JONATHAN DUBE

Versus

SIYAPHUMELELA COLLECTIVE FARMING CO-OPERATIVE SOCIETY LIMITED

And

DEPUTY SHERIFF, GWANDA

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 23 JANUARY AND 2 FEBRUARY 2023

Opposed Application

L. Nkomo, for the applicant
J. Tshuma, for the 1st respondent
No appearance for the 2nd respondent

KABASA J: This is an application for the confirmation of a Provisional Order which was granted on 15th September 2016 and served on the 1st respondent on 7th October 2016.

The terms of the Provisional Order were couched as follows:-

Terms of Final Order Sought

1. The respondents be and are hereby permanently interdicted from enforcing the writ issued under HC 1554/2000.

2. The 1st respondent be and is hereby ordered to pay costs of suit.

Interim Relief

Pending the determination of this matter, the applicant is granted the following interim relief:-

1. The respondents be and are hereby interdicted from removing the applicant's cattle from the property known as certain piece of land being Lot 1 of Copthal Block 2 situate in the District of Gwanda in extent 4551,5214 hectares.'

As already stated the Provisional Order was granted and this application seeks its confirmation.

It is important to give a background of the matter. The background is this:-

The applicant is a member of the 1st respondent, a co-operative registered in terms of the Co-operative Societies Act (Chapter 24:05) and so registered since 1994.

The 1st respondent owns a farm known as Lot 1 of Copthal Block 2 situated in Gwanda and measuring 4551,524 hectares. The members are into cattle ranching.

The members had a dispute over the keeping of members' personal cattle on the farm and the dispute was resolved by CHIWESHE J (as he then was) under judgment number HB 71-2002. The court granted the following order:-

"1. Respondent removes his cattle from the farm known as certain piece of land being Lot 1 of Copthal Block 2 situate in the District of Gwanda in extent 4551 5214 hectares within 24 hours of the order failing which the Deputy Sheriff be and is hereby authorized to remove all these cattle identified as belonging to respondent from the farm.

2. That the respondent pays applicant's cost on an attorney-client scale."

This judgment was handed down on 5 July 2002. On 9 March 2006 a warrant of ejectment was issued and a notice of ejectment was duly served by on the applicant by the 2nd respondent on 20 July 2016. The applicant then sought and obtained the Provisional Order which is now the subject for confirmation.

The application is opposed. The opposing affidavit was deposed to by one Canaan Sibanda who identified himself as the treasurer of the 1st respondent and was acting in that

capacity and on behalf of the 1st respondent. In opposing the application four preliminary points were taken. The applicant also raised a preliminary point.

At the hearing of the application I asked the parties to address me on both the preliminary points and the merits. This I did so as to avoid the necessity to have the parties appear again should the preliminary points not find favour with the court.

I will therefore deal with the points *in limine* first (*Heywood Investments Pvt Ltd t/a GDC Hauliers* v *Zakeo* SC 32-2013). I do not intend to necessarily deal with the points *in limine* based on the party who raised such preliminary points first. That said I propose to look at the four preliminary points raised by the 1st respondent. These are:-

1. *Res judicata*
2. Court is *functus officio*
3. Incompetent relief sought
4. Dirty hands

Mr. Tshuma's argument as elaborated in the heads of argument is that this matter was heard and determined by CHIWESHE J in HB 71-2002. The arguments presented by the applicant are the same that were presented 20 years ago. The issues have therefore been definitively decided.

Is this point *in limine* properly taken? In *O'Shea* v *Chiunda* 1999 (1) ZLR 333 (S) SANDURA JA had this to say:-

> "*Res judicata* applies where the two actions are between the same parties, or their successors in title, concerning the same subject matter and founded on the same cause of action."

Counsel for the 1st respondent correctly articulated these requirements. Counsel went further to show why CHIWESHE J's judgment resolved the same issue. The following excerpts were quoted from the learned Judge's judgment.

> "In my view however, the crucial issue in this application is whether respondent (applicant herein) has the right to keep his cattle on the farm
>
> ……

> Clearly he has no defence. The farm is owned by the applicant for purposes of furthering applicant's objectives (1st respondent herein). Individual members have no inherent right to it outside the parameters of applicant's indulgence."

The learned Judge made these observations after making factual findings to the effect that the applicant was a member of the 1st respondent, a resolution had been passed by the 1st respondent that members should not keep their personal cattle on the farm and that all those who had personal cattle on the farm, without exceptions, should remove them.

It was in light of these undisputed facts that the applicant was ordered to remove his cattle.

The applicant averred that he initially appealed this judgment but did not prosecute the appeal. He then complied with the judgment and moved his cattle to Roy Farm situated at Marula in Figtree. The resolution that personal cattle should not be at the farm upon which the judgment under HB 71-2002 was predicated was subsequently rescinded and all members of the 1st respondent allowed to keep their personal cattle at the farm. Following the revocation of that resolution applicant moved his cattle back to the farm in 2006.

The cause of action which culminated in HB 71-2002 is not the same cause of action since the contention by the deponent to the opposing affidavit is that his herd is too large and prejudices other members whose herd is not as huge as the applicant's. This amounts to a new cause of action which ought to be prosecuted as such should the 1st respondent be so inclined, so argued the applicant.

It is important to note that the judgment by CHIWESHE J focused on the resolution by the 1st respondent to have personal cattle removed from the farm. The learned Judge went on to pronounce that such resolution had not been set aside. That was the cause of action which saw the 1st respondent obtaining judgment against the applicant.

In casu the applicant's contention is that the resolution was subsequently revoked and members' personal cattle were allowed onto the farm.

I am therefore persuaded by *Mr. Nkomo's* argument that the cause of action is not the same as was the case in HB 71-2002. The parties may be the same as well as the subject matter but the cause of action is not the same. If the removal of applicant's cattle is not based on a resolution that no personal cattle should be on the farm but that his herd is an

inconvenience due to its size, the 1st respondent cannot argue that this issue was resolved and a definitive pronouncement made on it by CHIWESHE J.

The issue of *res judicata* therefore does not arise. The court is not looking at the order but the cause of action which led to the grant of that order.

This point *in limine* was not properly taken and is accordingly dismissed.

The second point *in limine* raises more or less the same issue. In *Unitrack (Private) Limited* v *Tel-One (Private) Limited* SC 10-18 MAVANGIRA AJA (as she then was) had this to say:-

> "It is a general principle of our law that once a court or judicial officer renders a decision regarding issues that have been submitted to it or him, it or he lacks any power or legal authority to re-examine or revisit that decision. Once a decision is made, the term "*functus officio*" applies to the court or judicial officer concerned."

In HB 71-2002 CHIWESHE J rendered a decision on the issue regarding the authority allowing applicant to keep his personal cattle at the farm when there was a resolution passed that such cattle were to be moved from the farm. The learned Judge made a finding that the farm belonged to the 1st respondent and the resolution made by the 1st respondent was meant to promote the 1st respondent's interests. Individual members had no inherent rights outside the parameters of the 1st respondent's indulgence. The court pronounced itself on this issue and regarded all other issues as irrelevant for purposes of deciding the issue that was before it.

The question to ask therefore is this:-

"Is the court being asked to revisit an issue that was already decided?" The answer is NO. It would have been different if the applicant was arguing that the resolution has out-lived its purpose and so members should be allowed to keep their personal cattle on the farm. If that was the argument this court would have a ready answer to that and be quick to say that issue was determined already by the court, the resolution was passed and applicant being a member was bound by it. The court would therefore not revisit its decision as pronounced by CHIWESHE J. This is however not the position here.

The argument that the applicant ought to seek a variation of HB 71-2002 does not make much sense. HB 71-2002 addressed a particular issue and circumstances and that is what was obtaining then. What is there to vary? I would say there is no variation to talk about.

In *Mhlanga* v *Mhlanga* & 2 Ors HB193/22 DUBE –BANDA J correctly observed the following:-

> "The order of court must be obeyed and given effect to unless it has been varies or set aside by a court of competent jurisdiction." In *Magauzi & Anr* v *Jekera* SC54/22 the court said:
>
> When a court grants an order all subsequent acts affecting the dispute between the parties rely on the court's order and not the reason or facts the court based its judgment on. Execution of judgment debts is based on court orders and not the reason for which the court order was granted. Therefore a party or the parties cannot disregard a court order as they are bound by it. In the case of *Chiwenga* v *Chiwenga* SC2/14, it was stated that: The law is clear than an extant order of this court must be obeyed or given effect to unless it has been varied or set aside by this court and not even by consent can parties vary or depart therefrom. (See also *CFU* v *Mhuriro & Ors* 2000 (2) ZLR405 (S)."

In casu the order was not varied nor did parties agree to depart from it. The order was complied with, the cattle were moved to Roys Farm thereby satisfying the court order. Subsequent events which in themselves raise a new cause of action ought therefore to be brought before the court and an order speaking to that cause of action be rendered.

I would give the example of a landlord who successfully obtains a judgment evicting an errant tenant for failing to pay rentals. The errant tenant moves out without waiting to be evicted thereby complying with the court order. Years down the line the tenant manages to convince the landlord that he is a new man and the landlord agrees to let out his premises to him. The tenant however goes back to his errant ways. Can the landlord seek to have a warrant of ejectment issued based on the earlier judgment in order to evict the tenant? I would say he cannot. The parties cannot go back to court and say vary the earlier eviction order because we have since moved from the earlier position which necessitated eviction proceedings. That judgment would have served its purpose and the further developments would not be able to sit on that judgment. It would require a new court action altogether and when such is done the court cannot be said to be *functus officio*. The same applies *in casu*.

The point *in limine* has therefore not been properly taken and also fails.

The applicant seeks confirmation of the Provisional Order stopping enforcement of a writ which sits on the judgment under HB 71-2002.

The interdict is not sought as a way of defeating an extant judgment. The interdict is sought on the basis that the order was complied with without necessarily waiting for the execution of a writ. With that compliance the judgment was satisfied. The different circumstances which saw the applicant returning the cattle to the farm cannot be linked to the earlier satisfied judgment and equally a writ cannot be executed and on such judgment.

Would the position be different had the applicant waited to be ejected *via* a warrant of ejectment? If he had been so ejected and later the resolution revoked, would the 1st respondent competently issue another writ sitting on the same judgment to evict the applicant. A writ is valid until its execution.

I am of the view that where a party complies with a judgment without being evicted on the force of a writ and circumstances change which circumstances do not speak to the issues decided earlier, a party cannot seek to have a writ issued based on that earlier satisfied judgment.

Steve Sparrow Smith of Roys Farm where applicant says he took his cattle to in compliance with CHIWESHE J's judgment deposed to an affidavit confirming that sometime in 2004 the applicant moved his cattle to the farm which farm is in Figtree and the cattle were moved from Gwanda. The cattle were thereafter removed in 2006.

This served to confirm the applicant's assertion that he complied with the order in HB 71-2002 and only moved the cattle upon the revocation of the resolution which resulted in the court granting the order in HB 71-2002.

This court is therefore not being asked to interdict the execution of an extant and unsatisfied judgment.

There is therefore nothing incompetent about the order sought given the circumstances under which such order is being sought.

The position would be different if the court was being asked to grant an interdict stopping the execution of its extant and unsatisfied judgment. It is therefore important to consider this issue in its proper context. (*Commissioner of Police* v *CFU* 2000 (1) ZLR 503).

The court must indeed protect its own judgments and that includes ensuring a party does not seek to go back to a satisfied judgment and execute a writ which does not speak to the new circumstances.

That said this point *in limine* is equally without merit and must also fail.

The last point *in limine* is on dirty hands. The 1st respondent's counsel argues that the applicant has dirty hands and so should not be given audience.

In granting the Provisional Order TAKUVA J considered the same dirty hands principle. The learned Judge had this to say:-

> "The dirty hands doctrine does not apply *in casu* because the procedure and relief applicant has adopted and sought are provided for by the law. The proper meaning of the doctrine was stated by CHIDYAUSIKU CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *Minister of State for Information and Publicity and Others* 2004 (1) ZLR 538 (S).
>
> ……..
>
> There is a distinct difference between a litigant who, like *in casu*, strenuously disputes defiance and one like in the ANZ case who admits its open defiance of the law."

The applicant says he complied with the order and his assertion was supported by the farm manager of the farm where the cattle were moved to. Moving the cattle back because of the revocation of a resolution upon which the judgment was predicated which judgment he had complied with until such revocation cannot be viewed as being contemptuous of a court order. It cannot be said the applicant showed disdain for the court but now seeks relief from the same court.

The principle of dirty hands does not apply in these circumstances. In *Mhlanga* v *Mhlanga* HB 132/22 DUBE-BANDA J held that the applicant had dirty hands as he had failed to comply with an order to surrender custody of the children to the mother and sought to approach the court asking it to vary the very order. The learned judge had this to say:

> "A court would withhold its jurisdiction and protection against a litigant who is in defiance of the law. A court cannot come to the rescue of a litigant whose hands are dripping dirt. One cannot defy the court, undermine the orders of the court and when it suits him still approach the same court for assistance and relief. See *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity& Ors* SC20/2003. A court would withhold its jurisdiction against an errant litigant who is in defiance of a court order."

I agree entirely with these remarks. However the circumstances of this case are different. There was no defiance as the papers before me support the applicant's assertion that HB 71-2002 was complied with.

This point *in limine* equally lacks merit and also fails.

The 4 points *in limine* raised by the respondent are accordingly dismissed.

I turn now to the point *in limine* raised by the applicant. I must from the outset state that the issue of whether Canaan Sibanda was authorized to represent the 1st respondent was raised before CHIWESHE J who held that Canaan Sibanda was the chairman of the 1st respondent and had shown that as the chairman he presided over 1st respondent's organs and official proceedings and so on the face of it he had authority to represent the respondent.

20 years later Canaan identifies himself as the Treasurer of the 1st respondent and 2 members of the 1st respondent's interim management committee confirmed that an interim management committee was set up by the Registrar of Co-operatives on 22 August 2016 and they are in that interim committee but no resolution was passed appointing Canaan Sibanda to represent the 1st respondent in the proceedings under case number HC 1834/16.

The issue is not on *locus standi* where one establishes that they have a direct and substantial interest in the matter (*Abrahamse* v *Cape Town City Council* 1953 (3) SA 855, *Marais and Anor* v *Pongola Sugar Milling Co and Ors* 1961 (2) SA 698 (N)). The issue is whether Canaan Sibanda was authorized to represent the 1st respondent as he deposed to in his opposing affidavit. The matter is not between Canaan Sibanda and the applicant but between the 1st respondent and the applicant.

The importance of such authority seeks to establish that the party is not on a frolic of his own. This is not a matter where Canaan is seeking to oppose the application in his

personal capacity as one with a direct and substantial interest in the matter but seeks to oppose it as one authorized to by the 1st respondent.

The two members of the management committee who deposed to affidavits refuted the assertion that there was a meeting of the management committee on 10th January 2020 at which meeting it was resolved that Canaan Sibanda be the 1st respondent's representative in the matter under HC 1834/16.

It did not escape the court's attention that the resolution is dated 1st July 2020, the very date the opposing affidavit was deposed to when the meeting was supposedly held on 10th January 2020.

The fact that the opposing affidavit was deposed to on the very date when such authority was supposedly given, juxtaposed with the affidavits from 2 members of the committee who refuted the holding of a management committee meeting on 10th January 2020 gives the impression that such authority, without the one who signed it deposing to an affidavit verifying the same, leaves one with more questions than answers.

The 2 members' sworn statements were not controverted. If no meeting was held on 10th January 2020 who then authorized the deponent to the opposing affidavit to represent the 1st respondent.

The papers before me show the disharmony between the 1st respondent's members which lack of harmony resulted in the Registrar of Co-operative Societies resolving that the farm owned by the 1st respondent be subdivided and the two rival groups be apportioned shares in line with their share ratios. Meetings of the Co-operative were adjudged to be no longer possible as the Co-operative members had drastically fallen out with each other. The Chaiman who purportedly signed the resolution authorizing Canaan Sibanda to represent the 1st respondent was said to have taken advantage of the discord in the members to appoint an auditor without consultation with the other group.

Given the foregoing and the challenge to Canaan Sibanda's authority, Canaan's authority had to be supported by the adduction of evidence and there was no such evidence. (*Retrenched Employees of National Breweries Ltd as represented by Mudondo* v *National Breweries Ltd and Anor* SC 92-01)

That said the point *in limine* challenging Canaan Sibanda's authority to represent the 1st respondent was properly taken and must succeed.

Without the requisite authority Canaan Sibanda's opposition is no opposition at all.

I am therefore persuaded to accept that the application for confirmation of the Provisional Order is not opposed.

The Provisional Order granted on 15th September 2016 be and is hereby confirmed in terms of the draft order.

Calderwood, Bryce Hendrie and Partners, applicant's legal practitioners
Messrs. Webb, Low and Barry, 1st respondent's legal practitioners