

BERNARD MAKIE & 124 OTHERS
versus
CALEDONIA ENTERPRISES (PVT) LTD
and
PADDY TONGAI ZHANDA
and
RINA LEONIE DU TOIT
and
MINISTER OF LANDS AND RURAL RESETTLEMENT
and
MINISTER OF LOCAL GOVERNMENT
And
THE OFFICER-IN-CHARGE, ZRP, MABVUKU
and
THE PROSECUTOR GENERAL
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 4 & 11 November 2015

Urgent Chamber Application

S Hashiti, with him *V Muza*, for the applicants
D Drury, for the 1st, 2nd and 3rd respondents
E Mavuto, for the 7th respondent
No appearance for the 4th, 5th, 6th and 8th respondents

ZHOU J: The urgent application in *casu* was filed on 13 October 2015. It was placed before me on 15 October 2015. Having gone through the papers I came to the conclusion that the matter was not urgent, and accordingly struck it off the roll of urgent matters. The applicant's legal practitioners were advised of my comment and of the fact that the matter had been struck off the roll by the registrar through a letter dated 22 October 2015. By letter dated 26 October 2015 which was delivered to the registrar on the 29th of the same month the applicants' legal practitioners asked to be given an opportunity to address me orally on the question of urgency. On 3 November 2015 I met the parties' legal representatives in chambers in order to agree on a date for oral submissions to be made on the question of urgency. The

parties agreed to return for argument on 4 November 2015.

At the commencement of the hearing on 4 November 2015 Mr *Hashiti* for the applicants conceded that the seventh respondent was not supposed to be joined in the proceedings and that no relief was being sought against him. On that account Mr *Mavuto* was excused from attending the proceedings.

The factual background to the matter is as follows: The applicants are settlers on a farm which is owned by the first respondent which is commonly referred to as Caledonia Farm. It appears that sometime in 2013 the farm was gazetted for acquisition by the Government of Zimbabwe. The applicants allege that the farm was then parcelled out to various organisations for residential stands, including those that are listed in the applicants founding affidavit filed in support of the instant application. The applicants did not receive individual offer letters. They were allocated pieces of land on the farm by the different organisations. The precise circumstances in which the farm was allocated to the various organisations are not apparent from the papers filed. What is accepted as common cause is that in 2014 the Government withdrew the acquisition of the farm and thereby returned it to its original owner. Thereafter there were disputes between the owner of the farm and the applicants. Some of those disputes ended up before this Court. On 13 May 2015 this Court issued a provisional order pursuant to an urgent chamber application filed under Case No HC 4187/15. That order was confirmed on 29 July 2015. It was an application by the first, second and third respondents, in which they cited one *Zvidzai Kawocha* as the first respondent. The Minister of Lands and Rural Resettlement is cited as the second respondent while The Officer in Charge of Mabvuku Police Station is cited as the third respondent. The terms of the provisional order are as follows:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms:-

1. It be and is hereby declared that Caledonia Enterprises (Pvt) Ltd is the lawfully registered owner of a certain piece of land situate in the District of Goromonzi called Lot 1 of Caledonia measuring approximately 297, 4369ha held under Deed of Transfer 8541/96 (hereinafter called “the property”) and that the summary invasion of the property by the first respondent and other persons acting through or in association with him on Tuesday 5 May 2015 and the continued possession, occupation and use of the property by them up until the execution and implementation of the interim relief was unlawful.
2. First respondent pay applicants’ costs of suit on a legal practitioner and client scale.

INTERIM RELIEF GRANTED

That pending the determination of this matter (the) applicants are granted the following relief:

- (a) Applicants and all persons claiming occupation through them be and are hereby restored to free and undisturbed possession, use, occupation and control over Lot 1 of Caledonia measuring approximately 297, 4369 ha held under deed of transfer 8541/96; and
- (b) First respondent and all persons acting in common purpose with or through him are ordered forthwith to remove all chains, locks, obstructions or other kinds of impediments in respect of the permanent improvements on or to the property and failing that the applicants, its agents, representatives or invitees be and are hereby authorised and empowered to do so; and
- (c) First respondent and all other persons acting in common purpose with or through him and/or all other persons who are not the agents, representatives, invitees or employees of the applicants be and are forthwith ordered to vacate the property and in so doing that they remove any movable assets that might have been introduced by them onto the property. Failing their vacation and removal the Sheriff and/or Deputy Sheriff of Zimbabwe be and is hereby authorized and empowered to attend to the eviction of all such persons.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to applicant's legal practitioners or the Sheriff or his Deputy to attend to the service of this order forthwith upon the respondents in accordance with Rules of the High Court."

That order, which was confirmed on 29 July 2015, is the order whose execution the applicants seek to stop through the instant application.

A matter is urgent if it "cannot wait to be resolved through a court application". See *Dilwin Investments (Pvt) Ltd t/a Formscuff v Jopa Engineering Company (Pvt) Ltd* HH 116 – 98, at p. 1; *Pickering v Zimbabwe Newspapers* (1980) Ltd 1991 (1) ZLR 71(H) at 93E. In the case of *Kuvarega v Registrar-General* 1998 (1) ZLR 188(H) at 193F-G, CHATIKOBOJ said:

"What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules."

The applicants were aware of the above provisional order from May 2015 when it was granted. The application in *casu* was instituted on 13 October 2015, some five months after the provisional order was granted. Mr *Hashiti* for the applicants initially sought to argue that the applicants were not aware of the order given in Case Number HC 4187/15 when it was granted in May 2015. When it was pointed out to him that the first respondent in Case No. HC 4187/15 is one of the applicants in the instant matter, and that three other applicants also deposed to affidavits in previous matters seeking to challenge the same order, he submitted that the court should find that the matter is not urgent in respect of those four applicants but

find that the matter is urgent in respect of the other applicants. That is a startling submission when one considers that there is only one application instituted by all the applicants in this matter, and that all the applicants are being represented by one law firm. What is clear, therefore, is that the applicants have waited for five months to bring this application on an urgent basis. Quite clearly, the matter does not meet the requirements for the preferential treatment envisaged by the rules relating to urgent applications.

Even if this Court was to consider, as urged by the applicants, that they only became aware of the judgment in Case No. HC 4187/15 on 14 September 2015 when the Sheriff moved in to evict them, the applicants have not explained their inaction for a period of almost a month up to 13 October when the urgent chamber application was filed. The suggestion that the applicants were negotiating for a whole month or that the evictions had stopped and only resumed after 6 October is clearly not supported by the averments in the founding affidavit. In paragraph 26 (f) the applicants state, inter alia, that:

“The destructions and illegal evictions commenced on the 14th of September 2015 and have been on-going. Some of our members have unsuccessfully approached this court . . . (b) Up to the 6th October 2015, the 6th respondent working under the instructions of 2nd respondent, continued with the evictions, arrests and destruction of our dwelling houses . . .”

From the above, this is an example of a case in which the applicants waited for the day of reckoning. They failed to treat the matter urgently when the need to act arose. It is clear that for many months and weeks the applicants were aware of the judgment and were, in fact, involved in initiatives to stop its enforcement.

In the circumstances, no meaningful submissions have been made to persuade the court to revisit its conclusion that the matter is not urgent.

In the result, the matter must be struck off the roll of urgent matters as directed on 15 October 2015.

Muza & Nyapadi, applicants' legal practitioners
Honey & Blanckenberg, 1st, 2nd and 3rd respondents' legal practitioners