

LOLA VERLAQUE
and
EDWARD VERLAQUE
versus
CHESTER MHENDE
and
O.I.C NORTON POLICE STATION

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 16 October & 1 November 2023

Urgent Chamber Application

Adv Magwaliba, for the applicant
Adv D Ochieng, for the 1st respondent
No appearance, for the 2nd respondent

TAKUVA J:

This is an urgent chamber application wherein the applicant seeks the following relief:

“TERMS OF FINAL ORDER SOUGHT

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

- a) The first Respondent be and is hereby interdicted from making any alterations to the portion of Kwayedza (crebilly) Farm, Pota Road, Norton which is designated as Joint Venture portion of the farm.
- b) The second Respondent be and is hereby directed to apprehend the first respondent and commit him to Chikurubi Prison for a period of 21 days for contempt of court.

INTERIM RELIEF GRANTED

Pending the return date the applicant is granted the following relief:-

- a) Pending the determination of the court application under HC 1965/22 AND HC 1129/23, the first Respondent be and is hereby interdicted from carrying out any alternations to the

current state of the KWAYEDZA (CREBILLY) Farm portion under the joint venture agreement.”

BACKGROUND FACTS

The Applicants and the first respondent entered into a Joint Venture Agreement on 19 April 2019 for the purpose of conducting farming activities at Kwayedza Farm (crebilly), Zvimba District (the farm). The first Respondent is the holder of a 99 year lease in respect of the farm and Applicants were to be the financial and technical partners in the agreement. In furtherance of the joint venture agreement, Applicants brought a herd of cattle sheep onto the farm. The cattle are being kept on an open grazing basis and in excess of 200.

As time went on disagreements arose in the implementation of the joint venture agreement. Applicants obtained a court order against the first Respondent under HC 4122/21 in which the first Respondent was ordered to restore to the Applicant occupation of the joint venture portion of the farm. The first Respondent did not comply with this court ordered leading to Applicant's institution of an application for contempt under case number HC 1073/22. Under this case first Respondent was ordered to restore fettered access to the joint venture portion of the farm to the Applicants and not to in anyway interfere with Applicants' farming activities. The first Respondent remains in defiance of the two court orders.

Meanwhile first Respondent obtained an arbitral award for Applicants' eviction from the farm, cancellation of the joint venture agreement and payment of damages. The first Respondent applied for registration of the award under HC 1965/22 while Applicants applied for the setting aside of the arbitral award under HC 1129/23. The two matters have been consolidated and waiting set down.

APPLICANTS' CASE

Applicants contented that first Respondent has interfered with their farming activities contrary to the terms of a court order under HC 1073/22 in that on 11 August 2023, the first Respondent brought a bulldozer onto the farm which cleared a considerable size of the grazing land meant for pastures for the joint venture livestock. The livestock herd is at the risk of starvation and imminent financial doom for the joint venture.

Faced with this catastrophe applicants instructed their farm manager to make a police report at Norton Police Station. The police refused to assist as they insisted on being shown an original copy of the court under HC 1073/23. Applicants' legal practitioners wrote a letter on 17 August 2023 to the first Respondent's legal practitioners of record protesting first Respondent's conduct. The first Respondent continued unabated in clearing the grazing area.

Further, Applicants submitted that since this court has not yet pronounced itself on the lawfulness or otherwise of the arbitral award, the *status quo* should be maintained but such has now been disturbed by the contemptuous conduct of the first Respondent. Applicants' rights are not only located in the joint venture agreement but have also been confirmed by this court in HC 4122/21 and HC 1073/22.

URGENCY

On the second and third September 2023, Applicants were informed by their farm manager one Josiah Basikiti that first Respondent was continuing with clearing the grazing land. On 4 September 2023, first Applicant instructed her lawyers. On this basis, Applicants submitted that they treated the matter as urgent by taking action urgently. The matter can not wait since there is already pending matters before this court whose outcome would be rendered academic by the conduct of the first Respondent. It was therefore Applicants belief that the matter is urgent.

Irreparable Harm

If this application is not urgently dealt with, the first Respondent will continue with clearing the grazing land rendering livestock on the farm commercially worthless in that they will either die from starvation or they will fetch lower prices. As the technical and financial partners in the joint venture. Applicants invested huge sums of money in the joint venture which investments they have not even recouped.

First respondent's contemptuous behaviour

It is Applicants' contention that there are currently two extant court orders directing the first respondent to grant access to Applicants and not to interfere with the operations on the joint venture portion of the farm. These court orders under HC 4122/21 and HC 1073/22 have not been appealed against or set aside by any competent court, yet respondent continues to ignore them. Respondent is aware of their existence in that he was served on 23 August 2021 with the order under HC 4122/21 and the one under HC 1037/22 was brought to his attention formally under HC

467/23. The first Respondent has refused to comply with these court orders even after being repeatedly called upon to desist from such contemptuous conduct.

In HC 1073/22 one of Applicant's complaints was that first Respondent was keeping his own personal chickens in the portion of the farm meant for the joint venture farming. After being ordered to desist from such conduct by the court, the first Respondent on, either the second or third September engaged the Zimbabwe Electricity Supply Authority to remove the transformer that ordinarily powered the fowl runs and installed it elsewhere. As a result, the joint venture no longer keeps chickens due to lack of power in the fowl run.

Applicants have also cited the second Respondent due to the fact that in the past they had unsuccessfully sought assistance from the police at Norton. The officers would give flimsy excuses for not taking action against the first Respondent. This led Applicants to believe that second Respondent needs to be specifically ordered and directed by Court to carry out his mandate.

The second Applicant filed a supporting affidavit. The farm manager one Josia Basiketi also filed a supporting affidavit in which he narrated the events of 11 August and second and third September 2023. He confirmed that currently there are 301 cattle and 200 sheep on the farm surviving on the grazing area on the portion of the farm reserved for the joint venture activities.

Applicants also filed the Memorandum of Agreement between first Respondent and Applicants. This agreement is the basis of the joint venture operations on Kwayedza Farm.

FIRST RESPONDENT'S CASE

Three points *in limine* were raised namely, a) that the matter lacks urgency b) Applicants have no *prima facie* rights and c) the relief sought is incompetent. As regard urgency it was argued that applicants failed to treat the matter as urgent as the actions complained of occurred over a month ago. They have failed to explain why no action was taken for three weeks.

The first Respondent argued that Applicants' rights have not been divulged by the facts. According to the first Respondent, Applicants rights can not arise from the joint venture agreement because that agreement was cancelled by the Arbitral Award. Such rights can only exist if the award cancelling them is set aside. Reliance on the two court orders is not helpful either as these are "bound up" with the joint venture agreement which stands cancelled.

Further, so the argument went, the application to set aside the award does not suspend it and Applicants did not allege they enjoy compelling prospects of success in that application. Finally, it was submitted that Applicants wish the court to proceed as if the award does not exist.

As regards the argument that the relief is incompetent, the submission is that the relief speaks to a joint venture which has been cancelled. This, it has been argued is legally untenable in that one can not enforce a contract that does not exist.

MERITS

The Respondent contended that due to applicants' wrongfulness, the joint venture never actually came to be. All that is there is an agreement to form a joint venture but Applicants prevented the formation of a joint venture by hijacking the farm for their unilateral occupation. It was argued that the application to set aside the arbitral award is insincere in that it's really purpose is to slow down the registration and ultimate execution of the award. This application is an attempt to enforce through the backdoor a "bygone contract" that Applicants have been found to have breached. First Respondent denied being in wrongful occupation of any part of the farm intended for the joint venture.

It was denied that first Respondent has violated grazing rights, as all he did was to level a small area to raise a lawn, mount a marquee, toilets and service units. This small area does not form part of the grazing lands as it belongs to the first Respondents as the owner of the farm. As the force of the court orders is co-extensive with the joint venture, the cancellation of the joint venture by the arbitrator means that what remains extant is the determination that the applicants have no right to occupy the farm and are liable to pay damages to the first Respondent. The interference with electricity flow on the farm was denied.

Finally, it was submitted that Applicants have not shown any entitlement to relief and that the application is an abuse of process that forms part of a campaign to extend their wrongful stay at the property. For this reason, first Respondent urged the court to dismiss the application with costs on the legal practitioner and client scale.

THE LAW

An interdict is an interim order of court pending the final determination of the principal dispute between the parties. It is directed at the maintenance of the *status quo* pending final determination of the matter. This remedy is granted in almost any kind of circumstance where

there is a well grounded apprehension of irreparable harm. It is a remedy of an extra ordinary nature which is not available to a litigant who is possessed of another or alternative remedy. The remedy is not for past invasion of rights.

The standard formulation of the requirements for an interlocutory interdict was put in L.F *Boshoff investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267A-F as follows; “Briefly these requisites are that the applicant for such temporary relief must show:-

a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear is *prima facie* established though open to some doubt.

b) that if the right is only *prima facie* established, there is a well grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing this right;

c) that the balance of convenience favours the granting of interim relief; and

d) that the applicant has no other satisfactory remedy. See also C B Prest

The law and Practice of INTERDICTS JUTA & CO 2014 at pp 50-51

PRIMA FACIE RIGHT

According to Prest *supra* interdicts are based upon rights, that is, rights which interms of the substantive law are sufficient to sustain a cause of action. Such right may arise out of a contract or a delict; it may be a real right, or a personal right. Applicant for an interlocutory interdict must show a right, which is being infringed, or which he apprehends will be in fringed.

The right must be a strict legal right. Further, the right set up by an applicant for a temporary interdict need not be shown by a balance of probabilities. If it is *prima facie* established though open to some doubt that is enough.

In *casu*, first Respondent contends that the Applicants have no *prima facie* rights because the contract that gave rise to their rights was cancelled by the Arbitrator. He also contended quite strongly that Applicants’ rights can not derive from the court orders as these became irrelevant upon cancellation of the contract by the Arbitrator.

This argument is strong on the surface. However, it quickly becomes untenable when one digs deeper. I do not consider the cancellation of the agreement by the arbitral award to have

extinguished the applicants' rights in a situation where the award itself is challenged and its registration is also challenged. For an arbitral award to vest or take away rights, it must first be registered in terms of Article 36 of the Model Law on arbitration awards. A litigant can not enforce or execute an unregistered arbitral award. To do so is in my view tantamount to self-help.

As regard the court orders it is clear that the right of the Applicants derive from the court orders. These are meant to protect the *status quo* pending the resolution of the arbitration proceedings. It is common cause that an arbitral award has been issued. It is also common cause that the registration of that award is challenged. It is again common cause that the arbitral award itself is sought to be set aside by the Applicants. It only makes sense that the *status quo* must be preserved and there are two court orders to that effect. In light of this, there can be no doubt that the first Respondent, in trying to unilaterally alter the situation on the ground is committing an inversion of rights which had been pronounced upon judicially by the courts. The two court orders protect the right to possession. The Applicants have been granted the right to remain on the property pending the determination of the arbitration proceedings as and any proceedings well that relate to the registration of the arbitral award. Ultimately, pending determination by this court of whether that arbitral award is contrary to public policy or not the court orders that have already been granted remain extant.

In the result, I find that the first Respondent's contention that there is no *prima facie* right established lacks merit. There is sufficient evidence to support the conclusion that Applicants have *prima facie* rights to protect.

Turning to the alleged incompetence of the relief, I find that the same argument about cancellation of the agreement is recycled. I have already shown above that this argument is devoid of merit.

The first Respondent also argued that the matter is not urgent and gave reasons for that submission. I am not persuaded by this argument because the Founding Affidavit has given a detailed explanation of what happened from 11 August until the present application. Clearly, the Applicants have throughout been taking action in order to correct the conduct of the first respondent. The first Respondent admits acting contrary to two existing court orders. This prejudices not only the Applicants but also to the administration of justice. Therefore, there is sufficient and good grounds for urgency. I so find.

WELL GROUNDED APPREHENSION OF HARM

This simply means an act of interference with the applicant's rights on the part of the respondent or a reasonable apprehension that such an act will be committed. It is also merged with the requirement relating to irreparable harm. A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with certain facts. The test is an objective one and the onus is on the applicant to establish that there exists an actual or well-grounded apprehension of harm.

In *casu*, most of the acts complained of are admitted by the first Respondent who believes that he is entitled to act in that manner. On the basis of facts presented to me, I take the view that there is a sound basis for the entertainment of a reasonable apprehension by the applicants. The injury is of irremediable nature or character.

Balance of Convenience

C B Prest *supra* while discussing this requirement states;

“The court must weigh the prejudice the applicant will suffer if the interim interdict is not granted against the prejudice to the respondent if it is. If there is greater possible prejudice to the respondent, an interim interdict will be refused, if though there is prejudice to the respondent that prejudice is less than that of the applicant, the interdict will be granted subject, if they can be imposed, to conditions which will protect the respondent.....The essence of the balance of convenience is to try to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just can be found at the end of the trial.....” at pp 72-73.

In the present matter, I am of the view that the first Respondent is clearly violating the law and that the Applicants have made out a *prima facie* case for the intervention of the court. I am convinced that the first Respondent will suffer no prejudice whatever by the grant of the interim interdict. This is the case because he is temporarily forbidden to interfere with applicants' operations within the portion of the farm that falls under the jurisdiction of the joint venture.

NO OTHER SATISFACTORY REMEDY

Where an obvious alternative remedy presents itself. Then clearly the scope for the grant of an interdict is limited and justice can be done without the need for any interdictory application. On the other hand, where the alternative is not obvious and emerges only with difficulty then the

question to be asked is, “is it just, in all the circumstances that the plaintiff should be confined to his remedy in damages?” See *Evans Marshall & Co Ltd v Bertola SA* (1973) 1 All ER 992.

In the present matter, the applicants unsuccessfully approached the police at Norton for assistance. In my view this is not the case where it can be said that the applicants be confined to their remedy in damages.

Accordingly, the applicants have no other satisfactory remedy.

First respondent’s contemptuous behaviour

It is common cause that there are two court orders under HC 4122/21 and HC 1073/22 granting access to the Applicants and directing first Respondent not to interfere with operations on the joint venture portion of the farm. Despite numerous reminders, the first Respondent refused to comply with these court orders. The first Respondent has admitted clearing a grazing area by removing grass. He has justified this conduct by claiming that the portion he has cleared is not part of the portion reserved for the joint venture but it is part of the “remaining extent” belonging to him.

Surprisingly, first Respondent did not attach a diagram or map showing the area he is working on. The tenor and import of first Respondent’s defence is telling. It goes like this:’ “This is my farm. The joint venture agreement was cancelled by the arbitrator. Therefore, the applicants are occupying my land unlawfully. For these reasons I am entitled to utilise my land in whatever manner I deem fit.” The first Respondent does not recognise the court orders. For these reasons, I am convinced that the first Respondent disregarded and continue to ignore the two court orders that are extant. His conduct constitutes interference, which is contemptuous of the court.

Having taken into account all the evidence presented before me, I conclude that Applicants have established all the requirements for a temporary relief by way of an interim interdict.

In the result, I make the following order:

Pending the return date, the Applicants are granted the following relief:-

Pending the determination of the court application under HC 1965/22 and HC 1129/23, the first Respondent be and is hereby interdicted from carrying out any alterations to the current state of the Kwayedza (Credilly) Farm portion under the joint venture agreement.

Adv. Magwaliba with R Chatereza, applicants' legal practitioners
Adv D Ochieng, first respondent's legal practitioners