KUDAKWASHE JERRY DENGU
versus
MAXMILLION MTETWA
and
MINISTER OF LANDS, AGRICULTURE, FISHERIES,
WATER AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 4 May 2021

Urgent Chamber Application

*A*pplicant in person
P. Chimombe, for the 1st respondent
P. Siqoza, for the 2nd respondent

CHATUKUTA J: On 4 May 2021 the court granted the following order with the consent of the parties:

"IT IS ORDERED BY CONSENT THAT:

1 The 1st respondent be and is hereby interdicted from constructing permanent structures, installing any irrigation infrastructure and planting any crops on subdivision 5 of Carnsmore Farm, Mazowe until the action in case number C148/2020 filed at Concession Magistrates Court by the applicant is finalised.

2 1st respondent to pay costs of suit."

The court proceeded to give an ex-tempore judgment. Written reasons have been requested. These are they.

The applicant filed an Urgent Chamber Application for the following provisional order:

"TERMS OF THE FINAL ORDER SOUGHT

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

(1) The 1st Respondent be and hereby (*sic*) ordered to stop constructing any permanent structures, installing any irrigation infrastructure and planting any crops on Subdivision 5 of Cairnsmore Farm, Mazowe until the eviction court case number C148/2020 filed at Concession Magistrates Court by the Applicant is finalized.

(2) 1st Respondent to pay costs of suit on a Legal Practitioner and Client Scale.

INTERIM RELIEF GRANTED

(1) Pending the return date of this application, the 1st Respondent be and hereby (*sic*) ordered not to continue any further preparations for the construction of permanent structures, preparations to install irrigation infrastructure and any further preparations for the planting of winter crops on Subdivision 5 of Cairnsmore Farm, Mazowe."

The application is opposed by the first respondent. The first respondent however has consented to the granting of the final order sought instead of the provisional order in the event that the court rules in favour of the applicant. Mr *Siqoza*, for the second respondent, submitted that the second respondent would abide by the order issued by the court. The second respondent placed before the court a report prepared by the Acting Provincial Lands Officer, Mashonaland Central Province pertaining to subdivision 5.

The following facts are common cause: By offer letter dated 8 November 2006, the second respondent offered the first respondent the right to occupy Subdivision 2 of Cairnsmore Farm in Mazowe measuring 486 hectares. On 5 December 2016 the second respondent withdrew the offer letter. This was after the second respondent had issued the first respondent with a Notice of Withdrawal of the offer letter and the first respondent had responded to the Notice. The first respondent has challenged the withdrawal of the offer letter.

The second respondent proceeded to subdivide the farm into two; subdivision 2 measuring 268 hectares and subdivision 5 measuring 208 hectares. The applicant was issued an offer letter dated 18 October 2017 for subdivision 5 of Cairnsmore Farm in Mazowe. As at 29 April 20021, both the applicant and the first respondent have beenoccupying subdivision 5. They have both been farming and putting up infrastructure on the same subdivision. Although he is on the ground, the first respondent has not been issued with a new offer letter.

On 10 December 2020, the applicant issued summons at the Concession Magistrates Court under case number C148/2020 for the eviction of the first respondent from subdivision 5. The matter is pending.

The applicant has argued that he is in possession of an offer letter entitling him to occupy subdivision 5. The first respondent is occupying part of subdivision 5 when he does not have an offer letter entitling him to do so. The applicant contends that the first respondent has started putting up permanent structures, irrigation infrastructure and is conducting farming activities in preparation for winter crops. He further argues that the first respondent is hampering his occupation, enjoyment and use of the subdivision.

The opposition to the application by the first respondent is based on the applicant's averments in the founding affidavit that he is presently in occupation of subdivision 2. He avers that the applicant cannot therefore seek to interdict him from carrying out activities on subdivision 2 when he is in possession of an offer letter for subdivision 5. He argues that the applicant does not have a right, it be clear or *prima facie*, to occupy subdivision 5.

The report produced by the second respondent confirms the following: The offer letter issued to the first respondent for the original subdivision 2 was withdrawn. The first respondent has not been issued any offer letter for the new subdivision 2 or any other subdivision on Cairnsmore Farm. Both the applicant and first respondent presently occupy subdivision 5. Both have been putting up developments on the subdivision and are in the process of preparing for winter farming.

In an application of this nature a party must establish the following requirements:

1. a *prima facie* right even if it is open to doubt;
2. a well-grounded apprehension of irreparable harm if the relief is not granted;
3. the unavailability of an alternative remedy; and
4. that the balance of convenience weighs in favour of granting the application.

At the onset the court sets out facts which are common cause. Most importantly, the facts that both the applicant and the first respondent are occupying subdivision 5. Ms *Chimombe*, for the respondent, made various concessions during oral submissions the import of which confirms the applicant's contention that the first respondent is on subdivision 5. She conceded that the first respondent is putting up permanent structures and has commenced preparing for the winter farming. She further conceded that the parties have been co-existing and operating on the farm for a while. She proposed that the order sought by the applicant be amended to allow the applicant and the first respondent to continue co-existing. In response from the court as to how that will be achieved, she stated as follows:

> "As an interdict pending the matters which are already before the land commission as well as the one at Concession Magistrates Court pending. So that the parties may just maintain the status without the first respondent constructing any further permanent structures."

The alleged dispute that the applicant is on subdivision 5 and the respondent is on subdivision 2 has thus been put to rest. In any event, the first respondent does not challenge the

report placed before the court by the second respondent which confirms that the applicant and the respondent are both on subdivision 5. Failure to challenge the report amounts to acquiescence of the contents therein.

Ms *Chimombe* conceded that all the requirements for an interim interdict had been met. In spite of the concession she prays for an order that allows the applicant and the first respondent to co-exist pending the determination of C148/2020. The concession is in my view proper. The applicant has lawful authority to occupy subdivision 5 by virtue of the offer letter issued to him by the second respondent. Section 2 (1) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] (the Act) provides that an offer letter; a permit; or a land settlement lease constitutes lawful authority to occupy State land. In *CFU & Ors* v *Ministry of Lands & Ors* 2010 (1) ZLR 576 (S) it was remarked at 592 G that:

> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise rights of possession or occupation.
>
> **The holder of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, police and other public officials to assert their rights**."(own emphasis)

It therefore follows that the applicant has established that he in fact has a clear right to occupy subdivision 5 and deserves the protection of this court.

Ms *Chimombe* further conceded that both parties were putting up permanent structures, irrigation infrastructure and preparing for the 2021 winter crop season. The concession is relevant in so far as it supports the applicant's contention that there is a well-grounded apprehension of irreparable harm if the relief is not granted. The first respondent again cannot escape the report by the second respondent which confirms the first respondent's conduct complained of by the applicant.

The applicant does not have any other remedy except the present application. The fact that there is a pending action in the magistrates court for the eviction of the first respondent does not constitute a remedy to prevent the conduct of the first respondent complained of.

The balance of convenience weighs in favour of the applicant for the reason that he is in possession of lawful authority to be on subdivision 5. The first respondent does not have an offer letter to occupy the subdivision or subdivision 2 he alleges to be occupying. He has therefore remained on the farm after the withdrawal of the offer letter in open defiance of the law. His plea to be allowed to remain on the farm pending determination of C 148/2020

amounts to inviting this court to sanction unlawful conduct in clear violation of the Act. Further, the first respondent did not file a counter application praying for an order for co-existence.

Regarding costs, the applicant has not motivated his prayer for costs on a legal practitioner to client scale. He is entitled to costs on an ordinary scale.

It is for the above reasons that the court granted the applicant the final interdict.

Baera & Company, 1st respondent's legal practitioners
Civil Division, 2nd respondent's legal practitioners