

BEVERLY HILLS ESTATE (PVT) LTD
versus
MBEDZI HOLDINGS (PVT) LTD

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 14 June 2022

OPPOSED APPLICATION

M. Mtlongwa, for the Applicant
B. Majamanda for the Respondent

NDLOVU J At the close of hearing of this opposed matter I gave an *ex tempore* judgment and indicated to the parties that in the event that one or both of them want full written reasons for my judgment, they can ask for them and same will be provided. The Respondent has asked for the written reasons and the following are the reasons.

This matter came before me on the opposed roll. The Applicant was seeking an interdict against the Respondent in the following terms:-

1. The Respondent and all its agents be and are hereby interdicted from carrying out farming activities on Applicant's farm being Lot 1 of Wallacedale farm, Odzi- Mutare.
2. The Respondent and all its agents be and are ordered not to interfere in any way with Applicant's farming activities at the farm named in (1) above.
3. The Respondent and all its agents are barred from entering into the Applicant's farm and interdicted from using and taking/ removing any farming equipment from Applicant's farm.
4. The Respondent pays costs of this application

BACKGROUND FACTS:

It is common cause that in May 2020 the parties entered into a Memorandum of Understanding ("MOU") according to which the Respondent was to conduct winter and summer farming at the Applicant's farm being Lot 1 of Wallacedale Farm Odzi, Mutare ("the Farm"). In terms of that MOU the parties were desirous to form and operate a Joint Venture (a "JV"). The MOU was a precursor to the signing and execution of an Agreement for the JV. The MOU would run from 01 May 2020 to 31 January 2021. It was a fundamental term of the MOU that the parties would upon the expiry of the MOU shall sign, enter into and execute a JV. At the expiry of the MOU no JV agreement was signed and entered into. Needless to say, the MOU contained its own other terms spelling out the rights and obligations of either party.

During the MOU turbulence hit the relationship between the parties in that according to the Applicant, the Respondent failed to meet some of its obligations. According to the Respondent it duly met its obligations as was provided for in the MOU and it only questioned and disputed claims by the Applicant for irrigation equipment costs which claims the Respondent found to be ridiculous because some of the equipment was derelict and belonged to ARDA. Be that as it may be, the parties were no longer singing from the same hymn book, let alone the same hymn and verse.

According to the Applicant, the MOU was a test case meant to enable the 2 parties to know and understand each other before a JV could be entered into. The MOU failed that test necessitating that the parties not enter into a JV at the expiry of the MOU. For its part the Respondent's position is that the MOU was not a test case but rather it was a precursor to the JV and that is the reason why the Respondent proceeded to pay the Applicant's legacy debts and constructed roads, a clinic and even rehabilitated dilapidated infrastructure. With the MOU lasting only for 9 months Respondent would not even have retained its capital investment, let alone harvested its crops. Respondent performed its obligations under the understanding that it was going to enter into a JV with the Applicant and is currently of the view that the JV is now in operation, so stated the Respondent. There lies the controversy between the parties.

OPPOSITION

The Respondent took 3 points *in limine* which I dismissed and they are:

1. Material Dispute of Facts

The Respondent avered that the application raised serious material dispute of facts incapable of resolution on the papers. The alleged dispute of facts was in essence whether or not the JV took effect.

The Applicant counter argued that its cause of action is based on the fact that the MOU has expired and the Respondent accepts that the MOU has expired.

I dismissed this point *in limine* for want of merit. I found the contention between the parties very clear and the papers sufficient for the resolution of the matter.

2. Incompetent Application

The Respondent argued that the Applicant has applied for an interdict yet on the other hand wants an eviction order. In so doing, the Respondent is left confused as to what exactly the Applicant is seeking.

The Applicant's counter argument was that at all material times the Applicant retained occupation of the farm and that the Respondent was only given access to and use of the farm. In the Draft Order, the Applicant was seeking to interdict the Respondent from accessing the farm and or using Applicant's equipment thereat.

I found the point *in limine* taken suffering a drought of merit and dismissed it because the draft order is clear and in any case a court is not bound by a draft order as framed by an Applicant.

3. Interdict Requirements Not Met

The Respondent contended that the MOU provided for arbitration and yet the Applicant did not exhaust that domestic remedy and neither did it embark on negotiation. In addition to the above, the Respondent contended that the Applicant will not suffer irreparable harm if the interdict is denied as whatever harm Applicant may suffer can be cured with a monetary compensation.

I dismissed this point *in limine* because it was intruding into the merits of the case through a side door as it were.

MERITS

I have identified the controversy between the parties as being whether or not there is a JV agreement in operation between the parties. A determination of that issue would put to rest the matter one way or another. However, this being an interdict application the Applicant naturally has to satisfy the requirements of a final interdict.

The requirements for a final interdict in brief are proof of;

- 1) A clear right.
- 2) Irreparable harm.
- 3) Want of an alternative remedy.

Airfield Investments (Pvt) Ltd v Minister of Lands & Others 2004 (1) ZLR 511

a) A Clear Right

By being a holder of an undisputed offer letter over the farm from the relevant government ministry the Applicant has a clear right over the farm.

Commercial Farmers Union & Others v Minister of Lands & Others SC 31/10.

b) Irreparable Harm

Where the right is clear, the damage need not be irreparable. *Setlogelo v Setlogelo* 1914 AD 221 @ 227

Charuma Blasting & Earthmoving Services (Pvt) Ltd v Isaac Njainjai & Others SC 137/99.

In any case it is not arguable that Applicant, if Respondent is not interdicted, will not be able to utilise its land the way he deems fit, land he has a clear right to. Applicant does not want Respondent's money.

c) Want of An Alternative Remedy

The relationship between the parties has been contractual. It is common cause that the contract has expired. Whatever alternative remedies were contained in that contract are no longer applicable in the present situation. There is simply no alternative remedy available to the Applicant.

THE JOINT VENTURE

It is common cause that the MOU came about with the clear intention to sign a JV. It is also common cause that no JV was signed at the expiry of the MOU. The relationship between the parties was birthed and regulated by the MOU. The Respondent argued that the life of the MOU did not match the investment made. That might be so but all there is that the Respondent signed the MOU and made the investments in question. He may have signed a bad deal and that is not unusual. That is what the freedom to contract in essence entails. The court cannot revise or revive the parties, MOU. A JV could only come to be and operational if drawn and signed on or before 31 December 2020 as stated in the MOU. Nothing of that sort was done. No JV was created and none therefore can be said to exist. After all an MOU is a non-binding agreement that states each party's intention to take action, conduct a business transaction or form a new partnership.

Having established the requirements for a final interdict in the first place and considering the above status of the relationship of the parties I granted the application on the following terms.

IT IS HEREBY ORDERED THAT:

1. The Respondent and all its agents be and are hereby interdicted from carrying out farming activities on Applicant's farm being Lot 1 of Wallacedale farm, Odzi- Mutare.
2. The Respondent and all its agents be and are ordered not to interfere in any way with Applicant's farming activities at the farm named in (1) above.
3. The Respondent and all its agents are barred from entering into the Applicant's farm and interdicted from using and taking/ removing any farming equipment from Applicant's farm.
4. The Respondent pays costs of this application

Mangezi Nleya & Partners, Applicant's legal practitioners
Khupe & Chijara Law Chambers, Respondent's legal practitioners