CHRISTOPHER HARLY BRACE MACQUIRE
and
TWAIROB INVESTMENTS (PVT) LIMITED
versus
MUNYARADZI TICHAONA
and
BERNARD MAHARA MUTANGA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 1 August, 2013

G.N. Mlotshwa, for applicant
S. Takawira, for the 1st respondent
T.C. Masara, for the 2nd respondent

MANGOTA J: The first applicant and the second respondent have a long standing dispute between them. The dispute centres on the control and ownership of the second applicant. Each one of them claims that it is a director of the second applicant.

In an effort to make the court appreciate the nature and extent of the dispute, the first applicant attached to its founding affidavit Annexure A. The annexure is a judgment of this court. Its contents indicate that the first applicant, its brother Phillip Michael Bathorp Macquire and the second respondent all claim shareholding in the second applicant. Indeed, the second respondent informed the court that it was the shareholder and director of the second applicant. It made an effort to show that the first applicant and its brother Phillip Michael Bathorp Macquire had fraudulently made themselves directors of the second applicant as a result of which they were tried, convicted and sentenced therefor. The conviction and sentence, it stated, still stand against them.

The issue of the claim of ownership, control and directorship of the second applicant is not the business of this court. That issue is the subject of pending litigation between the parties.

It is, however, common cause that the second applicant is the owner of a piece of immovable property which is known as the remainder of Gurlyn Barton A or Makomo Farm. The farm is approximately 30 hectares in extent. On the farm in question is what has been referred to as stand number 19 of the Remainder of Gurlyn Barton A. That portion of the farm measures 30 615 square metres. The first applicant and members of its family do occupy

and stay in a house which is on stand number 19. The first applicant stated, in its founding affidavit, that members of its family and itself have been in quiet and undisturbed occupation, as well as possession, of the house which is situated on stand number 19 from 2009 to the afternoon of 23 July 2013 when the first respondent came to leave some household effects in the verandah of the house. This, according to it, disturbed its quiet possession, enjoyment and use of the house as well as its surroundings which are within the precincts of stand umber 19.

A reading of the papers filed of record together with the submissions of counsel tends to suggest that the real protagonists to this case are the first applicant and the first respondent. The second applicant and the second respondent appear to be remotely connected to the present application. The first applicant, it would appear, was labouring under a genuine but probably mistaken view when it stated, in its founding affidavit, that the first respondent was acting under the direction and control of the second respondent. Counsel for the second respondent, in fact, submitted that his client was wrongly joined to the application. He stated that the second respondent was nowhere near the house which the first applicant and its family are in occupation of on 23 July, 2013. The contents of the opposing affidavit of the second respondent are to an effect which is similar to the submissions of its counsel on this matter.

The first applicant stated, in its founding affidavit, that at about 2 p.m of 23 July, 2013 the first respondent drove through the gate which leads to the house it is in occupation of on stand number 19, offloaded household furniture from the motor vehicle and left that furniture in the verandah of the house. It stated that the furniture comprised: beds, stoves, deep freeze, fridge, lounge suits and other paraphernalia.

The first respondent's act of leaving furniture in the verandah of the house which the first applicant is in occupation of prompted the latter to file this application with the court on an urgent basis. The first applicant seeks spoliation relief and a declaratory order which is to the effect that the conduct of the first respondent in the mentioned regard is unlawful.

The first respondent did not deny that it drove to the house which is on stand number 19 or that it left household effects in the verandah of the house. It confirmed the assertions of the first applicant to have been the true and correct position of the matter. It stated, in para 7 of its opposing affidavit, on that aspect of the case, as follows:-

> "…. The first applicant succinctly sets out the prevailing position. For the past ten months we have been utilising the property with the consent of the first applicant who has not protested in any manner. We did not evict him from the property but simply

sought to do what we have always done, bringing movable property and utilising the land ….."

It is noted that the first respondent's abovementioned conduct was embarked upon by it a day after the Supreme Court's ruling of 22 July, 2013 against the first applicant and others. These had unsuccessfully applied to this court, in another matter, for an interdict to be placed against the second respondent and others. When they lost in the court *a quo*, they filed an appeal with the Supreme Court which, unfortunately for them, also ruled against them on the basis that the appeal was not properly before that court because leave to appeal had not been sought from the court *a quo.* Their appeal was, accordingly, dismissed on a procedural technicality which they had overlooked and not on the merits.

The dismissal of the appeal, in the court's view, propelled the first respondent to go and leave household furniture in the verandah of the house which the first applicant and its family members are in occupation of. It did that, so it claimed, in its capacity as the projects manager of the second applicant. To the extent of its claim as read together with the second respondent's claim which is to the effect that the latter is a director of the second applicant, a *nexus* between the two seems to emerge. This observed set of circumstances raises some fundamental questions as regards the fact of whether, or not:-

- the first respondent was acting on its own accord when it went and left the furniture in the verandah of the house; - and/or
- the first respondent was acting under the direction and/or control of the second respondent when it left the furniture in verandah of the house.

It is, in the court's view, inconceivable that the first respondent would have conducted itself in the manner which it did without the knowledge, consent, acquiescence and/or direction of the second respondent. The second applicant is a legal *persona* who can only act, speak, see and perform lawful as well as unlawful actions through such natural persons as the first, or the second, respondent or both. Left to itself, it cannot do anything as it is deaf, dump, blind and has no mind of its own. It is, accordingly, for the abovementioned reasons, if for no other, that the first applicant stated, as it did, that the first respondent was acting under the control and direction of the second respondent. Indeed, the first applicant addressed itself in the third person plural in some parts of its opposing affidavit. Such words as were pronounced in the foregoing paragraphs show in a clear and unambiguous way that the first respondent was not acting alone when it went to leave the furniture in the verandah of the house. It was, if anything, acting with someone and that someone is the second

respondent. The court, therefore, finds as a fact that both respondents were involved in the conduct which the first applicant is complaining of.

In its opposition to the application, the first respondent raised four matters *in limine*. The court will deal with those matters each, in turn, as follows:-

(i) The impropriety of the first applicant's legal practitioners certifying certificates which they drafted:

It is not in dispute that the first applicant's legal practitioners, *Julian Sambo* and *Gerald Nqogile Mlotshwa*, respectively signed the certificate of urgency and the certificate which is signed under r 247(2)(b) of the rules of this court. The first respondent argued in an effort to convince the court of the impropriety of such conduct. It, to that end, drew the court's attention to a number of case authorities which, it hoped, would persuade the court to go along with its manner of reasoning on the subject matter. The most relevant of those cases was that of *Chifada* v *Edgars Stores Ltd & Anor*, the citation of which was erroneously given as 2005(1) 301. That case was relevant in that the court made pronouncements on the matter which the first respondent had raised *in limine*. The court did not, however, derive maximum benefit from the case as the wrong citation which had been given made it hard, if not impossible, for the court to get hold of it, let alone read and appreciate the reasoning which went behind the court's judgment in that case.

It remains the court's view that an urgent matter, by its very nature, requires that it be expeditiously dealt with. That matter is expeditiously dealt with when the affidavits which pertain to it are promptly drafted and the necessary certificates which support the affidavits are certified and signed by persons or officials who have the requisite qualification(s) to certify and sign such so that the affidavits and the certificates which are so certified and signed are taken to court with the minimum of delay. The court's views on this point are in sinc with those which were expressed in *Mudekunye & Ors* v *Mudekunye & Ors* 2010(2) ZLR, 226 wherein the court which was dealing with a matter of a similar nature said:-

> "…A certificate of urgency prepared by a legal practitioner representing the client or by a legal practitioner from the same law firm does not, in any way, reduce the court's discretion in determining the question of urgency. If anything, the court is better off with that kind of certificate as opposed to being guided by a legal practitioner from a different law firm who is either not connected with the case or may have been over-whelmed by the voluminous nature of the application and, therefore, ends up blindly preparing or merely signing a certificate of urgency because he has been requested to do so by a fellow legal practitioner ….".

There is, in the court's view, nothing which is improper in a legal practitioner filing a certificate of urgency to certify the urgency of the matter which was being handled by a law firm of which he was, or is, a member. The court will not, in the face of the foregoing reasoning, expunge the two certificates which the first applicant's legal practitioners signed. The certificates will, on the contrary, remain in the record and will, in that case, support the first applicant's side of the matter.

(ii) The second point which the first respondent raised *in limine* was, or is, that which relates to the fact of whether or not the first applicant has *locus standi* to depose to an affidavit on behalf of the second applicant. It was argued by the first respondent that the first applicant does not have the requisite *locus standi.* The court agrees with that assertion of the first respondent. It also agrees with the case authorities which the first respondent cited in support of its argument on the mentioned point. Those cases are, however, relevant where a company director is properly and lawfully appointed as such and not where, as in the present case, the first applicant's directorship in the second applicant is not only a hotly contested issue but is also a matter which has dragged the first applicant before the court where it was tried, convicted and sentenced therefor. The first applicant's statement wherein it stated, in its founding affidavit, that it had the authority of the second applicant to depose to the affidavit on the latter's behalf was, accordingly, misplaced. The second applicant could not, and cannot, clothes it with authority to either speak, or write, or depose to an affidavit for, and on its, behalf given the above-described set of circumstances. The founding affidavit which the first applicant deposed to relates to no one else but the first applicant itself. A reading of the contents of that affidavit confirms the court's observations on this point in a conclusive manner. Those contents show that it was not the second applicant, but the first applicant who, claimed to have been injured by the conduct of the respondents. The first applicant, therefore, deposed to the affidavit in its own right as someone who felt that the conduct of the respondents was injurious to the well-being of its family members and itself. The second applicant did not ever complain to the court, or to anyone else for that matter, against the respondents. The first applicant did. The court, on the abovementioned basis, accepts that the affidavit which the first applicant

deposed to and which affidavit relates to it as a natural, as opposed to a legal *persona,* is properly before the court.

(iii) In so far as the third point *in limine* is concerned, the first respondent submitted, in argument that:-

* the first applicant did not comply with r 241 of the rules of this court,
* the rule in question is peremptory – and
* non-compliance with that rule renders the application which the first respondent placed before he court null and void. The argument which the first respondent made in the abovementioned regard is, from a *prima facie* perspective, valid. The first respondent, however, continued with its argument and stated that what appeared in the application was a truncated version of form 29B. It is the court's view, therefore, that those who drafted the rules of this court remained alive to the fact that, in some cases, parties who prepare and place matters before the courts may overlook this, or that, matter for one reason or the other as a result of which the courts would penalise them on the basis of some technicality even in situations where their cases are, on the face of it, unassailable on the merits. The drafters of the rules, therefore, refused to tie the courts' hands but to allow them, in some cases, a leeway which would enable them to dispense real and substantial justice. They, to that extent, availed to the courts r 4c of the rules of this court as a safety measure which courts can employ in the interest of justice. The court remains of the view that the interests of justice would best be served if the court, on the basis of the mentioned rule, refuses to be bogged down with technicalities the peremptory nature of r 241 notwithstanding. The court maintains this position of the matter on the point in issue particularly if regard is had to the merits as measured against the demerits of the application which is before it.

(iv) The fourth and last point which the first respondent raised *in limine* is that which relates to the issue of urgency. The first respondent's contention on this point was, or is, that:

* the application which is before the court is not urgent – and

* the first applicant's conduct did not, or does not, show that it treated the matter as an urgent one.

There is no hard and fast rule which governs the issue of whether, or not, a matter is urgent. Each case depends on its own circumstances. The court is satisfied that the matter which is before it is not only urgent but has also been treated as such by the first applicant. Its urgency centres on the fact that if the matter is not treated with the urgency that it deserves, the parties who are involved in the present wrangle would resort to the law of the jungle. The ripple effect of this is that such parties would disturb the peace which should prevail between them as well as that of other persons in the process. That would, not unnaturally, lead to disharmony and the disruption of law and order in society as well as the attendant increase of unnecessary workload for all law enforcement agents and the courts. It is the court's view that the first applicant treated the present matter with the urgency which it deserved. The Supreme Court ruling which propelled the first respondent to go and leave the household effects on the verandah of the house which the first applicant was occupying was handed down on 22 July, 2013. The first respondent went to the first applicant's home on the afternoon of 23 July, 2013. The first applicant's initial reaction was to report the first respondent's conduct to the police. These processed the matter from the afternoon, to the night, of the day of the incident. They ordered the first respondent to have vacated, or removed the household effects from the verandah of, the house upon, or before 10 a.m of 24 July, 2013. The first applicant left the police station at 10 p.m of the day of the incident. When it did so, it remained hopeful that the first respondent would comply with the order which the police had issued to it. The first respondent stayed put and, when that happened, the first applicant wasted no further time. It approached, and filed this present application with, the court on 25 July, 2013. Surely, it cannot be suggested that the first applicant did not treat the matter with the urgency that it deserved. It, if anything, dealt with that matter as expeditiously as was reasonably possible under the circumstances.

Having disposed of the issues which the first respondent had raised *in limine,* the court proceeds to deal with the matter which constitutes the basis of this present application. The first applicant stated that members of its family and itself had been in quiet and undisturbed possession as well as occupation of the house which is on stand number 19 from 2009 to the afternoon of 23 July, 2013. It stated, further, that the afternoon of 23 July, 2013 was the first incident where, according to it, the second respondent had launched a full frontal

assault on the residence in an attempt, it surmised, to drive its family members and itself out of the house.

The first respondent made every effort to convince the court that the 23rd July 2013 was not the first time that it and others whom it did not mention had placed their movable property on the remainder of Gurlyn Barton A or Makomo Farm. Its assertion in the mentioned regard was confirmed by the first applicant. The latter stated that, prior to 23 July 2013, the respondents had confined themselves to dumping bricks or abusing boreholes (selling water) on other stands on the 30 hectare property. It said the spot where the respondents carried out the above activities was far removed from the house which it was, or is, occupying. It informed the court that it did not object to the respondents carrying out their activities on stands which were, or are, far away from the house wherein it was, or is, staying. It, however, objected to having the respondents' household effects remaining in the verandah of the house which it is occupying. The question which begs the answer at this point of the proceedings is whether, or not:

- the first applicant's peace, tranquillity, possession and occupation of the house was interrupted, or disturbed by the conduct of the respondents and/or
- the presence of the respondents and the activities which they were carrying out on stands which were far removed from stand number 19, the house which the first applicant occupies in particular, amounted to acquiescence on the part of the first applicant vis-à-vis the respondents' conduct.

Silberberg and Schoeman provide a clear and succinct answer to the abovementioned question. The learned authors state in "The Law of Property", 3rd ed, pp 139-140 that:-

> "…A possessor need not have been dispossessed of the whole thing before he is entitled to claim a spoliation order. Even where he has been deprived of possession of only a part thereof, he is entitled to this relief".

There is no doubt that the first applicant was despoiled of stand number 19. Its peace, tranquillity, possession and occupation of stand number 19 were disturbed in a most reprehensible manner by the respondents. These took the law into their own hands when they should not have done so at all. The courts do not take kindly to persons who, with the necessary intent, resolve to break the law as the respondents did. Self-help actions cause disorder and they should be sanctioned in a more pronounced manner than otherwise by the courts. Such conduct is a recipe for serious disaster which courts are enjoined to curb in a very effective way. Persons who are desirous of asserting their rights are encouraged to do so

through due process of the law and not through such conduct as the respondents exhibited in the instant case. It goes without saying, therefore, that the parties to this matter should be made to revert to their status *quo ante*. They should maintain peace between them pending finalisation of the case which relates to the ownership, directorship and control of the second applicant.

The first applicant, in the court's considered view, has shown, on a balance of probabilities, that:

- it was in peaceful occupation and possession of stand number 19, the house which is on that stand in particular – and
- the possession, or occupation thereof was unlawfully interrupted or seriously disturbed by the respondents.

The first applicant's application, accordingly, succeeds with costs.

G.N. Mlotshwa & Co, applicant's legal practitioners
Govere Law Chambers, 1st respondent's legal practitioners
V.S. Nyanguly & Associates, 2nd respondent's legal practitioners