturbed possession they had before they were despoiled and which relief they obtained in HC1315/21.

The appeal, as argued by the respondent, is likely to be heard soon and it only makes sense, given what each party has at stake, to allow the applicants to enjoy undisturbed and peaceful possession of the farm until their fate is determined by the law. The respondent can equally pursue the eviction action which is currently pending. I therefore fail to appreciate the prejudice likely to be suffered by the respondent should this application be granted.

The applicants have therefore made a case for the relief they seek.

I am of the view that the respondent unnecessarily opposed this application and the applicants were consequently unnecessarily put out of pocket.

A case has been made for punitive costs.

In the result I make the following order:

1. The applicants are hereby granted leave to carry into execution the judgment of this court granted on 7th October 2021 as judgment under HB190/21 notwithstanding the appeal noted by the respondent to the Supreme Court on 12th October 2021 under SCB53/21 or any other appeal that may be noted in respect of this matter.
2. The respondent shall pay the costs of this application on a legal practitioner-client scale.

Webb Low & Barr Inc. Ben Baron & Partners, applicants' legal practitioners
Tanaka Law Chambers, respondent's legal practitioners