ANDREW JOHN PASCOE
versus
MINISTRY OF LANDS & RURAL RESETTLEMENT
and
W. BUNGU
and
THE ATTORNEY GENERAL N.O

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 5 & 8 June 2017

Urgent Chamber Application

F Mahere, for the applicant
T Mutomba, for the 1st & 3rd respondents
E Samukange, for the 2nd respondent

FOROMA J: This is an urgent chamber application in terms of which the applicant seeks the following relief as set out in the provisional order:-

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. That it be and is hereby declared that the letter of Mr A Tsimba in his capacity as Acting Provincial Resettlement Officer – Mashonaland East Province drawn on the 10 May, 2017 for the Ministry of Lands and Resettlement providing an eviction / vacate date and cessation of possession, occupation, use and all farming activities on Plots 3 and 5 of Ivordale Farm by 30 June, 2017 is null and void and of no force or effect on account that – in its effect and implementation – it violates sections 68 and 69 of the Constitution of Zimbabwe and section 3 of the Administrative Justice Act Chapter 10:28.
2. That it be and is hereby declared that applicant, his agents, representatives, invitees and employees are entitled to the continued possession, occupation and use of the whole of

subdivision 2 of Ivordale in the Goromonzi District of Mashonaland East Province measuring approximately 449.792 ha ("the property") until such time as a final determination has been rendered with regard to applicant's review proceedings and relief in HC 12727/16.

3. That respondents jointly and severally – the one paying the other to be absolved – pay the costs of this suit.

INTERIM RELIEF

Pending the determination of this matter applicant is granted the following relief:-

a) That first and second respondents and all other persons acting through them be and are hereby interdicted from interfering with applicant's farming operations, possession and control of movable and immovable property including livestock on Subdivision 2 of Ivordale in the Goromonzi District of Mashonaland East Province measuring approximately 449.792 ha – as reflected in applicant's offer letter dated 16 July 2014 – incorporating as it does newly depicted Plots "3" and "5" as set out in a subdivision plan drawn by officers in the 1st respondent Ministry and fresh offer letters in favour of 2nd respondent and an unknown person.

b) That it be and is hereby declared that the interim relief granted by his Lorship Mr Justice Chitapi in favour of the applicant on 11 January, 2017 in HC 12511/16 shall continue to apply until such time as a final determination is made by the High Court in regard to the validity of the withdrawal of applicant's offer letter and downsizing of applicant's property.

The application was opposed and was heard before me on 5 June 2017. At the commencement of the hearing Ms *Mahere* who appeared for applicant applied for an amendment of the official heading by deletion of the word Ministry wherever it appeared in reference to first respondent and substituting the word Minister in place thereof in order to correctly bring the first respondent before the court in line with paragraph 3 of the founding affidavit. The reference to Ministry as opposed to Minister was on account of a typing error. Mr *Mutomba* who appeared for the first and third respondents opposed the application to amend on the basis that the

application was a nullity as against the first respondent and thus no amendment as sought could be achieved in order to bring the Minister before the court. I considered the opposition as purely technical in view of the contents of paragraph 3 of the founding affidavit. In any case no actual or potential prejudice was proven or demonstrated as likely to be occasioned by first respondent by reason of the amendment. I accordingly granted the amendment and directed the matter to proceed.

Mr *Mutomba* then raised a point *in limine* in regard to urgency arguing that the matter was not urgent considering that applicant was served the letter complained about on 12 May 2017 and had not done anything until 1 June 2017. He therefore urged that the application be dismissed.

Ms *Mahere* opposed the respondents application for dismissal (on the basis that the matter was not urgent) pointing to the fact that what triggered the urgency was the position conveyed to applicant by the first respondent's representatives at the meeting of 29 May 2017 at the Provincial Minister for Mashonaland East at Marondera, which as recounted in paragraph 29 of applicant's affidavit says 29.

> "They also emphasized that in their view the notice to cease operations constituted an eviction order / notice and that should l fail to cease operations by 30 June 2017, I would be arrested and evicted without further ado and charged under the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. I explained to the Committee that my understanding of the law was that an eviction order had to be issued by a judge or Magistrate in a court of law. I was told in no uncertain terms that my understanding was incorrect and that they stood by their view that the notice to cease operations constituted an eviction sanctioned by law….."

Ms *Mahere* further argued that the threat uttered as contained in paragraph 29 as quoted grounded a reasonable fear of unlawful eviction by the respondents hence the urgent resort to seek interdictory relief pending the determination of the pending application for review per case no. HC 12727/16.

Even though l considered the matter to be urgent I was concerned with the procedure adopted and invited Ms *Mahere* to address the issue i.e. whether the correct procedure *in casu* was an urgent court application as opposed to an urgent chamber application. My concern was based on the fact that applicant had more than one and half months as at 12 May 2017 to 30 June 2017 in the rules of court. Ms *Mahere* did not consider that there was any scope for an urgent court application and brought my attention to Order 32 rule 244 which she considered as

authority for an urgent chamber application until I brought her attention to Rule 223 A. For the avoidance of doubt the rules of this court explicitly provide for urgent court applications and here is how:

Order 32 Rule 232 dealing with the time for opposition to a court application provides as follows – 232 The time within which a respondent in a court application may be required to file a notice of opposition and opposing affidavit shall be not less than ten days exclusive of the day of service plus one day for eve additional 200 km ……..

> "provided that in urgent cases a court application may specify a shorter period for the filing of opposing affidavits if the court on good cause shown agrees to such shorter period"- the underlining is for purpose of emphasis. The court's agreement to a shorter period would obviously be easily obtained if in the certificate of urgency in terms of r 223 A the applicant addresses the issue of the shortened *dies induciae*."

Once an opposing affidavit is filed within the shortened *dies induciae* the matter can be set down in terms of r 223 (2) a) as read with r 238 (i) (a) and (b) which provides for setting down of urgent applications for hearing. Respondent's heads of argument in an urgent court application have to be filed in terms of r 238 2a (ii) which provides as follows;

> " Provided that
> (i)……
> ii) the respondent's heads shall be filed at least five days before the hearing."

There is therefore an obligation for applicant in an urgent court application to afford the respondent at least five days to the hearing for purposes of filing heads of argument as in terms of r 238 (2) (b) a party who fails to file heads of argument in terms of r 238 (2) (a) shall be barred.

It is clear that when diligently applied the rules provide an alternative to the flood gate of urgent chamber applications that this court has to reckon with. I dare say that an urgent court application can easily be disposed of within a period of about 15 working days. Thus a lot of urgent chamber applications are needless avoidance of urgent court applications. In fact l dare say that an urgent application should be made as an urgent court application unless as provided in r 226 (2), the matter is so urgent that it cannot wait to be resolved through an urgent court application. This interpretation to r 226 2 (a) is as consistent with reference to a court application under the said rule.

By its very nature a court application whether urgent or ordinary provides litigants with an equal and proper opportunity to ventilate their positions on a matter in dispute unlike an urgent chamber application where a party may simply appear before a judge without any opposing papers and make submissions not supported on any evidence before the judge. Urgent Chamber Applications by their nature are time consuming as one has to content with at least two court appearances i.e. initially to obtain a provisional order and subsequently at confirmation of the provisional order on the return date whereas an urgent court application will guarantee a final judgment based on one hearing thus reducing the court's workload through duplication as the papers have to be read at least twice. There obviously are more advantages in adopting the urgent court application procedure than the urgent chamber application procedure. It however is not proposed to provide an exhaustive list of the advantages at this stage. It is clear therefore that in light of the foregoing applicant ought to have brought his application as a urgent court application.

On the merits Ms *Mahere* submitted that applicant had satisfied the requirements of an interim interdict and that in regard to the fear of harm actual or imminent she emphasised the significance of the events of 29 May 2017 in particular the opinion as allegedly expressed i.e. that the letter contained a notice to cease farming operation and activities on subdivisions for Plot 345. Applicant further argued that unless the interdict was granted applicant risked suffering irreparable loss of the winter wheat crop and if ejected the pending review application if eventually successful would become of academic value only if not *brutum fulmen.* She argued further that applicant did not have an alternative satisfactory remedy to the interim interdict. She therefore submitted that the respondents had to be stopped in their tracks by the grant of the paragraph (a) of the interim relief per provisional order after applicant abandoned paragraph (b) of the interim relief sought.

First and second respondents opposed the application and stressed that the respondents did not regard letter dated 10 May 2017 as a Court Order and thus did not intend to act upon it to eject applicant as suggested by applicant. They also argued that the application was not necessary in the light of CHITAPI J's judgment granting a Spoliation Order to applicant. They therefore on that basis sought the dismissal of the application.

Second respondent also opposed the application contending that in its papers the applicant had not suggested that he was involved in the conduct complained about by the applicant and did not believe that he was properly cited in these proceedings. He thus considered that as against him the application had to be dismissed with costs. He was content to abide the order of CHITAPI J and was at this stage awaiting the administrative steps to be taken by the allocating authority before he can take steps to lawfully eject the applicant.

The letter of 10 May 2017 from Tsimba the Acting Provincial Resettlement Officer Mashonaland East addressed to applicant reads as follows:

> Re: Cut-Off Date of Occupation and Farming Activities at Plot 3 & 5 Ivordale Farm Goromonzi
>
> "Reference is made to the above.
>
> You are advised that the cut-off date of your occupation and farming activities at Plot 3 & 5 Ivordale is 30 June 2017 which was reached after assessment of your farming activities in the stated submissions on 9 February 2017. You have to confine your farming activities in sub-division 4 of Ivordale Farm measuring 247.09 hectares which was allocated to you. After 30 June no further activities by you at plot 3 & 5 of Ivordale Farm will be entertained."

After listening to the parties submissions l make the following findings:

(i) The interim relief of a spoliation order granted to the applicant by CHITAPI J in HC 12511/16 is extant and all respondents are bound by it as the provisional order has not been discharged.

(ii) Applicant's review application per HC 12727/16 is still pending and an answering affidavit therein was filed on the 9th February 2017 and almost 3 months had passed to the 10th May 2017 when applicant was written the notice to cease operations on behalf of first respondent (the subject of complaint).

(iii) No explanation has been given by the applicant as to why the review application has not been set down - no heads of argument have been filed to date despite the provisions of r 236 (4) of the High Court of Zimbabwe Rules 1971. The filing of the Urgent Chamber Application in the circumstances does not appear to be warranted. Had applicant been

diligent in its pursuit of the application for review this application would probably not have been necessary. It is accepted that in terms of r 229 C (b) the use of the incorrect form of application does not justify in itself the dismissal of the application. Despite the finding that an urgent court application ought to have been preferred to an Urgent Chamber Application I find that applicant ought to have set-down its review application instead of mounting the current application especially given the interim relief as granted by CHITAPI J aforesaid. This is typically a case where the old adage i.e. that the law comes to the aid of the diligent and not the sluggard should be restated.

Applicant abandoned paragraph (b) of the interim relief sought and applied only for an order in terms of paragraph (a) of the interim relied sought. However I refuse the application in its entirety.

As respondents opposed the application they are entitled to their costs. I accordingly make the following order. It is ordered that

(i) The application is dismissed

(ii) Applicant to pay respondents costs

Honey & Blankenberg, applicant's legal practitioners
Messrs Venturas & Samukange, 2nd respondent's legal practitioners
Civil Division Attorney General's Office, 1st and 3rd respondent's legal practitioners