

DAVID GEORGE PALMER
versus
SOLOMON NYASHA KANYENZE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 16 December 2019 and 8 January 2020

Urgent chamber application

D. Drury, for the applicant
T.R. Madzingira, for the respondent

DUBE-BANDA J: This is an urgent application argued before me on the 16 December 2019. For ease of reference and where the context allows, I refer to applicant as Mr *Palmer* and respondent as Mr *Kanyenze*. After hearing Counsels for both parties I reserved judgment. In this application applicant seeks a final order drafted in the following terms:

1. That the execution of the order of the court *a quo* in the matter between *Solomon Nyasha Kanyenze v David George Palmer Murewa CIV 95/19* be and is hereby suspended pending the decision of the appeal in the High Court in case number HC CIV Appeal No. 352/19.
2. That there be no order as to costs in the event that this application is not opposed. Alternatively: that respondent pay applicant's costs of suit.
The application is opposed.

In the certificate of urgency it is alleged that there is a prospect of execution of the order granted by the court *a quo* which if carried into force - notwithstanding the noting of the appeal - will cause irreparable damage and harm to the appellant and thus render the appeal academic or nugatory. It is contended that the objective grounds of challenge set out in the grounds of appeal warrant a stay of execution.

In the founding affidavit it is contended that whilst the respondent has not made an application for the execution of the interdict order and has not processed a writ of execution, the imminent threat of a writ to stop the maintenance and care of the existing tobacco crop - which is valued at hundreds of thousands of United States dollars and in excess of the monetary

jurisdiction of the Magistrates Court-is very real. This could take place at any time and for that reason it becomes procedurally necessary that a stay of execution pending the finality of the appeal process be granted.

Applicant makes the point that in order to maintain the present *status quo* he has to continue tending to the tobacco crop rather than abandoning or neglecting it, as such would cause him irreparable loss and prejudice. He contends that this application is meant to avoid censure for any perceived contempt of court emanating from the order of the court *a quo*.

Factual background

Mr *Kanyeze* sought and obtained from the Magistrate's Court in Murewa an order framed as follows:

1. The application for an interdict be and is hereby granted.
2. Respondent and all those acting through him be and are hereby ordered to desist from interfering with the applicant's peaceful and undisturbed use and enjoyment of his 150 ha of subdivision 8 Journeys End Farm, Murewa in any way whatsoever.
3. Respondent and all those acting through him be and are hereby ordered to immediately stop all farming activities on Subdivision 8 Journeys End Farm Murewa.
4. Costs on a higher scale.

Mr *Palmer* aggrieved by the magistrate's order noted an appeal with this court, and such appeal is pending under cover of case number HC Civ. Appeal 352/19. The appeal is yet to be set down for a hearing. Mr *Palmer* attacks the judgment of the Magistrate's court on six grounds set out in the notice of appeal. The grounds of appeal are couched as follows:

1. The court *a quo* grossly erred in law in refusing to hear *viva voce* evidence in circumstances where a special plea of jurisdiction had been raised and a request to do so was moved by appellant(respondent in the court a quo)
2. A *fortiori*, the court *a quo* grossly erred in law in proceeding to determine a special plea of jurisdiction in circumstances where same could not be established on the papers and consequently no oral evidence had been led.
3. The court *a quo* grossly erred in holding that the applicant had demonstrated locus standi to mount an interdictory application on the strength of a 2017 offer letter and that such property description in certain photographs *ipso facto*

constituted acceptable evidence and proof that the photographed area of the land was unlawfully occupied by appellant before or when the application was launched.

4. The court *a quo* grossly erred in law in proceeding to grant an application for an interdict in circumstances where the parties had not made any submissions on the merits of the case.
5. The court *a quo* grossly misdirected itself in proceeding to grant relief in circumstances where applicant had failed to make a proper case for an interdict.
6. The court *a quo* grossly misdirected itself in granting interdictory relief in favour of the respondent (applicant in court a quo) in respect of a property described as Subdivision 8 of Journey's End in Murewa district of Mashonaland East Province measuring approximately 150 ha in extent when such property was not geographically identified with sufficiency.

Pending the finalisation of his appeal, Mr *Palmer* seeks from this court an order quoted above. He contends that this matter is urgent and this court has jurisdiction to adjudicate it. Mr *Madzingira* for the respondent raised a number of preliminary points. It is argued in *limine* that this court has no jurisdiction to entertain this matter; that the draft order is defective; that this application is pre-mature and that this matter is not urgent.

The parties argued both the preliminary points and the merits of the matter. First I deal with the preliminary points, if these succeed then the inquiry ends there, if they fail, then I shall proceed to adjudicate the merits of the dispute.

Preliminary points

Respondent argues that this court has no jurisdiction to adjudicate this matter at this stage. Cut to the bone, it is contended that this court cannot, as a court of first instance entertain an application to stay execution of an order emanating from the Magistrate's Court. It is submitted that the Magistrate's court has jurisdiction to control its own processes and it can hear an application for stay of execution of its order. Mr *Madzingira* places reliance on s 40 (3) of the Magistrate's Court [Chapter 7:10], which provides that:

“Where an appeal has been noted the court may direct either that the judgment shall be carried into execution or that execution thereof shall be suspended pending the decision upon the appeal or application.”

In *James Chipadze v Tonderayi Mutema and Others* HH 283-18 this court held that applications arising from execution of warrants issued out of the magistrate's court are clearly for that court to determine. The magistrate's court has its own rules dealing with such matters. Rules of the High Court cannot be used to determine issues relating to execution of warrants against property issued out of the magistrate's court. I agree that as a general rule this court should be slow, as a court of first instance, to entertain matters which fall within the jurisdiction of the magistrate's court.

According to Mr *Drury* for the applicant, this court has jurisdiction to hear this matter. It is argued that this application does not involve the inherent or original jurisdiction of this court, it involves the ancillary jurisdiction anchored on the notice of appeal. Put differently, it is the notice of appeal that activates or engages the jurisdiction of this court to hear this matter. It is argued that once this court is seized with the appeal it is then imbued with the jurisdiction to control and regulate the process having a bearing on the appeal.

It is further argued for the applicant that the jurisdiction that this court has to control its own processes includes the power to determine whether or not execution must be carried out pending the hearing of an appeal.

I agree with Mr *Drury* that the jurisdiction of this court, as a court of first instance to hear this matter is activated by the appeal pending before this court. It does not involve the original jurisdiction of this court. Once this court is seized with the appeal, it has jurisdiction to regulate any process having a bearing on the appeal. See *Netone Cellular (Pvt) Limited v 56 Netone Employees & Another* SC 40/50 and *Synohydro Zimbabwe (Private) Limited v Townsend Enterprises (Private) Limited* SC 27/19. This court has to protect the integrity of the appeal pending before it. If this court does not invoke its jurisdiction and determine whether execution should be carried out or stayed pending appeal, and the appeal finally succeeds, this might result in empty victory. This court has jurisdiction to guard against such an eventuality.

The jurisdiction of this court to entertain this matter, as a court of first instance is also anchored on section 176 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013, (Constitution). This is the empowering provision which enjoins this court to regulate its own processes. The provision provides as follows:

“The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution.”

There is an appeal pending, and this court cannot be helpless to regulate the process having a bearing on such appeal pending before it.

Therefore my answer to this question is that this court has jurisdiction, as a court of first instance to hear this matter on the basis of the notice of appeal and section 176 of the Constitution. Therefore the preliminary point alleging lack of jurisdiction of this court, as a court of first instance, to hear this application has no merit and is refused.

It is further argued, for the respondent, that this application is an abuse of the process of this court, because by operation of law, the execution of the order from the court *a quo* is stayed pending leave to execute pending appeal being granted or the finalisation of the appeal. It is correct that authorities clearly establish that at common law a decision of a lower court in respect of which an appeal has been noted cannot be executed upon. It can only be executed upon leave to execute being granted. No such leave was applied for or granted in this case. It is the applicant who seeks to stay execution on the grounds that an appeal has been noted. In my view the applicant is entitled to make such an application once he has noted an appeal. See *Netone Cellular (Pvt) Limited v 56 Netone Employees & Another (supra)*.

More so the order granted by the court *a quo* makes such an application imperative. I say so because the order granted by the court *a quo* does not necessarily require the respondent to make an application to execute pending appeal. The order directs Mr Palmer and all those acting through him to desist from interfering with Mr *Kanyeza's* peaceful and undisturbed use and enjoyment of his 150 ha of subdivision 8 Journeys End Farm, Murewa, in any way whatsoever. Mr *Palmer* and all those acting through are ordered to immediately stop all farming activities on Subdivision 8 Journeys End Farm Murewa. The order requires action on the applicant, it places an *onus* on him to comply, and not on respondent to demand compliance.

The order requires Mr *Palmer* to comply with its terms, failure of which he risks an allegation of contempt of court. It is therefore incumbent upon him to take the first move. He must seek an order to suspend compliance with the order of the court *a quo* pending appeal that he has filed. It is different from an order sounding in money, in which the judgment creditor may have an interest to execute pending appeal. In *casu*, the wording of the order does not require the respondent to act, but it requires the applicant to act. Applicant must comply, do what the order demands or seek a court order to suspend compliance, which is what he has done by filing this application.

In my view Mr *Palmer* cannot be faulted for having taken the first move. I therefore find that the point *in limine* in respect of the alleged abuse of the process of this court has no merit and is refused.

Respondent contends that the draft order is incurably defective for want of compliance with Form 29C. Respondent argues that the order sought is interim, while applicant says it is final. My view is that although this order is sought in an urgent application, in respect of this application it is a final order. Once this application is determined, it will not be re-visited again, at least by this court. An order is final and effective because it has the effect of a final determination on the issues between the parties in respect to which relief is sought from the court. See *Blue Ranges Estates (Pvt) Ltd v Muduvuri & Another* 2009 (1) ZLR 368. The order sought in this application has the effect, if granted, of settling the dispute in respect of applicant's compliance with the order of the court *a quo* pending the finalisation of the appeal pending before this court. There is nothing interim about the order sought.

Is it competent to seek a final order in a chamber application accompanied by a certificate of urgency? There are instances where a final order can competently be granted in such an application and there could be instances where granting a final order in such a case would be incompetent. It is something that has to be decided on a case by case basis. A final order for spoliation may be granted in an urgent application. See *Blue Ranges Estates (Pvt) Ltd v Muduvuri & Another*. In *casu* applicant seeks an order to stay compliance with the order of the court *a quo* pending appeal, and there is nothing that can be determined on the return day. My view is that respondent will suffer no prejudice should a final order be granted in the circumstances of this case, he was served with the present application; he filed a notice of opposition and an opposing affidavit and his case was competently and effectively argued by Counsel.

Again a draft order is what it is, a draft order. A court is not bound to grant an order as presented in the draft. In terms of rule 240 of the High Court Rules, 1971 (Rules), at the conclusion of the hearing or thereafter the court may refuse the application or may grant the order applied for, or any variation of such order or provisional order. I therefore do not agree that the draft order is incompetent. Finally, if this court agrees that a good case has been made, it is for this court to design the order that speaks to the justice of this case. As a result the preliminary point attacking the competence of the draft order has no merit and is refused.

It is further contended by the respondent that this application is pre mature, implying that it is not ripe for adjudication. It is alleged that this court is hamstrung in making a finding

on the issues of prospects of success; irreparable harm and balance of conveniences without the record of proceedings from the court *a quo*. The idea behind the requirement of ripeness is that a complainant should not go to court before the complaint is ripe for adjudication. It is opposite of the doctrine of mootness, which prevents a court from deciding an issue when it is too late. The doctrine of ripeness holds that there is no point in wasting the court's time with half-formed decisions whose shape may yet change, or indeed decisions that have not yet been made. But this principle should not be taken too far. It would be unattainable to expect an applicant to wait until there is absolutely no possibility of the action being reversed. See *Bindura Town Management Board v Desai & Co* 1953 (1) SA 358 at 363D.

My view is that, the fact that there is an order of court that is extant and enforceable, makes the matter ripe for adjudication. In any event applicant is obliged to comply with the order of the court *a quo* immediately upon notice of it. To avoid compliance, applicant must seek the intervention of this court and this is exactly what he has done. The issue of the absence of the record is no bar to hearing of this matter. The court may make factual finding on the undisputed evidence before it, even without the record. As a result I find that the preliminary point in respect of ripeness has no merit and is refused.

Respondent contends that this matter is not urgent. Urgent applications are governed by r 244 of the High Court Rules, 1971 (Rules), which provides:

“Where a chamber application is accompanied by a certificate from a legal practitioner in terms of paragraph (b) of subrule (2) of rule 242 to the effect that the matter is urgent, giving reasons for its urgency, the registrar shall immediately submit it to a judge, who shall consider the papers forthwith.

Provided that, before granting or refusing the order sought, the judge may direct that any interested person be invited to make representations, in such manner and within such time as the judge may direct, as to whether the application should be treated as urgent.”

This Court enjoys a discretion in urgent applications to authorise a departure from the ordinary procedures that are prescribed by the Rules. However the court is usually hesitant to dispense with its ordinary procedures, and when it does, the matter must be so urgent that ordinary procedures would not suffice or meet the justice of the case.

In the ordinary run of things, court cases must be heard strictly on a first come first serve basis. It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis. The *onus* of showing that the matter is indeed urgent rests with the applicant. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage over other litigants by jumping the queue. And have its matter given preference over other pending matters. That indulgence

can only be granted by a judge after considering all the relevant factors and concluding that the matter is urgent and cannot wait. See *Kuvarega v Registrar General and Another* 1998 (1) ZLR 188.

In assessing whether an application is urgent, this court may consider a number of factors, being whether the urgency was self-created; the consequence of the relief not being granted and whether the relief would become irrelevant if it is not immediately granted.

I have to determine on a factual matrix of this case, whether applicant has indeed discharged the *onus* of showing that this matter is urgent and cannot wait. Should applicant be allowed to jump the queue and have its case given preference over other pending matters? I now turn to this issue.

Respondent contends that the order appealed against which forms the basis of the present application was handed down on the 29 November 2019. It is said that the present application was only filed on the 11 December 2019. It is complained that it has taken applicant seven days to file this application. It is then argued that this amounts to self-created urgency.

In answer applicants argues that this matter is urgent. It is said from the date of filing the appeal, it took applicant five working days to file this application. Applicant contends that five days cannot be taken to be inordinate and cannot be considered to be a delay. For this proposition applicant relies on the authority in *National Prosecuting Authority v Busangabanye & Another* HH 427/15 at page 3 wherein MATHONSI J (as he then was) held that:-

“In my view this issue of self-created urgency has been blown out of proportion. Surely a delay of 22 days cannot be said to be inordinate as to constitute self-created urgency.”

In my view applicant acted when the need to act arose. A delay of five working days cannot by any stretch of imagination be defined as inordinate or a delay. This case exemplifies the danger of blowing out of proportion the notion of self-created urgency.

This matter is urgent. The order of the court *a quo* demands applicant to comply with it immediately. To avert compliance until the finalisation of the appeal, it became incumbent on applicant to seek the intervention of this court on an urgent basis. As a result, I find that the preliminary point alleging lack of urgency has no merit and is accordingly refused.

Merits

In application proceedings it is a general rule that where a dispute of fact has arisen on the affidavits, a final order may be granted if those facts averred in the applicant's affidavits

which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it, is however not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. See *Plascon-Evans Paints Limited v Van Riebeeck Paints (Proprietary) Limited, Room Hire Co. (Pty) Ltd v JeppeStreet Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), at pp 1163-5; *Da Mata v Otto, NO*, 1972 (3) SA 585 (A), at p 882 D - H). Therefore in application proceedings a court may grant a final order based on common cause facts; facts not seriously disputed and facts not disputed at all.

In *casu* the following facts are either common cause, that on the 29 November 2019, the court *a quo* granted an interdict in favour of Mr *Kanyeze* and that on the 3rd December 2019 Mr *Palmer* filed a notice of appeal, and such appeal is pending under cover of case number HC CIV 352/19.

Applicant in his founding affidavit makes specific allegations of fact to show that he will suffer irreparable harm should this application be refused; that the balance of convenience favours him and that the appeal has prospects of success. In his opposing affidavit, respondent instead of meeting applicant's facts head on, he repeats allegations raised as preliminary points, issues of jurisdiction and the absence of the record of proceedings from the court *a quo*. The approach taken by the respondent does not serve a useful purpose, because applicant's version remains intact and unchallenged. It is important for a party when opposing the relief sought by an opposing litigant to deal specifically with the averments contained in such party's affidavits, challenge them and demonstrate the basis of the challenge. This respondent did not do.

Applicant in paragraphs 11.1 to 11.27 provides detailed of the irreparable harm that he will suffer should this application be refused; shows that the balance of hardship or convenience favour the granting of this application and shows that his appeal carries prospects of success. This detail is not challenged by the respondent, all he says in paragraph 12 of his opposing affidavit is that "these are denied and disputed in total." Such a response by a litigant to detailed submissions by the opposing party is not enough, it is inadequate. The court remains with uncontroverted evidence before it. Without any meaningful opposition the court can only accept the version put up by the litigant with detailed evidential material before it. As a result, I find that applicant's version on the merits to be common cause, or not seriously disputed.

The 11 ha. field which is the subject of this litigation between the parties has been used by the applicant for over two decades. He has grown winter wheat and now there is a tobacco crop whose export value is USD 140 000.000. This crop is expected to mature in or around April 2020. I agree that the facts of this show that applicant will suffer irreparable harm should respondent take over this field and the crops pending the adjudication of the appeal.

Applicant avers that before the launch of the proceedings before the court *a quo*, respondent was not in possession or control of any of the fields that relates to his offer letter of 2017. It is submitted by applicant that the offer letter relied upon by respondent is stale. This allegation is not controverted. Respondent has put no crop of any kind on the disputed lands. He has not invested any monies on the disputed lands. The essence of the balance of convenience is to try to assess which of the parties will be least seriously inconvenienced by being compelled to endure what may prove to be a temporary injustice until the just answer can be found at the conclusion of the matter. In *casu* I find that the balance of hardships favours the applicant.

The grounds of appeal contained in the notice of appeal and the detailed averments in the applicant's papers shows that applicant has an arguable case on appeal. In my view the justice of the case require applicant be allowed to protect his crop until such that his appeal is finalised.

Based on the papers before me; common cause facts; undisputed facts and the submissions by the parties, I am satisfied that applicant has an arguable case on appeal. I am also satisfied that applicant will suffer irreparable harm should this application be refused and that the balance of hardship favours him.

Disposition

In conclusion, I find that applicant has discharged the *onus* on him of showing that he has made a good case for the relief he is seeking from this court. As a result I order as follows:

1. That applicant's compliance with the order of the Magistrates Court, Murewa in the matter between *Solomon Nyasha Kanyenze v David George Palmer* Murewa CIV 95/19 be and is hereby suspended pending the decision of the appeal in the High Court in case number HC CIV Appeal No. 352/19.
2. That there be no order as to costs.

Madzingira & Nhokwara, applicant's legal practitioners
Honey & Blanckenberg, respondent's legal practitioners