

KISMET BUTCHERY (PVT) LIMITED
and
DORRIS MACHINGAMBI
and
INSPECTOR MUTSINDIKWA N.O.
and
DOCTOR DZIMWASHA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 19 & 26 October 2017, 28 February 2018

Urgent chamber application

R Mabwe, for the applicant
1st respondent in person
T.R. Mutendi, for the 2nd respondent

NDEWERE J: On 26 October, 2017, I granted the following interim relief on the Provisional Order sought by the applicant on an urgent basis:

“Terms of the Interim Order granted

1. That pending the finalisation of the Distribution of Estate Late Henry Machingambi DR 2447/15, 1st, 2nd and 3rd respondents are interdicted from performing the following at Townlands Farm Masvingo;
 - a) Removing cattle from Townlands Farm, Masvingo.
 - b) Granting permit allowing removal of cattle from Townlands Farm Masvingo.
 - c) Clearing cattle for movement from Townlands Farm Masvingo.
 - d) To refrain from operating the abattoir.
 - e) And if any cattle had been moved to order the immediate return of same to Townlands Farm, Masvingo.”

Oral reasons for my decision were given during the application hearing. However, after the first respondent noted an appeal, I was requested by the appeal court to give the written reasons for my decision, hence this written judgment.

The background facts were that the applicant company Kismet Butchery (Pvt) Ltd was purchased by a couple, Henry Machingambi and Lynmarry Machingambi on 1 December, 2000. The couple was married in terms of the Marriage Act, [*Chapter 5:11*] in 1997.

From 2000 to 2004, Lynmarry was a Director as well as the Principal Officer of the company. She ran the company full time after resigning from her job while her husband, Henry was a lecturer at Masvingo Teacher's College. In August, 2004, she suffered a stroke and thereafter, her husband took over the running of the business.

As the business progressed, the couple leased Townlands Farm from Masvingo Municipality. The lease agreement was between the City of Masvingo and Kismet Butchery (Pvt) Ltd. The last extension of lease was to 31 October, 2015 at a rental of \$1 200.00 per month, reviewable by Masvingo Council.

Sadly, Henry passed away on 1 October, 2015, during the last month of the lease of Townlands Farm by the applicant. A month before he passed away, on 31 August 2015, the late Henry Machingambi executed a will. The will was not contested. The will bequeathed certain immovable property to the surviving spouse and other children. One immovable property and "my shares in Kismet Butchery and all my herds of cattle shall be awarded to Dorris Machingambi" stated the will.

Doris Machingambi is the first respondent, a daughter to the deceased from another lady. She was also appointed executor of the estate in terms of the will. Her executorship was not contested.

Pursuant to both her office as executor and as a major beneficiary of the late Henry's estate, the first respondent re-registered cattle at Townlands Farm in her name. She then moved some cattle on 5 October, 2017. She planned to move more cattle on 9 October, 2017 but on 8 October 2017, the applicant filed an urgent chamber application for an interdict to stop her moving cattle from Townlands Farm and to order her to return those she had already moved from the farm. Because of Lynmarry's poor health condition since the stroke she suffered, the founding affidavit on behalf of the applicant by a company director was deposed to by Lynmarry's curator *bonis*. She said the applicant was seeking an interdict to bar the first respondent from moving cattle from Townlands Farm and barring the second and third respondent from clearing the cattle or permitting the first respondent to move the cattle without a resolution passed by Kismet Butchery (Pvt) Ltd and before finalisation of estate late Henry Machingambi DR 2447/15.

The founding affidavit stated that cattle which were supervised and controlled by the late Henry Machingambi belonged to Kismet Butchery (Pvt) Ltd. She said when the process of registering cattle on stock cards started, the late Henry was the person responsible for the day to day operations, hence the stock card carried his name. The affidavit stated that the first

respondent did not own any cattle which were at Townlands Farm, the only cattle she was entitled to as inheritance were 105 herd of cattle approved by the Master's Office which were at Kimberley Farm and CSC farms.

It was noted that the interdict application did not interfere with the first respondents claim for 105 cattle found at Kimberley Farm in Mashava and CSC Ranch in Mushandike. The interdict sought was about the cattle at Townlands Farm in Masvingo, which farm was leased by the applicant. It was noted further that the interdict application did not interfere with the first respondent's 50% share in Kismet (Pvt) Ltd, subject to the clearance of all the company liabilities first. The interdict which applicant sought was simply to protect the applicant company from the misappropriation of its assets by the first respondent without the company's approval and before finalisation of the late Henry Machingambi's estate.

The first respondent opposed the application. She started by raising preliminary objections to the application. She said the application was not urgent. She also said the application was defective because the Master of the High Court and the Executor were not cited as parties. She further said the relevant government ministries ought to have been cited as opposed to their officials. She also said the applicant had not attached proof of the ownership of the cattle by Kismet Butchery (Pvt) Ltd.

I considered all the preliminary points. On the issue of misjoinder and non-joinder of the Master and Executor, I found that no prejudice arose to any of the parties because of the non-joinder of the Master and Executor. The Master had already written a letter which was part of the record dated 2 October 2017, clarifying the issue in question. If this had been considered to be insufficient, the Master himself could have been joined by the court at any stage of the proceedings, or asked to file a report on the Estate. As regards the non-joinder of the executor, I noted that the first respondent herself was the Executor Testamentary so all issues which the Executor would be expected to canvass had already been canvassed by the first respondent in her opposing papers. On the second and third respondents, I noted that the word "NO" appeared after the second respondent, meaning that he was being taken to court in his official capacity. There would be no additional value in citing the actual Minister or Ministers.

Furthermore I was persuaded by r 87 of the High Court Rules referred to by the applicant's counsel. Rule 87 provides as follows:

- “(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.”

The above rule clearly shows that misjoinder and non-joinder of the Master, Executor and Minister are not fatal. The issues which affect the parties cited can still be determined by the court

After the above considerations, I condoned the applicant's failure to join the Executor, Master and Minister of Agriculture as parties. Rule 4C (a) of the High Court Rules, 1971, authorises such condonation by a Judge.

On urgency, I noted that first respondent started the process of moving stock from Townlands Farm from 4 October, 2017. She was given further clearance to move more stock on 9 October, 2017. I further noted that she was moving the stock from farms which included Townlands Farm, a farm leased by Kismet Butchery (Pvt) Ltd, thus raising the probability of moving Kismet Butchery (Pvt) Ltd's stock. I noted that the applicant acted speedily and filed the application on 8 October, 2017, to interdict the movement of stock on 9 October, 2017 and on any other future date. I also noted that irreparable harm would be suffered by the applicant if stock was moved before there was a clear separation of assets between what belonged to the late Henry Machingambi as a person and what belonged to the applicant. I therefore ruled that the application was urgent.

On the merits of the application, I was satisfied that the requirements of an interdict had been met. In *Eriksen Motors (Welkom) Ltd v Proten Motors, Wamanton & Anor* 1973 (3) SA 685 (A) ADAMS JA: dealing with the issue of temporary interdicts said the following at p 691 C – G.

“The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the court. Where the right which it is sought to protect is not clear the court's approach in the matter of interim interdict was lucidly laid down by INNES JA in *Setlogelo v Setlogelo* 1914 AD 221 at p 227. In general, the requisites are;

- a) a right which, though *prima facie* established, is open to some doubt;
- b) a well-grounded apprehension of irreparable injury;
- c) the absence of ordinary remedy.

In exercising its discretion, the court weighs, inter alia, prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience.”

In the present case, we had a company leasing Townlands Farm till Henry Machingambi's death. There were cattle on Townlands Farm. Applicant said the cattle belonged to it, the Lessee. Then we had a situation where the stock cards all had Henry Machingambi's name. It was common cause that the late Henry Machingambi was the sole operator of Kismet Butchery, following the illness of his wife Lynnmary. But none of the cattle on Townsland Farm appeared to be in the applicant, Kismet Butchery (Pvt) Ltd's name. Yet

Kismet was the one leasing the farm and paying \$1 200 monthly rentals. Why would applicant lease a farm for so long and pay \$1 200 monthly if none of the cattle on the farm belonged to it?

Indeed, even first respondent admits that the deceased left several assets ranging from movable and immovable properties in Masvingo and cattle; “all these assets were registered in his personal names” says the respondent in the first paragraph of the last page of her heads of argument. The question is how could all the assets be in his personal names when he was running Kismet Butchery (Pvt) Ltd; a company, up to the point of his death? In fact, even in his will he bequeathed 50% of his shares in Kismet Butchery (Pvt) Ltd to first respondent. What 50% in Kismet was he bequeathing to first respondent, if all assets and cattle belonged to him personally? So clearly, there is a probability of a mix up between the late Henry’s personal wealth and that of the applicant. Therefore in my view, the applicant was able to establish a right, although that right may not be very clear in the sense of having specific proof of ownership of the cattle as first respondent desired.

Since some of the cattle had already been moved, and authority to move more cattle had been sought and obtained, the applicant had a well-grounded apprehension of irreparable injury. In my view, the prejudice to the applicant would have been worse if the interdict had not been granted, than it would be to the first respondent if the interdict was granted.

There was also a possibility of some fraud having been perpetrated by first respondent and the officials who were assisting her. First respondent relied on a document dated 4 July, 2017. That document had no official letterhead and it was not addressed to any specific person. The document read as follows:

“This letter serves to confirm that the estate of the late Henry Machingambi (DR 2447/15) has been distributed according to his will on 30 June 2017.”

That first part raised eyebrows. The only authority the court would have expected to write so authoritatively about distribution in terms of a will was the Master’s office. Yet the letter did not emanate from the Master’s Office.

“All the herd of cattle have been allocated to Doris Machingambi 22-222083 M 22”

Again that was a very authoritative statement expected to come from the Master’s Office. Allocated by whom, if the court may ask? It was also noted that this document was referring to all cattle, yet the Master’s letter of 2 October 2017 referred to 105 cattle only.

“As vet department, we have transferred all the herd of cattle into her name.”(the underlining is my own)

Now we know who the authors were: it was allegedly the Veterinary Department of the Ministry of Agriculture.

“The farms are as follows. Kimberly Farm in Mashava, CSC ranch in Mushandike and Townlands Farm in Masvingo. We are in the process of preparing her stock Registers as all the requirements have been met.

Yours faithfully
G Rufu.”

When applicant queried the above document before filing its answering affidavit, the document was disowned by an official letter from the Provincial Veterinary Department dated 24 October, 2017.

“Having looked at the document and after consultations with the purported author, we confirm the letter originated from the office of The Animal Health Inspector for Masvingo District, Mr G Rufugokuda.

However, the document is unofficial thus it does not represent our position as a department on the matters it addressed.”

This meant that the Ministry of Agriculture did not authorise the transfer of all cattle to the first respondent. Neither did it authorise the movement of the cattle from the farms. The letter went on to disclose that stock register 001515 which first respondent relied on, was sold on 10 November, 2015. It was not clear from that letter why the stock register was sold on 10 November, 2015, and to whom or the implications of the sale. Suffice to say the letter of 24 October 2017 from the Provincial Veterinary Office put holes into the basis of first respondent’s movement of the cattle from Townlands Farm. The letter of 24 October, 2017 clearly shows that the Veterinary Department did not authorise the transfer and movement of cattle, but rather an employee of the department, acting on a frolic of his own, purported to authorise the transfer of the cattle to the first respondent as well as their movement. It was also noted that on the document, Mr Rufugokuda did not give his name in full, probably to try and disguise the source of the fake letter. He shortened his name to G. Rufu.

In view of all the above facts, the court had no option but to grant the interim relief sought.

Munanganirwa & Company, applicant’s legal practitioners