

**J.C. CONOLLY AND SONS (PVT) LTD**

**Versus**

**R.C. NDHLUKULA**

**And**

**THE OFFICER COMMANDING, MAT SOUTH PROVINCE**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 30 JANUARY & 12 MARCH 2015

*Advocate P. Dube & J. Tshuma* for the applicant  
*S. Mguni* for the 1<sup>st</sup> respondent

Urgent Chamber Application

**TAKUVA J:** On 17 June 2014 applicant obtained a provisional order against the 1<sup>st</sup> respondent and the Minister of Lands and Rural Settlement. The order is in the following terms:

“Pending the return day, the following relief is granted:

1. The 1<sup>st</sup> respondent be and is hereby interdicted and barred from taking occupation of or bringing cattle onto the piece of land namely a farm known as Subdivision A of Centenary, measuring 1304, 5441 hectares situate in the Bulilima District.
2. The 2<sup>nd</sup> respondent is interdicted from taking any steps to evict the applicant from the farm described above.
3. It is hereby declared that until this application is determined on the return day, the applicant and all claiming occupation through it are entitled to remain in peaceful occupation of the farm, and to continue operations on the farm undisturbed.
4. In the event that the 1<sup>st</sup> respondent or any party claiming occupation through him has, by the time of service of this order, taken occupation of the farm, it is ordered that the 1<sup>st</sup> respondent or any such person shall vacate the farm immediately and restore occupation and possession to the applicant.

5. In the event of a party referred to in paragraph 4 above failing to vacate the farm in accordance with this order, the Deputy Sheriff is authorized and directed to evict such party from the farm.

6. Service of this application and provisional order

That the service of this provisional order and application shall be served on the parties as follows:

- a) On the 1<sup>st</sup> respondent at 92C Napier Avenue, Hillside, Bulawayo
- b) On the 2<sup>nd</sup> respondent at Gwanda Ministry of Lands Offices
- c) Applicant's legal practitioners, correspondent legal practitioners or a messenger in their employ are authorized to serve the provisional order and process as stated above."

The facts of this matter are as follows:

The applicant is the owner of a piece of land situate in the district of Bulilima in the Figtree area known as Subdivision A of Centenary. The 1<sup>st</sup> respondent claims to be the holder of an offer letter issued by the Minister of Lands and Rural Resettlement. On 1<sup>st</sup> May 2014, the 1<sup>st</sup> respondent arrived at the farm brandishing an offer letter authored by the 2<sup>nd</sup> respondent and informed the applicant's workers that he would be taking occupation of the farm on the 1<sup>st</sup> of August 2014. Subsequently, on 25<sup>th</sup> May 2014, a person who identified herself as the 1<sup>st</sup> respondent's wife arrived at the farm and announced that she would be taking occupation on the 1<sup>st</sup> June 2014.

The applicant then brought an urgent application for an order interdicting the 1<sup>st</sup> respondent from taking occupation of the farm. Despite being served with the application, the 1<sup>st</sup> respondent did not appear in court leading to the granting of the provisional order referred to above in the form in which it was sought. The provisional order was served on the 1<sup>st</sup> respondent on 27 June 2014 and the 1<sup>st</sup> respondent opposed the application through his legal practitioners of record.

Despite knowledge of the provisional order under case number 1204/14, the 1<sup>st</sup> respondent did not comply with its terms resulting in applicant filing this urgent chamber application against 1<sup>st</sup> respondent on the grounds that he is in contempt of the order of court issued in HC 1204/14 and for an order declaring him to be in contempt and other relief.

The basis of the application is set out in the applicant's founding affidavit deposed to by David John Connolly a director of the applicant. In summary the grounds are as follows:

1. Between the 1<sup>st</sup> August 2014 and the 6<sup>th</sup> August 2014, the 1<sup>st</sup> respondent began to systematically take occupation of the farm, and to evict the applicant's employees and its livestock, the provisional order notwithstanding.
2. On 4 August 2014 a letter was done and addressed to the 1<sup>st</sup> respondent's legal practitioners in the hope that they would advise him to desist from taking occupation of the farm but that did not stop the 1<sup>st</sup> respondent.
3. Earlier, on 1<sup>st</sup> August 2014, the 1<sup>st</sup> respondent, his wife, employees and other persons acting at his behest moved tractors, trailers, ploughs and other implements onto the property.
4. Also the 1<sup>st</sup> respondent brought various household goods, including beds, wardrobes, satellite dishes etc which have been dumped on the verandah of a house occupied by David John Connolly.
5. Further, the employees of the 1<sup>st</sup> respondent rounded up the applicant's cattle and drove them, without the consent of the applicant off the property onto a neighbouring property owned by applicant causing in the process overcrowding extremely detrimental to applicant's pedigree breeding programme.
6. Between the 1<sup>st</sup> and the 6<sup>th</sup> August 2014, the 1<sup>st</sup> respondent ordered the applicant's employees to vacate their accommodation and some left for neighbouring farms resulting in a reduction of the labour force.

The 1<sup>st</sup> respondent opposed the application. In his opposing affidavit he states:

1. No eviction has taken place on the land in question and he has not interfered with applicant's operations.
2. On 1<sup>st</sup> May 2014 he personally approached Mr Connolly and advised him that that portion of the land had been gazetted and offered to him and he therefore wanted to take occupation in terms of the law on the 1<sup>st</sup> of August 2014. He returned on the 1<sup>st</sup> August 2014 to assess the progress as regards "winding up operations".
3. Further 1<sup>st</sup> respondent denied that he had systematically taken occupation of the farm but admitted that he "stationed only 7" of his workers to "monitor applicant's progress in winding up operations". Also 1<sup>st</sup> respondent admitted to have moved farm implements onto the land in question but denied carrying out any farming activity pending the outcome in case number HC 1204/14.
4. First respondent admitted that the "monitoring team" brought household goods to the farm. According to 1<sup>st</sup> respondent, there is nothing amiss with that, since applicant is in unlawful occupation of gazetted state land long after the expiry of the statutory 90 day period.
5. It was denied that the monitoring team was interfering with applicant's operations by evicting applicant's workers from their accommodation.
6. Further, 1<sup>st</sup> respondent stated that the application should have been brought by way of court application on notice rather than by way of chamber book. For that reason, it was said the relief sought is incompetent at law. It was also stated that the application is not urgent in that the alleged interference started between the 1<sup>st</sup> and 6<sup>th</sup> August 2014 yet this application was filed on the 13<sup>th</sup> of August 2014, some 7 days after. Finally, 1<sup>st</sup> respondent contended that there is no financial prejudice that is being suffered by the applicant in that it has been allowed an "extended time to harvest its ripe crop and is delivering same to the market."

The applicant filed an answering affidavit wherein it attached as annexure RA 1 a list of the employees who had been put out of their homes by the 1<sup>st</sup> respondent. Also attached as annexure RA 2 is a bundle of photographs which show amongst other things the following:

1. the wife of one of the 1<sup>st</sup> respondent's workers living in the applicant's irrigation foreman's house;
2. bags of cement brought by the 1<sup>st</sup> respondent and stored between milk tanks in the applicant's dairy;
3. a Massey Ferguson 240 tractor and various other agricultural implements belonging to the 1<sup>st</sup> respondent;
4. a building under construction by the 1<sup>st</sup> respondent; and
5. locks placed by the 1<sup>st</sup> respondent's workers on the doors of staff houses after the eviction of the applicant's workers.

The essentials of contempt of court are the following:

- (i) that the person charged with contempt had knowledge of the court order;
- (ii) that such person was aware of the constraints placed upon him by the court order;
- (iii) that the person disobeyed the court order; and
- (iv) that the disobedience was willful.

See *Wilson v Minister of Defence & Ors* 1999 (1) ZLR 144 (HC); *Scheelite King Mining Co (Pvt) Ltd v Mahachi* 1998 (1) ZLR 173 and *Mudzimu v Municipality of Chinhoyi & Samuriwo* 1986 (1) ZLR 12 (HC)

Further, it is trite that where defiance has been proved, the onus rests on the respondent to show that such defiance was not willful or *mala fide* – see *Lindsay v Lindsay* 1995 (1) ZLR 296 (S); *Macheka v Moyo* 2003 (2) ZLR 49 and *John Strong (Pvt) Ltd v Wachenuka* [2010] ZWHHC 44.

*In casu*, the first two requirements are common cause in that the 1<sup>st</sup> respondent admitted that he was aware of the court order and the constraints placed upon him, by it. In fact, it is not surprising that he readily admitted knowledge of the provisional order. This is so because 1<sup>st</sup> respondent was served with the provisional order through his legal practitioner of record on the 27<sup>th</sup> June 2014.

Secondly, applicant's legal practitioners wrote a letter to the 1<sup>st</sup> respondent's legal practitioners on 4 August 2014 highlighting the existence of the order and requesting the 1<sup>st</sup> respondent to act in accordance with it. Thirdly, 1<sup>st</sup> respondent has opposed the confirmation of the provisional order by filing an opposing affidavit and heads of argument in case number HC 1204/14. This provisional order places 1<sup>st</sup> respondent under various constraints contained in paragraphs 1 to 4. Finally, this order restrained 1<sup>st</sup> respondent from taking occupation of the farm, bringing cattle onto the farm, or evicting the applicant from the farm.

What is in issue is whether or not there was defiance of the court order by 1<sup>st</sup> respondent. Again, it is difficult to understand why the 1<sup>st</sup> respondent contends that there was no defiance in view of the evidence, the bulk of which is common cause. The following conduct has been admitted by the 1<sup>st</sup> respondent during the hearing.

1. that he moved his workers onto the farm who padlocked the residences against re-entry by the applicant's workers – see annexure RA 2.
2. that he moved his farm implements and equipment onto the farm;
3. that he brought household furniture onto the verandah of a residence on the farm (paragraph 8 of the opposing affidavit)
4. that he brought building materials onto and had started building on the farm (annexure RA 2)

In my view, there can be no doubt that these actions carried out after 1<sup>st</sup> respondent became aware of the court order, show that he has indeed acted in defiance of that court order.

Having found that the 1<sup>st</sup> respondent acted in defiance of the constraints placed upon him by an order of court, the next question becomes whether such defiance has been willful. See *Ex parte Mushambi* 1989 (2) ZLR 191 (HC). The onus rests on the 1<sup>st</sup> respondent to show that his disobedience of the court order was not *mala fide*. At this point, it is necessary to closely examine the 1<sup>st</sup> respondent's papers to see whether the onus is discharged. In his opposing affidavit, 1<sup>st</sup> respondent appears more focused on asserting a right on his part, and lack of a right on the part of the applicant.

Put differently, 1<sup>st</sup> respondent feels justified for taking occupation of the farm through his workers and property. These justifications were stated as follows:

- (a) the employees who are on the property are there for the purposes of “monitoring” the applicant. Surprisingly, 1<sup>st</sup> respondent does not state how this sits in accord with an order which debars him from interfering with the applicant’s operations, and from moving onto the farm;
- (b) the household property is for use by the monitoring team. However, it is not stated how this monitoring is in accord and not in discord with the provisional order. More interestingly, however, having denied that he has evicted any employees of the applicant from their accommodation the 1<sup>st</sup> respondent omits to state where this team is presently residing or sleeping;
- (c) implements and equipment have been brought onto the property, but no activities are going on. This however is in blatant contrast with photographic evidence that show that the 1<sup>st</sup> respondent had started building on the farm;
- (d) the 1<sup>st</sup> respondent not only met the applicants’ representatives and the police, who attempted to explain to him the exigencies of the order, but declared to them that he would not be removed by any messenger of the court.

These factors in my view prove that the 1<sup>st</sup> respondent willfully disobeyed the court order. Quite clearly, by putting his employees in the staff quarters and his farm equipment on the farm, 1<sup>st</sup> respondent has effectively taken occupation of the farm which conduct, is specifically prohibited by the provisional order.

It appears from 1<sup>st</sup> respondent’s papers that he is belabouring under a misconception that possession of an offer letter *per se* grants him the right to resort to self help in evicting the previous owner or occupier of gazetted land. Self help is frowned upon by the law because it is inimical to the rule of law. Holders of valid offer letters should follow the specific procedure outlined in the Gazetted Land (Consequential Provisions) Act Chapter 20:28 when seeking to evict previous owners or occupiers of gazetted land.

The spirit of this Act is the provision of a legal frame work that enables due process to ensue where eviction is sought. A key component of this process is that an Eviction Notice is issued in writing by the acquiring authority (that is the Minister of Lands) and not by the beneficiary or holder of an offer letter.

As regards the relief sought, it should be noted that contempt of court is a serious infraction in that it strikes at the heart of the rule of law. Consequently, those found liable must be sufficiently punished.

Accordingly, there shall be an order in the following terms:

1. It is declared that the 1<sup>st</sup> respondent is in contempt of court
2. The 1<sup>st</sup> respondent, together with his employees and all persons occupying through him are ordered to fully comply with the provisional order issued in case number HC 1204/14 and shall do so by fully vacating the farm known as Subdivision A of Centenary, measuring 1304,5441 hectares, situate in the Bulilima District, and removing all livestock and movable assets, within 48 hours of service, upon the 1<sup>st</sup> respondent of this order;
3. Any person and or property remaining upon the property in defiance of paragraph 2 shall be evicted by the Sheriff of this court.
4. The second respondent shall provide an escort and any physical assistance necessary to the Sheriff during service and execution of this order;
5. The 1<sup>st</sup> respondent be and is hereby sentenced to 90 days imprisonment suspended on condition that he complies fully with this order and the provisional order in case number HC 1204/14 within 14 days of the date of this order.
6. The 1<sup>st</sup> respondent shall pay the costs of this application on attorney and client scale.

*Webb, Low & Barry incorporating Ben Baron & Partners*, applicant's legal practitioners  
*Muzvuzvu & Mguni Law Chambers*, 1<sup>st</sup> respondent's legal practitioners