

FELIX PAMBUKANI
versus
GARDNER MAGANDE
and
MINISTER OF LANDS, AGRICULTURE, RURAL SETTLEMENT,
FISHERIES AND WATER
and
THE COMMISSIONER GENERAL OF THE ZIMBABWE REPUBLIC
POLICE N.O

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 20 September 2021

Urgent Chamber Application

TL Mapuranga, for the applicant
L Uriri, for the 1st respondent
T Mutomba, for the 2nd and 3rd respondents

CHIKOWERO J: This is an urgent chamber application for a temporary interdict.

The applicant is a holder of an offer letter in respect of a farm called subdivision 2 of Wakefield in Chegutu. The farm is approximately 280 hectares in extent.

The first respondent is carrying out farming activities on subdivision 2 of Wakefield. It appears that he is not using the whole farm as the applicant seems to be conducting agricultural activities on some other portion of the same farm.

The third respondent is the Minister of Lands, Agriculture, Rural Settlement, Fisheries and Water. It is him who offered the farm in question to the applicant on 3 November 2008 under Model A2 Phase 11 of the Land Reform and Resettlement Programme. The Minister is sued in his official capacity.

Also cited in his official capacity, as head of the Police Service, is the Commissioner General of the Zimbabwe Republic Police. He is the third respondent.

The final relief sought is this:

- That the applicant be and is declared holder of valid rights to agricultural land in respect of Subdivision 2 of Wakefield in Chegutu District of Mashonaland West Province.
- That the 1st respondent shall bear costs of this application on the higher scale of attorney and client.

In the interim, the applicant seeks the following interim relief:

1. The 1st respondent, his agents and all those claiming through him be and is hereby interdicted from visiting subdivision 2 of Wakefield in Chegutu District of Mashonaland West Province without applicant's prior authority and approval.
2. The 1st respondent be and is hereby interdicted from carrying out any fresh farming activities on Subdivision 2 of Wakefield in Chegutu District of Mashonaland West Province.

The applicant, in his founding affidavit, says this. He engaged in no less than four legal battles, stretching back to 2009, to evict the former white farmer who was in occupation of Subdivision 2 of Wakefield. While those matters moved through the courts, that farmer was busy vandalizing infrastructure on the land. However, after successfully evicting the white farmer, the applicant resuscitated the infrastructure, including the irrigation equipment, using his own financial resources.

The turnaround drew the attention of the first respondent who then partnered the applicant's sons in tobacco farming. However, due to the first respondent's craftiness, the partnership was dissolved during the 2020-2021 harvesting season. The applicant proceeded to advise the first respondent to stop any further agricultural activities on the farm since the partnership had come to an end.

This notwithstanding, the first respondent, during one night in June 2021, utilized an unknown number of tractors to plough on and thereafter planted over one hundred hectares of wheat on the farm. Out of courtesy for the second respondent, who had provided the inputs under what is commonly referred to as the Command Agriculture Scheme, the applicant acquiesced in the first respondent remaining on the farm but only for the purpose of tending and harvesting the wheat crop.

The drama, so to speak, was still unfolding. On 1 September 2021 the applicant received certain information from one of his farm workers. It was to this effect. The first respondent had appeared at the farm in the company of uniformed, armed police details and soldiers. They threatened to first of all “deal” with the applicant’s workers before turning their ire on the applicant himself.

In para 18 of the founding affidavit, the applicant says:

“I did not take this threat to my peace and property rights lightly therefore I approached the people that were in the company of the 1st respondent in order to understand what they were doing in my farm” (the underlining is mine).

The applicant says that before he could approach the first respondent, the police details and the soldiers a short man clad in civilian attire, who identified himself as Mukorovi, met up with him. Mukorovi said he was an officer from the Police’s Very Important Persons Protection Unit and that the soldiers and police details were on a special operation on the farm.

Since the group bore firearms, the applicant decided not to seek any explanation from the first respondent and his companions. What worried him was that a commuter omnibus was the group’ means of transport, not an official police motor vehicle.

On checking with the Selous Police Station on 2 September 2021, the applicant was told that no Very Important Persons Protection operation was conducted at his farm.

Having received this insight, the applicant took the view that the first respondent had taken his craftiness a notch higher by corruptly abusing state machinery to further an unknown agenda.

The applicant, his family and workers are now living in fear. They do not know where the first respondent procured the services of the armed group who issued threats at Subdivision 2 of Wakefield on 1 September 2021. The applicant thus approached the court through the urgent chamber book. He wants the court to intervene by restricting the first respondent’s agricultural operations on the farm pending the harvesting of the winter crop.

The applicant says his safety and privacy are guaranteed only through a restriction of the first respondent’s actions pending harvesting of the winter crop. To avoid the need for a future approach to the court for another temporary interdict after the wheat harvesting season, the applicant is also praying for a temporary interdict barring the first respondent from commencing any fresh farming activities on subdivision 2 of Wakefield.

To forestall the corrupt takeover of his farm by the first respondent, the applicant shall, on the return date, pray for a declaratory order that he is the holder of rights over the farm in question.

To set the stage for a disposition of this application, it is necessary that I allow the applicant to speak for himself. This he does in para (s) 30 and 31 of the founding affidavit:

“30. The need to act arose on the 2nd of September 2021 when I learnt that the 1st respondent had caused his cohorts to put up a bogus VIP Protect Unit operation and I have not wasted this court's time in seeking an interdict since I have a *prima facie* right to restrict entrance into my farm. I submit I have not been a sluggard but have taken immediate action to seek a legal remedy.

31. Given the history, of the 1st respondent's adamant character and craftiness even of interfering the security forces, I have no alternative at law but seek an interdict from this honourable court.”(all underlining is mine)

In his opposing affidavit, the first respondent said the following. He entered into a verbal lease agreement with the applicant. The lease expires at the end of May 2022. Until then, he has no intentions whatsoever to vacate Subdivision 2 of Wakefield.

If the applicant considers that his offer letter entitles him to some relief which excludes the first respondent from the farm before the end of May 2022, then this urgent chamber application for a temporary interdict is not the appropriate process for that relief. The applicant must follow the proper cause.

The first respondent says he cannot be interdicted from visiting the farm since his right of access thereto is derived from his lease agreement with the applicant. The lease agreement has not been terminated.

As for the events of 1 September 2021, the first respondent says the visit was pursuant to a call that he received on 13 August 2021 from a Mr Timire who said he was from the Office of the President and Cabinet, asking the first respondent to host the Princess of SaoTome and Principe at the farm on 2 September 2021, after her tour of the first respondent's wheat field. The group that appeared at the farm on 1 September 2021 was the advance party. The tour by the Princess was cancelled as she was no longer visiting this country.

In the answering affidavit, the applicant took the view that the first respondent's narration about the Princess' supposed tour of the wheat field at the farm was a fairy-tale. The applicant maintained that the first respondent had sought to intimidate him by bringing armed persons to the farm. All that the applicant needed, pending the first respondent's vacation of the farm after the

harvesting of the 2021 winter wheat, was protection. This comes out clearly from para (s) 15, 16 and 17 of the answering affidavit:

“...the real issue is clear according to the papers that on the 1st of September 2021 the 1st respondent brought armed members of the security force whose business had not been sanctioned by any government office the security forces of which threatened my peace and that of my employees. I verified with Selous Police that there was no such VIP Protection sanctioned operation and this caused me to approach this court for protection.

16. I have not minced my words about my attitude towards the 1st respondent forcefully continued farming on my farm and have stated that the agreed position adopted out of respect is that he must wind up his winter wheat operations and leave. Meanwhile I need protection in order to regain that sense of security on my farm since I continually live in fear. I cannot fathom co-existing with the first respondent who has clearly showed this court that he is a dishonest character and will not stop his craftiness.

I am simply praying for protection through restricted access and that the respondent winds up his operations and commence no other. I have already demonstrated that the first respondent is not being truthful about any leasing, I do not have any lease agreement with him as alleged. The first respondent must just do the honourable thing and leave my farm upon harvesting his wheat.” (underlining is mine for emphasis)

The second respondent neither filed opposing papers nor made any submissions at the hearing. The third respondent filed a notice of opposition to which it attached two affidavits. The first was headed “3RD RESPONDENT’S OPPOSING AFFIDAVIT”. Therein the third respondent did not oppose the application at all. He made certain factual pronouncements on the events of 1 September 2021 at subdivision 2 of Wakefield. These pronouncements were mirrored in the supporting affidavit of the Acting Officer Commanding Police Protection Unit who, however, prayed for dismissal of the application.

I have disregarded the contents of the third respondent’s affidavit in determining this application. I do so because it is not an opposing affidavit at all. I have disregarded also the supporting affidavit already mentioned. It has no life of its own outside the third respondent’s affidavit.

In any event, Mr *Mutomba*, who appeared for the second and third respondents did not present argument before me. He said the second and third respondents did not oppose the application. All they would do is abide the decision of the court.

In argument, Mr *Mapuranga* urged me to find that the applicant had established a prima facie right, though open to doubt. He submitted that the rights being enforced were two-fold. The

first was the right to personal security as enshrined in s 52(a) of the Constitution of Zimbabwe, 2013.

The first respondent had appeared at the farm in question in the company of armed persons. At the first respondent's behest, they threatened and disturbed the peace thereby creating the real apprehension that the applicant, his family and employees were in danger. There exists real fear that the first respondent may do it again. This is the case for the applicant.

The *prima facie* case is made in that the first respondent does not deny that he attended at the farm on 1 September 2021 in the circumstances set out by the applicant. What the first respondent denied is that this was a bogus operation. Counsel made reference to the contents of the third respondent's supposedly opposing papers. I have already stated why I have excluded that evidence in determining this application.

Mr *Mapuranga* submitted that the second right which is under threat is the applicant's right to use and enjoy the land in question. This right derives from the offer letter issued to the applicant by the second respondent. The first respondent's activities threaten the applicant's right to use and occupy the land in question.

According to counsel, the critical issue is that the first respondent should stop the threatening activities similar to those of 1 September 2021. I was referred to *Sjambok and Another v Chinyama and Another* HH-118-15.

Mr *Uriri* urged the court to ask itself what really is the issue between the parties. It was common cause that the applicant is the holder of the offer letter. It also was common cause that the first respondent was occupying and using the farm in question. But the first respondent was not on the farm uninvited. His version is that he is in lawful occupation and use through a lease agreement which will expire at the end of May 2022. The applicant's version is a denial of such a lease. Instead, the applicant says the first respondent is using and occupying the farm at the pleasure of the applicant, but that he should vacate on harvesting the winter wheat crop. This is so because the first respondent's partnership with the applicant's sons was dissolved. With that, the first respondent's right to occupy and use the farm was extinguished.

Mr *Uriri* argued that it was unnecessary for this court to decide whether the first respondent is in occupation through a lease agreement or whether he had been in a partnership with the applicant's sons and, if so, whether such partnership was dissolved. The correct process for the

remedy required by the applicant is not an interdict. A lease agreement is not terminated through an interdict. A lease agreement is terminated through a notice issued to the first respondent by the applicant. If the first respondent refuses to vacate, then the applicant could issue process for ejection. An interdict is not a process for creating substantive rights.

Mr *Mapuranga*'s response was to make an oral application to amend the draft order by the deletion of para 2 of the interim relief sought. The application was not opposed. I granted it.

Herbstein and Van Winsen in "*The Civil Practice of the High Courts of South Africa*" 5th ed. at pp 1456-1457 set out the requirements of a temporary interdict as follows:

- “(a) the right that forms the subject matter of the main action and that the applicant seeks to protect should be *prima facie* established, even though open to some doubt.
- (b) A well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing the right.
- (c) The balance of convenience favours the granting of interim relief; and
- (d) The applicant has no other satisfactory remedy.”

In addition, the court has a discretion in deciding whether to grant the relief of a temporary interdict. This is the law in this country. It is settled.

I consider that the applicant has failed at the very first hurdle. It is true that the applicant is the holder of an offer letter in respect of subdivision 2 of Wakefield. He, thus, has the right to use and occupy the farm. But that cannot mean, when it comes to the first respondent, that the applicant has, in the words of para 30 of the founding affidavit:

“... a *prima facie* right to restrict entrance into my farm.”

It is common cause that the first respondent has a wheat crop on that farm. There is a dispute, which is not even the subject of this application, whether the first respondent is occupying and using the farm on the basis of a verbal lease agreement which will run out at the end of May 2022 or his right of occupation and use arose from a partnership agreement with the applicant's sons, which partnership was then dissolved.

Without the applicant instituting eviction proceedings against the first respondent which, if defended, will require the court to resolve the dispute that I have referred to above, I do not think there is any basis for this court to rely on the offer letter to find that the applicant has a *prima facie* right, though open to doubt, to restrict the first respondent's visits or access to that farm. He is already occupying the farm. That is the issue that the applicant should deal with. That is done through eviction proceedings. The present application is not such a proceeding.

The applicant wants this court to interdict the first respondent from visiting the farm in question without the former's prior authority and approval. I am not satisfied that there is a legal basis for such an order. This court is not being called upon to determine the legal validity or otherwise of the first respondent's use and occupation of the land in question. In my view, it necessarily follows that the court cannot grant a temporary interdict barring the first respondent from visiting the farm in question. After all, the first respondent is saying he does not need the prior authority and approval of the applicant to occupy and use the farm post 3 September 2021, when the application was filed, because he is already lawfully on the land in question. Without that issue being determined, in appropriate proceedings, it seems to me that the remedy sought is misplaced.

The remaining paragraph of the interim relief sought does not speak to the applicant's protection at all. A court can only consider granting that which is asked for. It cannot fashion and then grant relief not prayed for. The court is not a litigant.

In my view, since the applicant is saying his peace was threatened, and he is now living in fear of a recurrence and, additionally, the security of his person, then he should have sought a binding over order to keep the peace. An interdict is not a suitable remedy where there is an alternative, satisfactory remedy. Section 388 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] reads in relevant part:

“388 Binding over of persons to keep the peace.

- (1) Where a complaint on oath is made to a magistrate that any person –
 - (a) Is conducting himself violently towards, or is threatening injury to the person or property of another; or
 - (b) Has used language or behaved in a manner towards another likely to provoke a breach of the peace or assault;
whether in a public or private place, the magistrate –
 - (i) May order the person to appear before him; and
 - (ii) If necessary, may cause the person to be arrested and brought before him; and
 - (iii) When that person appears before him shall enquire into the matter.”

In terms of s 388(3)(a) the magistrate, after enquiring into the matter, may then grant a binding over order to keep the peace.

As regards the applicant's right to personal security as entrenched in s 52(a) of the Constitution, I do not think that is an issue at all. There are various subsidiary laws that operationalize that right. Section 388 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is just but one instance of such subsidiary laws.

Overall, my view is that this is a matter which should not have been brought as an urgent chamber application for a temporary interdict at all. It seems to me that the applicant, as an aggrieved litigant, told his legal practitioner what it is that irked him. The applicant had an idea of the kind of relief that he wanted. In the circumstances, the duty then fell on counsel's shoulders to identify the cause of action and to institute the appropriate court process to seek the correct remedy. In my judgment, the wrong cause of action was selected leading to an incorrect remedy being prayed for.

In the result, the following order shall issue:

1. The application be and is dismissed.
2. The applicant shall pay the 1st respondent's costs of suit.

Jarvis Palframen, applicant's legal practitioners
Kossam Ncube and Partners, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd & 3rd respondent's legal practitioners