GRAHAM DOUGLAS DABBS
versus
DENNIS MUSENGI
and
MINISTER OF LANDS AND LAND RESETTLEMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 14 May and 21 May 2014

Urgent chamber application

Mr Maunga, for the applicant
Mr Makuku, for the first respondent
No appearance, for the second respondent

MANGOTA J: On 10 November, 2006 the second respondent who is the Lands Acquiring and Allocating Authority under the Government's Land Reform Programme issued an offer letter to the applicant. The letter was issued in terms of s 2 of the Gazetted Land (Consequential Provisions) Act [*Cap* 20:28]. It offered to the applicant Subdivision R/E of Hippo Valley Settlement 26 in Chiredzi District of Masvingo Province for agricultural purposes. The offered piece of land is approximately 61.70 hectares in extent.

Following the offer of land which he received from the second respondent, the applicant proceeded to plant 15 hectares of sugar-cane and, according to him, successfully harvested the sugar-cane for the last eight (8) years. He stated, in his founding affidavit, that he does cattle feed lotting, crocodile and sugar-cane farming on the land which the second respondent offered to him.

On 27 July 2013, the second respondent offered to the first respondent subdivision 6 of Hippo Valley Settlement Holdings 26 in Chiredzi District of Masvingo Province for agricultural purposes. The land is approximately 18.20 hectares in extent.

Armed with the offer letter which he had received from the second respondent,the first respondent , the applicant stated, did on 26 August 2013, come to the applicant and he claimed to have a right to take five (5) hectares of applicant's land and a further eight (8)

hectares of the land which the second respondent had allocated to a Mr Benjamin Dandira. The applicant stated that, on 31 August 2013, the first respondent returned and purported to demarcate as well as peg the land himself. He said the first respondent allocated to himself 5 hectares of the applicant's land and 8 hectares of Mr Dandira's land. He continued and stated that of the five (5) hectares which the first respondent hived from his land, 3.7 hectares were under sugar-cane.

The applicant stated that the issue of farm boundaries which must exist between the first respondent and him is a matter which he referred to this court for resolution under case number HC 10998/13. He cited in that case the first respondent and the Minister of Lands and Land Resettlement as the respondents. That case, it is noted, is pending hearing at this court.

What, however, riled the applicant is the conduct of the first respondent whom he said started to harvest his sugar-cane. He, according to the applicant, started to harvest the latter's sugar-cane on 8 May 2014. He stated that, if the first respondent's conduct is not stopped, he would suffer irreparable harm of approximately $24 500-00. He, accordingly, prayed the court to interdict the first respondent from continuing to harvest and sell the sugar-cane which he said he planted.

The first respondent opposed the application and he raised four preliminary matters. His *in limine* matters were that:

- The application is not urgent
- The draft order is defective
- The applicant has no cause of action against him - and
- The applicant has an alternative remedy

It is pertinent for the court to examine the abovementioned preliminary matters in the order which the first respondent stated them with a view to determining whether, or not, the applicant's case has any merit. The court, accordingly, proceeds to examine the four matters as follows:

WHETHER OR NOT THE APPLICATION IS URGENT

The conduct which the applicant is complaining of started on 8 May, 2014 and, on 9 May, 2014 the applicant filed this application with the court on an urgent basis. The applicant cannot be said not to have treated his case with the urgency which it deserved. He, if anything, did all what was in his power in an effort to protect his interests. The first respondent's submissions on this issue are totaly divorced from the real substance of this

application. The application is not based on the issue of the parties' boundaries which matter is pending before this court. The application is, in essence, centred on the first respondent's conduct of 8 May, 2014 when he allegedly harvested the sugar-cane which the applicant claims to have planted. The applicant's argument is that the first respondent should not be allowed to reap where he has not sown any seed. The first respondent's opposition on this point does not hold.

WHETHER OR NOT THE DRAFT ORDER IS DEFECTIVE

The first respondent stated that the draft order was defective in the sense that the relief sought in the interim order was the same as the one which the applicant was seeking in the final order.

On a close examination of the draft order, the first respondent's argument on this matter would appear not to be devoid of merit. It is, however, more to the substance, than it is to the technicalities, of the case that the court should lean. Where the applicant's case, taken as a whole, is so hopelessly constructed as to render it to be of no substance, the court will have little, if any, difficulty dismissing it on the basis of some technicality which would have been raised. Where, on the other hand, the applicant's case is, from a *prima facie* perspective, not devoid of merit as appears to be the position *in casu*, the court would be failing in its duty if it allowed itself to be swayed from the path of justice on the grounds of some technicality which has been raised. It is for the mentioned reason, is for no other, that the court can, under such circumstances, take refuge under r 4 C of the Rules of this court in its desire to dispense real and substantial justice to the parties whose case is before it. After all, the orders which the first respondent complain of are merely draft orders which the court may, or may not, adopt or may adopt with some amendments which are in line with the established principle which enjoins courts not only to dispense justice but also to be seen to be dispensing real and substantial justice to all manner of people who come to court in search of it. The drafted order is, in the court's view, defective but it is not fatally defective as it is capable of being cured and allowed to stand.

THE APPLICANT HAS NO CAUSE OF ACTION AGAINST THE FIRST RESPONDENT

The first respondent contended that he is a holder of a valid offer letter which the second respondent issued to him. He argued that he was operating within the four corners of what was allocated to him.

The applicant does not quarrel with the fact that the first respondent was issued with an offer letter. His main concern which he stated in a convincing manner was that the first respondent:

(1) encroached onto a portion of his farm where the applicant grew his sugar-cane; - and
(2) started to harvest the sugar-cane which the applicant planted and tended up to the time of harvesting.

It cannot, under the above described set of circumstances, be suggested, let alone argued, that the applicant does not have a cause of action against the first respondent. He, if anything, has a serious bone to chew with the first respondent. He wants the first respondent interdicted from harvesting his sugar-cane as that continued conduct of the first respondent is injurious to his interests.

WHETHER OR NOT APPLICANT HAS AN ALTERNATIVE REMEDY

The first respondent stated that the applicant can sue him for damages in the event that he successfully argues his position in the main case. That remedy, in the court's view, is more fanciful than it is real. For a start, pursuance of that remedy is not without a cost to the applicant who will have to engage counsel to prosecute his claim for damages. Where the first respondent sells the sugar-cane which is the subject of the parties' dispute and earns some money from the sale, nothing will prevent the first respondent from spending the money as he pleases with the result that whatever judgement that is entered in the applicant's favour may be difficult, if not impossible, to enforce. The applicant was within his rights when he stated as he did that he did not have any efficacious remedy other than to pray the court to interdict the first respondent from harvesting the sugar-cane which he said belonged to him. The first respondent did not inform the court or the applicant of his financial status. Neither the court nor the applicant can assert with any degree of certainty whether he is or is not a man of means. The issue of applicant having an alternative remedy as the first respondent submitted cannot hold under the above-analysed set of circumstances.

On the merits, the applicant made mention of two very pertinent matters. The matters in question are contained in paras 15and 20 of his affidavit. The paras read:

"15 On 26 August, 2013 the first respondent came to the land and claimed to have a right to take 5 hectares of my land as well as 8 hectares of the land belonging to another farmer by the name of Benjamin Dandira. He returned again on 31 August and purported to demarcate and peg the land himself. According to the

demarcations he has purported to take 5 hectares of my land and 8 hectares of Benjamin Dandira ----------

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20 After I had instructed proceedings in the High Court under case number HC 10998/13, the first respondent then dropped his claim of 8 hectares of land on Dandira and further encroached into my property with 13 hectares. He now claims 18 hectares of my land. My cattle pens, borehole, storage dam and 3,7 hectares of sugar-cane are in the 18 hectares the first respondent purport to be his" (emphasis added)

The first respondent did not challenge the abovementioned assertions of the applicant. The assertions do, in many respects, support the position that the first respondent was not officially shown the boundaries of his piece of land and that he simply took the law into his own hands and proceeded to allocate to himself land which was in the lawful possession of Benjamin Dandira and the applicant. The court accepts, as a fact, that the first respondent allocated to himself land which the applicant was in possession of including the first portion on which the applicant planted the sugar-cane which is the subject of the parties' dispute (emphasis added).

The first respondent attached to his opposing papers Annexure M. He, however, did not explain the purpose which the annexure was serving in the context of the present application. The annexure does show and, in a large measure, support the applicant's claim which is to the effect that the first respondent encroached on to Benjamin Dandira's land as well as onto the land of the applicant. That is so as both of them filed an application with the magistrate's court against the first respondent.

The first respondent stated, on the merits, that he had been working on the plot and that he bought a lot of inputs like fertilisers. He, in support of his claim in this mentioned regard, attached to his opposing papers Annexures R1 and R2. Annexure R1 is dated 12 August, 2013 and Annexure R2 is dated 22 August, 2013. Both Annexures are from Mash Agro Dealers.

It is the court's considered view that the first respondent could not have purchased inputs for the plot which he said was allocated to him on 12th, or 22nd, August, 2013 which dates are on the annexures. That is so because the applicant stated, and his statement was not controverted, that the first time that the first respondent came to the land was on 26 August, 2013. He stated further, and his statement was also not disputed, that the first respondent

returned to the farm for the second time on 31 August, 2013. It is on this second return, the applicant said, that the first respondent purported to demarcate and peg the land allocating to himself 5 hectares of the applicant's land and 8 hectares of Benjamin Dandira's land. The first respondent did not address his mind to such pertinent issues as the applicant raised. His case was not methodically argued save for bold claims which he made without substanting them in any way.

In applications of the present nature, two principles guide the court in its desire to ascertain the veracity, or otherwise, of the applicant's case. The principles in question are:-

(a) whether, or not, the application is urgent - and

(b) whether, or not, the applicant treated the application with the urgency which it deserved.

The applicant was able to satisfy the court, on a balance of probabilities, that his case was unassailable. The first respondent, on the other hand, rumbled through the entire process in a most unconvincing manner. The second respondent was sued in his official capacity. He neither responded nor appeared in person or through legal representation. The court remains of the view that he will abide by whatever decision which will have been reached.

The court considered all the circumstances of this case. It deletes, in the *Interim Relief Granted* portion of the Provisional Order the words "finalisation of the matter" and it substitutes those with the words "The Return Day" so that the Interim Relief Granted Provisional Order reads, in part, as follows:

"Pending the Return Day, the following relief is granted:

(i) ----------.

(ii) ----------.

With the abovementioned amendments being taken into account, the application is granted with costs.

Maunga Maanda & Associates, applicant's legal practitioners
Ndlovu and Hwacha, first respondent's legal practitioners
Attorney General's Office, second respondent's legal practitioners