

JAMES HAROLD VAN DER MERWE
versus
SUN PRAIRE ENTERPRISES (PVT) LTD

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 20 July 2021 and 17 April 2023

Opposed application

Adv G Madzoka, for the applicant
Adv W T Nyamakura, for the respondent

CHINAMORA J:

Introduction

On 6 July 2021, with the consent of the parties, this court issued an order interdicting the respondent or its agents from removing any livestock or movable property from Subdivision A of Carnock Farm, Sandown Park Farm pending the finalization of this matter. The court also directed the parties to argue for the final relief on 20 July 2021, subject to the respondent filing its notice of opposition by 8 July 2021, and the heads of argument not later than 16 July 2021. The applicant was required to file his answering affidavit and heads of argument by 14 July 2021.

Factual background

It is common cause that the applicant is the registered owner of an undivided two thirds share in a certain piece of land situate in the district of Salisbury called subdivision A of Carnock measuring 275, 5738 hectares (hereinafter referred to as ‘Sandown Park Farm or the Farm’). The applicant and the respondent entered into an agreement, the terms which are in dispute. It is in terms of this agreement that the respondent took occupation of the farm. However, there was a disagreement between the parties and, as a result, the respondent issued summons against the applicant under HC 5538/19. The relief sought is a declaratur in terms of s 14 of the High Court Act [*Chapter 7:06*], confirming that the agreement of sale of farm equipment, livestock and permanent right of occupation between the parties was valid and binding. Furthermore, respondent

sought to prohibit the applicant or anyone acting through him from interfering with its farming activities and right of occupation of the farm. That matter is defended and is pending before this court. Let me now examine the dispute *in casu*.

The applicant's case

The applicant avers that sometime in September 2017, he entered into an oral agreement with the respondent represented by one George Potgieter. He asserts that the material terms of this agreement were that, the respondent was given occupation and permission to conduct farming activities at the farm for an indefinite period. In addition, the respondent had permission to use the movable property on the farm. In return for this, the applicant says that the respondent undertook to provide him with food, pay his medical aid subscriptions, and also pay all the levies and expenses that would accrue in respect of the farm.

According to the applicant, the respondent took possession of the farm and at the time of the application was still in occupation pursuant to the agreement. He submits that the contractual relationship between the parties subsequently became sour and irreconcilable to the extent that, on 29 March 2019, the applicant through his legal practitioners terminated the agreement. The respondent was given three months' notice to vacate the farm, and asked not to remove any movable assets without his written permission. The applicant alleges that at one point he was not on the farm and the respondent was in sole occupation or possession. It is during this period that the respondent took possession of applicant's records of existing movable assets, books of accounts and register of livestock that was at the farm, so alleges the applicant.

It is the applicant's submission that, despite the notice to vacate, the respondent failed, refused and/or neglected to leave the farm. From the applicant's founding affidavit, it emerges that on 1 July 2019, the respondent filed summons under HC 5538/19 for a declaratory order to confirm that the agreement between the parties was an agreement for sale of the right to permanent occupation of the farm, and to declare that it is the lawful owner of all the assets on the farm. The applicant defended the summons and filed his counter-claim for eviction. The matter is pending before this Honourable Court.

Whilst awaiting a hearing under HC 5538/19, the applicant says that he received a phone call around 3:30 pm on 29 June 2021 from one Gift Ruganga advising that Mr Potgieter, the

representative of the respondent together with his employees, had loaded 25 cattle onto a truck with the registration number AEZ 4209 and removed them from the farm. The following day, Ruganga contacted the applicant and informed him that Mr. Potgieter yet again loaded 25 cattle and removed them from the farm. According to applicant, by the time of filing this urgent chamber application only 20 cattle were left on the farm. I note from the papers on record that Ruganga filed with this court a supporting affidavit verifying the said facts. The applicant through his legal practitioners wrote to respondent's legal practitioners demanding that the respondent stop removing cattle from the farm pending the determination of HC 5538/19. He further avers that the respondent failed to give any assurance that he would not move any cattle from applicant's farm. The applicant also states that the respondent secured possession of another farm which is 14 km away from the applicant's and will certainly move the remaining 20 cattle and the applicant's other movable assets to the new farm.

The respondent's case

At the hearing and with the consent of the applicant, I condoned the respondent's late filing of its opposing papers. The applicant asked to amend the final order by the addition of the interim relief which I granted with the consent of the respondent. In the opposing papers, the respondent raised three preliminary points, which I will not go into, since, it was apparent that those points had been abandoned. On the merits, the respondent accepts that there was an oral agreement between parties, but disputes its terms and conditions as pleaded by the applicant. Instead, he asserted that the applicant sold to him the farm equipment, livestock and the right to occupy the farm in question and this fact was confirmed by applicant under oath. In addition, the respondent states that it is not privy to the conversation between the applicant and Ruganga. It goes no to say that it bought 169 cattle only, and the rest of the beasts were born after the sale. The respondent also claims that it bought various items namely hay baler, fire fighting machine and many other types of equipment. It is argued by the respondent that, in any event, applicant has sought eviction of the respondent from the farm in the substantive proceedings under case number HC 5538/19, and applicant has not raised the issue of livestock and equipment at the farm. Therefore, the respondent prays that the final order be dismissed with costs.

The law and the facts

It is common cause the final relief sought by the applicant is an order to declare that respondent's acts of removing applicant's movable assets and livestock from Sandown Park Farm are unlawful. The requirements for a declaratory order have time and again been restated by this court and the superior courts. Section 14 of the High Court Act provides that this court can issue such an order provided that the requirements of the grant of such an order are established. In this respect, the requirements for a declaratory order are that the applicant must be (1) an interested party in the sense of having a direct and substantial interest in the subject matter and (2) the interest must concern an existing, future or contingent right.

It is apparent that there is a condition precedent to bringing an application for a declaratory order. The applicant must be an interested person having a substantial and direct interest in the matter and such interest must relate to an existing future or contingent legal right. See *Recoy Investments (Pvt) Ltd v Tarcon* 2011 (2) ZLR 65 (H); *Mpukuta v Maker Insurance Pool & Ors* 2012 (1) ZLR 192 (H). In the present matter, both parties' rights are subject to confirmation by this Honourable Court under HC 5538/19 which is still pending before this court. Under HC 5538/19 respondent petitioned this court through summons for a declaratory relief that the verbal agreement of sale of farm equipment, livestock and the permanent right of occupation was legally binding and enforceable at law. The relevant part of the declaration annexed to the applicant's founding affidavit reads:

“WHEREFORE the Plaintiff prays as follows:

- i. The verbal agreement of sale of farm equipment, livestock and right of occupation entered into between Plaintiff and the Respondent in 2016 be declared valid and enforceable.
- ii. The Defendant and all persons claiming occupation through the Defendant be and are hereby prohibited from interfering with Plaintiff's farming operations and its permanent right of occupation at Subdivision A of Carnock Farm commonly known as Sandown Park Farm Beatrice...”

The effect of the relief sought under HC 5538/19 questions the rights of the parties to the property in question. In other words, the relief divests both parties of their rights to the property in question pending confirmation of the same which ought to be protected by a declaratur. It is settled that a legal right and not the factual basis upon which a right may be founded, ought to be shown. See *Movement for Democratic Change v President of the Republic of Zimbabwe and Ors* HH 129/05. In *Electrical Contractors Association (South Africa) and Another v Building Industries*

Federation 1980(2) SA 516(T), NICHOLAS J emphasized that a person seeking a declaration of rights must set forth his contention as to what the alleged right is. In *RK Footwear Manufacturers (Pvt) Ltd v Boka Book Sales (Pvt) Ltd* 1986 (2) ZLR 209, SANDURA JP (as he then was) had occasion to identify two considerations that a court had to bear in mind in determining whether or not to issue a declaratory order. The learned Judge stated that the court had to consider whether the applicant was an interested person in an existing future of contingent right or obligation and, secondly, whether the case was a proper one for the court to exercise its discretion. *In casu*, the court is being asked to declare the respondent's acts of removing the applicant's movable assets and livestock from Sandown Park Farm unlawful. This is not a proper case for the court to exercise its discretion as there is a pending matter for the determination of the rights of the parties in respect of the property in question under HC 5538/19. Therefore, there is no good and sufficient cause for requiring the declaratory order. It is obvious that the applicant is seeking a declaratory order in a matter where his legal rights and interest hinges on HC 5538/19, which is pending before this court. In my view, it is only appropriate that the decision be taken under HC 5538/19 as the court would have the benefit of hearing evidence on some issues which are not clear on the papers. It is on this premise that I am not hesitant in declining the request to declare respondent's acts as unlawful.

However, in order to protect the sanctity of the matter under HC 5538/19, the court will (as the parties have already consented) order that the respondent or its agents be stopped from removing any livestock or movable property from Subdivision A of Carnock Farm, Sandown Park Farm pending the finalisation of the matter under HC 5538/19. Secondly, the papers before me establish an application for an interim interdict. As a form of interim relief, an interdict seeks to freeze or maintain the *status quo* pending determination of the rights of the parties or the principal dispute between them by the court. See *Chinyemba v Agricultural Bank of Zimbabwe Limited* HH 848-15. In *Mudzvova v Mudzvova and Anor* HH 228-15 MATHONSI J (as he then was) made the following apposite remarks:

“This court has a duty to regulate its process and will at all times move in to protect that process so that it is not rendered useless by the conduct of the parties before determination at the appropriate time. Quite often in recent history litigants appearing before this court have shown a disdain to the process of the court and are invariably found stampeding to defeat such process where one party has filed court process seeking some form of relief it is only prudent that the other party should respect and wait finalization of the matter instead of acting in a way that negates the process.”

In light to the above *dictum*, it is the duty of this court to regulate its own processes and at times move to protect that process so that it is not rendered useless by the conduct of the parties before determination of the main matter.

Disposition

In the result, I make the following order:

1. The respondent or its agents are hereby interdicted from removing any livestock or movable property from Subdivision A of Carnock Farm, Sandown Park Farm pending the finalization of the matter under HC 5538/19.
2. There shall be no order as to costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Mlotshwa & Maguwudze, respondent's legal practitioners