

BRIGHT ZIYANGA
versus
TIAN ZE TOBACCO (PVT) LIMITED
and
NORTHERN TOBACCO (PVT) LIMITED
and
ALAGONIA FARMING (PVT) LIMITED
and
ALESTER ZIYANGA
and
MIRIAM ZIYANGA
and
TOBACCO INDUSTRY & MARKETING BOARD

HIGH COURT OF ZIMBABWE
HUNGWE J
HARARE, 11 December 2013

Urgent Chamber Application

A. Chambati, for the applicant
T. Magwaliba, for the 2nd respondent
I. Ndudzo, for the 3rd, 4th, & 5th respondent

HUNGWE J. The applicant seeks the grant of a provisional order in the following terms;

“TERMS OF THE INTERIM ORDER GRANTED

1. The order in case number HC 9919/13 be and is hereby stayed pending the hearing of the application for rescission of judgement under case number HC 10247/13.
2. The Registrar be and is hereby ordered to set down the application (for the) rescission of judgement under case number HC 10247/13 as soon as possible.”

The facts leading to the present application may be summarised as follows. Fourth applicant has a farm, Una farm in Hwedza, on which he carries out tobacco farming together with his wife, fifth respondent under the name and style of third respondent. By agreement executed between the parties, third, fourth and fifth respondents contracted to grow 84 ha for second respondent’s exclusive benefit. Second respondent undertook to provide financial support under the agreement. Dispute arose between the four parties which dragged in the relatives of the fourth and fifth respondents. During efforts to amicably resolve the dispute

between the parties, the name of another contractor for tobacco farming, first respondent, featured prominently. Second respondent made enquiries with first respondent as to the extent of first respondent's involvement in the dispute between second respondent and its growers indicating that it had been advised that should the dispute spill into the courts legal advice at hand indicated that first respondent would have to be joined in the fray. The basis for this seemed to have been a growing realisation of certain claims by applicant to part of the 84ha of tobacco on Una farm. First respondent indicated that as far as it understood the facts, the dispute did not in any way involve it. Eventually, second respondent filed an urgent court application seeking a provisional order regarding the 84ha of tobacco at Una farm. Second respondent did not join first or applicant in the application filed under HC 0010/13. At the hearing, applicant sought to be joined as an interested party to the proceedings as he claimed that 35ha of the 84ha subject of the application were grown by him for first respondent. There is a dispute as to whether the court ruled on the application for joinder by the present applicant. Applicant says the court reserved its ruling on this point but proceeded to grant the order sought by the second respondent. On the other hand, second respondent says the court dismissed the application for joinder and granted the order it sought. Alternatively, second respondent argues that even if there was no pronouncement on the point by the court, the decision made in those proceedings is not subject to appeal. Applicant is seeking to get by the back door what he failed to obtain in terms of the proceedings in HC 9919/13.

In *Enhanced Communications Network (Pvt) Ltd v Minister of Information, Posts & Telecommunications* 1997 (1) ZLR 342 (HC) this court held that for the grant of a temporary or interim interdict, the requisites are that -

- (1) the right sought to be protected is clear; or
- (2) (a) if it is not clear, it is *prima facie* established, even though open to doubt; and
(b) there is a well-grounded apprehension of irreparable harm if the relief is not granted and the applicant ultimately succeeds in establishing his right;
- (3) the balance of convenience favours the grant of the relief; and
- (4) there be no other satisfactory remedy.

In *LF Boshoff Investments (Ptv) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267 CORBETT J (as he then was) said;

"Where the applicant cannot show a clear right, and more particularly where there are disputes of fact, the court's approach in determining whether the applicant's right is *prima facie* established, though open to some doubt, is to take facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial of the main action."

However the court always has a discretion in an application of this nature.

I must point out that most of the averments by either party are heavily contested by the other. For example, the applicant claimed that the second respondent always knew that applicant has tobacco growing on Una farm which tobacco was sponsored by the first respondent. This, according to the applicant is why second respondent sought legal advice regarding how to proceed with the matter at court. Although the advice was that the second respondent would necessarily have to join first respondent, this advice was ignored thereby creating the present problems for everyone concerned. Second respondent vigorously disputes that this issue was brought to its attention in the manner now framed by the applicant with the support of the first respondent. Second respondent argues that the assurance given by first respondent that the dispute did not involve it gave it good reason to assume that first respondent had no stake in the 84ha of tobacco at Una farm. It expressed surprise by first respondent's sudden change of attitude in this regard. It seems to me that the second respondent may have failed to appreciate the full consequences of disregarding the legal advice given by its legal practitioners to its own detriment. In any event, I doubt whether, even if it had joined the applicant together with the first respondent, it would not have succeeded in obtaining the relief that it eventually obtained in HC 9919/13. The applicant has not established a clear right on the papers. However, I must decide whether he has also failed to establish a *prima facie* right, though that right may be open to some doubt. The applicant contends that the order granted in HC 9919/13 adversely affects his right to property. It was given without him being granted the opportunity to put forward his side of the dispute. Therefore his right to a fair hearing were infringed. This of course is disputed. The point is not whether what applicant says at this stage is true or not but whether, if he establishes his case in the final trial, his right to a fair hearing would have been infringed if the order he seeks is not granted presently. The argument is persuasive. I am inclined to hold that to disregard a party's protest that he was not afforded an opportunity to be heard is constitutes

an infringement to his constitutional right to a fair hearing. Even if this right is not established on the papers, I believe it is *prima facie* established in the averments made.

As to whether there is a well-grounded apprehension of irreparable harm if the relief is not granted and the applicant ultimately succeeds in establishing his right, it is clear to me that on the facts applicant stands to suffer irreparable harm should this court not grant the relief he seeks but he ultimately succeeds in establishing his right to have been joined in the pleadings when the matter is finally determined. In these circumstances the balance of convenience favours the grant of the interim interdict. The order sought however cannot be granted in its form. Applicant seeks an order against the Registrar when he has not made the Registrar a party to these proceedings. He cannot on that basis secure the grant of that order in that respect. In any event there is no factual basis set out in the papers for the grant of such an order. The interim relief he seeks is in my view sufficient to protect his rights pending the final determination of the application he has filed seeking rescission of HC 9919/13.

There are other unsatisfactory features pointed out by Mr *Magwaliba* regarding the form of the draft order. In my view these do not detract from the entitlement to the relief demonstrated by the applicant in this case.

In the result the following interim relief is therefore granted:

“1. Pending the final determination of the application for the rescission of judgment in case number HC 9919/13, the execution of the order in case number HC 9919/13 be and is hereby stayed.”

Chambati & Mataka, applicant's legal practitioners
Mawere & Sibanda, respondent's legal practitioners