

J.C. CONOLLY AND SONS (PVT) LTD
versus
R. C. NDHLUKULA
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MUSAKWA J
BULAWAYO, 29 January & 28 April 2016

Opposed Application

P. Dube, for the applicant
G. Mlotshwa, for the 1st respondent

MUSAKWA J: This is an application for confirmation of a provisional order that was granted on 17 June 2014. The terms of the provisional order were to the following effect-

“INTERIM RELIEF GRANTED

Pending the return day, the following relief is granted:

1. The 1st 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 1 304, 5441 hectares situate in the Bulilima District.
2. The 2nd 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 1st 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 1st 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.”

The order that is being sought to be confirmed, after amendment reads as follows-

“1. The provisional order issued by this court on the 17th June 2014 be and is hereby confirmed in the following terms:

1. 1.1 The 1st respondent and all persons claiming occupation through him be and are hereby interdicted from taking occupation of, or bringing cattle onto the piece of land namely a farm known as Subdivision A of centenary, measuring 1 304, 5441 hectares situate in the Bulilima District until such time as the applicant and all claiming occupation through it have been removed by order of a court of competent jurisdiction.
- 1.2 The 1st respondent and all persons claiming occupation through him be and hereby directed to remove any and all cattle and belongings that may have been brought onto, or remain on, the said farm forthwith.
- 1.3 The 1st respondent and all persons claiming occupation through him be and are hereby interdicted from interfering with the applicant's business operations on the said farm.
- 1.4 The 1st respondent shall pay the costs of this application.”

The applicant used to own Subdivision A of centenary in Bulilima District. The land was compulsorily acquired in 2000. It now vests in the second respondent. The first respondent was issued with an offer letter in respect of the piece of land. It is contended by the applicant that it has invested heavily on the land. The urgent chamber application giving rise to the provisional order was premised on doubts regarding the authenticity of the offer letter issued to the first respondent. Thus the applicant had initially sought the nullification of the offer letter on the return day. It is now conceded that the offer letter was properly issued to the first respondent, hence the amendment to the draft order. In making the concession, Ms *Dube* for the applicant submitted that the applicant initially had an imperfect knowledge of the compulsory acquisition of the farm.

At the commencement of the hearing, counsel for the applicant pointed out that the second respondent was not properly before the court. This is because, following the granting of the provisional order, no opposing papers were filed on behalf of the second respondent. Mr *Mukucha* who appeared for the second respondent initially claimed that the notice of set-down they received for this hearing related to an urgent chamber application. He however, acknowledged that he now realised that the present matter relates to the confirmation of the provisional order. Nonetheless he sought to make submissions on points of law, the basis of which he could not justify. I thus ruled that the second respondent remained barred.

Following the granting of the provisional order, the applicant subsequently sought an order of contempt against the first respondent, which order was granted. The first respondent noted an appeal against the order of contempt and that appeal is yet to be heard.

Ms *Dube* sought as a preliminary point the barring of the first respondent from being heard on the basis that he has not complied with the contempt order. It is common cause that the first respondent noted appeal against the contempt order. Whilst acknowledging the appeal that was noted, Ms *Dube* persisted with the preliminary point on the basis that despite the noting of the appeal, the first respondent had still not complied with the provisional order. Since the preliminary point is allied to the final relief sought I directed Ms *Dube* to proceed to address me on the merits.

Ms *Dube* submitted that since the compulsory acquisition of the farm in 2000 the applicant has been in peaceful and undisturbed possession. During that period the applicant has been utilising the land. State officials have visited the land and encouraged the applicant to continue with its operations. As a result the applicant has made substantial investments including a finance scheme with Dairiboard Zimbabwe (Limited).

Ms *Dube* further submitted that the order being sought is for the first respondent to follow due process in settling on the farm. In this context, due process entails the eviction of the applicant following a court order in which it was found that the first respondent is in unlawful occupation of the farm. Thus he cannot summarily evict the applicant. A legal finding that the applicant is in unlawful occupation of the farm has not been made. In placing reliance on the cases of *Harland Brothers and Another v The Minister of Lands and Rural Resettlement* HH-6-10 and *Commercial Farmers Union and Others v Minister of Lands and Others* 2010 (2) ZLR 576 (S). Ms *Dube* further submitted that these authorities highlight that beneficiaries of offer letters must not resort to self-help if they want to occupy land offered to them.

On the issue of visits by state officials, Ms *Dube* submitted that such visits were made by the deputy Minister of Agriculture. Thus this overt encouragement dilutes the element of unlawfulness. There is the element of legitimate expectation.

Mr *Mlotshwa* took issue with applicant's counsel's reference to spoliation. He thus submitted that what is before the court is an application for confirmation of a provisional order for an interdict. He made reference to the amended draft order. Thus he submitted that the applicant has to overcome the hurdle of establishing a clear right to the land. Reference was made to the first respondent's heads of argument dealing with the requirements for an interdict.

Mr *Mlotshwa* further submitted that the applicant's case is not distinguishable from similar cases where litigants sought similar relief. This is particularly so where the applicant has conceded the lawfulness of the acquisition and the validity of the offer letter issued to the first respondent.

The requirements for a final interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy. In this respect see *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent and Another* 2000 (1) ZLR 234 (HC) and *SetlogelovSetlogelo* 1914 AD 221. Commenting on the element of clear right, BARTLETT J in *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent and Another* supra had this to say at 239-

“The reference to a clear right in respect of a final interdict, as opposed to a prima facie right in regard to a temporary interdict, means no more than a clear right must be established on a balance of probabilities. See *Aussenkehr Farms (Pty) Ltd v Walvis Bay Municipality* 1996 (1) SA 180 (C) at 188F-G; Silberberg & Schoeman *The Law of Property* 3 ed at 146.”

Although the applicant was granted spoliatory relief in the interim order, what is being sought now is an interdict. The issue is what right the applicant is seeking to safeguard. In other words, does the applicant have a clear right of occupation of the farm in question?

The starting point is that the applicant is already in breach of s 3 (1) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] which provides that-

“Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.”

Lawful authority is defined as –

““lawful authority” means—

(a) an offer letter; or

(b) a permit; or

(c) a land settlement lease;

and “lawfully authorised” shall be construed accordingly;”

Apart from the above provisions, s 3 (3) criminalises the unlawful occupation of gazetted land. I am mindful that there has been no mention of whether the applicant has been charged for unlawful occupation of the disputed farm. Regardless of whether criminal charges have been preferred, it is not in dispute that the applicant is in breach of the law as it remains in occupation of the farm without lawful authority.

In *Commercial Farmers Union and Others v Minister of Lands and Others* supra it was held that the Constitution vests all rights of former occupiers of gazetted land in the State. Although it is clear that the final order sought is not one of spoliation that aspect was again canvassed in *Commercial Farmers Union and Others v Minister of Lands and Others* supra in which at 594 CHIDYAUSIKU CJ had this to say-

“It was submitted that the orders were issued in spoliation proceedings. Spoliation proceedings cannot confer jurisdiction where none exists. A court of law has no jurisdiction to authorise the commission of a criminal offence. In any event, spoliation is a common law remedy which cannot override the will of Parliament. A common law remedy cannot render nugatory an Act of Parliament.

Apart from this, there is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe (Private) Limited v Minister of State for Information and Publicity and Others* 2005 (1) ZLR 222 (S). Indeed if this point had been raised as a preliminary point, the probabilities are that this application would have been dismissed on that point alone. A former owner who is in occupation of acquired land in open defiance of the law cannot approach the courts for assistance.”

Similar sentiments were expressed in *Airfield Investments (Pvt) Ltd v Minister of Lands and Others* 2004 (1) ZLR 511 (S) which is referred to in the first respondent's heads of argument. In light of the above case authorities and relevant legislation, I found applicant's counsel's preliminary point of seeking that the first respondent be denied audience to be untenable. The applicant has no legal right to the land in question. That means the element of a clear right as a requirement for the interdict has not been met. It matters not that the applicant has received covert encouragement from government officials. It was duplicitous of those government officials to have given the applicant such false hope without ensuring it is issued with a legal permit to remain on the land.

In the final analysis, the provisional order is hereby discharged with costs.

Webb, Low & Barry, applicant's legal practitioners
G N Mlotshwa and Company, 1st respondent's legal practitioners