

ALLIED TIMBERS LIMITED
versus
ESQ XAVIER CHIPATO
and
GIFT MASIYA
and
VERNON MASEKETE
and
OFFICER IN CHARGE: ZRP CASHEL

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 27 February 2023

Opposed Application

Advocate *G. R. J Sithole* with Mr *P Nyakureba*, for the applicant
1st Respondent in person

MUZENDA J: This is an application for Review where applicant prays for the following relief:

“1. That first respondent’s ruling of 8th July 2022 be and is hereby held to be irregular and is hereby set aside and substituted with the following:

‘The application be and is hereby dismissed with costs.’

2. Each party is to bear its own costs.”

The application is being opposed by first to third respondents, fourth respondent opted to be guided by the court’s ruling.

Background Facts

First and second respondents made a court application in the Magistrates Court, seeking an interdict to bar applicant from cutting or removing timber from a woodlot allegedly belonging to first and second respondent. Applicant averred that the woodlot is situated within its demarcated area leased to it by Forestry Commission.

The court *a quo* concluded that there were material disputes of fact and ordered that the matter be referred to trial and that papers filed by the parties constitute the pleadings. Applicant was dissatisfied by the magistrate’s ruling and brought this application. Applicant contends

that the decision of the court *a quo* is grossly irrational and renders the proceedings *a quo* highly irregular in that it does not disclose whether the third party is to be joined as a defendant or plaintiff, taking into account that the alleged issue for trial is an issue to be prosecuted by the third party, hence challenges the proceedings on the grounds of gross irregularity. To the contrary first and second respondents, herein contend that the magistrate was correct by referring the matter to trial since it was not clear as to whether the woodlot belonged or is leased by applicant or that it belongs to Chimanimani Rural District Council. Hence if it is found that the applicant has no rights over the woodlot then the application by the first and second respondents has to be granted. To the respondents the magistrate ought to have granted the relief.

Applicant's Submission

Applicant went at sea covering the law on the powers of this court to review proceedings of lower courts and moreso based on irregularity and contend that *in casu*, the magistrate disposed of the matter before it in a grossly irregular manner. The court *a quo* had to either grant the order as sought by the respondents or to discharge the provisional order granted *ex parte* or dismiss the relief sought. There was no need by the magistrate to extend the interim order or grant the preservation order on the return day which had not been requested by the respondents. Applicant further states that the magistrate granted an order not sought by the parties after it had effectively extended the operation of an interim order. Applicant also contends that there are no disputes of facts.

The Law

Order 23 of Magistrates Court (civil) Rules, 2019 providing for "Interdicts and Attachments" reads as follows:

1. An application to the court for an Order referred to in s 12 of the Act (an order for arrest *tanquam suspectus de fuga*, an attachment, an interdict or a *mandamus van spolie*) or for an order referred to in order 22 r 7(i)(a) and (b) may be made *ex parte*.
2. An *ex parte* application referred to in subrule (1) shall be upon affidavit stating shortly the facts upon which the application is made and the nature of the order applied for."

Order 22 r 5 provides as follows:

"Orders court may make on application

5. After hearing the parties the court may:

- (a) Refuse the application and give written reasons for its decision; or
- (b) Grant the order applied for or any variation thereof, giving written reasons for its decision, or
- (c) order that the issue shall be tried by way of action and give such directions as it thinks just to enable such issue to be brought to trial, and make such order as to costs as it thinks just.”

Applying Law to the facts

First and second respondents brought an application for an interdict in terms of Order 23 of the Magistrates Court (Civil) Rules. The application was appropriate. The magistrate dealt with the application in terms of order 22 cited above more particularly rule 5. The court *a quo* made a finding that there are material disputes of fact and acted in terms of Order 22 r 5(c) and directed as it did, that the application be converted into action and affidavits filed by the parties be pleadings for trial and that the local authority and or Forestry Commission be called to court to clarify the position and ownership of the woodlot in dispute or that they be joined as parties to the proceedings. In so doing the Magistrate properly exercised his jurisdiction. In terms of Order 22 r 5(b) the Magistrate is legally permitted to vary the provisional order or order given provided he supplies reasons for doing so.

I am constrained to find any gross irregularity alleged by the applicant to justify interference by this court. In any case a trial would help to facilitate a conclusive decision on the matter on the aspect of who has the right of harvesting timber, applicant or first and second respondents.

As to the issue of costs, they follow the fate of the application.

It is ordered as follows:

- 1. The application is dismissed with costs.***
- 2. Applicant to pay second Respondent's costs.***

Maunga Maanda & Associates,