

BRIAN ANDREW CAWOOD
versus
ELASTO MADZINGIRA
and
THE MESSENGER OF COURT – MWENEZI N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO, 6 February 2017 & 6 March 2017

Urgent chamber application

Mr *J.G. Mupoperi*, for the applicant
Mr *R. Chavi*, for the first respondent
The second respondent in person

MAFUSIRE J: This was an urgent chamber application to stop an eviction on the grounds that the second respondent, the messenger of court, allegedly on the back and call of an official from the Ministry of Lands, was straying outside the four corners of the court order that defined the premises the applicant, and all those claiming occupation through him, had to be evicted from.

The applicant said the messenger of court, in executing the warrant of ejection, was to strictly confine himself to such premises as were mentioned in the judgment of the court *a quo*, namely the homestead on Lot 21A of N.R.A., **measuring +/- 224m²** [*emphasis by applicant*]. Instead of doing that, the messenger of court, at the back and call of the Ministry of Lands official, was bent on evicting the applicant, and those claiming occupation through him, particularly his workers and manager, not only from the homestead, but also from the adjacent, stand-alone buildings or developments or structures that comprised a cold room, a butchery, a workshop, five servants' quarters, a manager's house, some twelve feed rooms and an abattoir.

The first respondent opposed the application. The messenger of court appeared at the hearing to explain what he was doing on the ground.

The first respondent raised three points *in limine*. The first was that the matter was not urgent. The second was that the interim relief was exactly the same as the final order sought. The third and last was that the applicant was non-suited by reason of the non-joinder of the

Ministry of Lands, the acquiring authority, and therefore the true owner of the land in question.

The urgent chamber application was filed on 2 February 2017. The first respondent said the order of eviction had been given on 25 November 2016, thus almost three months ago, and that after the applicant had appealed, the first respondent had obtained leave to execute on 27 January 2017. The first respondent's point was that the applicant had slept on his rights since November 2016.

I dismissed the first point *in limine*. It was ill-conceived. Legal practitioners should not waste precious time by raising dud points *in limine* as if they are a mandatory ritual in every case.

Plainly, the applicant never slept on his rights. He acted immediately when the need to do so had arisen. When he lost the eviction proceedings, he appealed. When the first respondent applied for leave to execute pending appeal, he opposed it. When the second respondent came to execute the warrant of ejection, he reacted by filing the urgent chamber application a mere two days later.

The first respondent's second point *in limine*, namely that the interim relief was exactly the same as the final one, had merit. But I held over decision on it and opted to hear the merits. A draft order can always be amended on good cause shown and with an appropriate order of costs.

I dismissed the third point *in limine*, the one about the non-joinder of the Ministry of Lands. The urgent chamber application was not about anything done, or to be done, by the Ministry of Lands, even though there was some gratuitous reference to the messenger of court taking instructions from some lands officer, which the messenger of court denied. The urgent chamber application was about the allegedly wrong conduct of the messenger of court, at the instance of the first respondent. I could effectively determine that dispute. It was between the parties before me. I could determine it even in the absence of any other party whose presence would merely have been for peripheral purposes.

Rule 87[1] of the Rules of this Court is clear. It says no cause or matter shall be defeated by reason of the joinder or non-joinder of any party, and that 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 persons who are parties to the cause or matter.

Both the first and second respondents denied that the second respondent had strayed outside the four corners of the court order. They admitted that the ejection was meant to

cover the structures mentioned by the applicant, save for the manager's house. This was some appreciable distance from the rest of the buildings. The applicant concurred the manager's house was a considerable distance away from the rest of the structures.

The respondents argued that the homestead, as identified by the court order, comprised the main dwelling or farmhouse and its adjacent buildings such as the workers' quarters, the butchery, abattoir, workshops, and all the rest of them in the applicant's papers. The first respondent argued that the "homestead" from which eviction was sought, had been canvassed and resolved in the court *a quo*. He said this "homestead" was not to be identified merely by reference to the area, i.e. +/- 224m², but also by reference to a map that depicted the actual homestead and the extent of the land covered. That map had been produced during the eviction proceedings.

After submissions I dismissed the application and said written reasons would follow. These are they.

The background to the application was this. The first respondent was one of a number of persons allocated pieces of land by government, as the acquiring authority, under its land re-distribution programme. The allocation was on the farm or ranch previously owned and occupied by the applicant. In addition to the subdivision allocated to him, the government also leased to the first respondent, under a written agreement of lease for five years, the homestead on that farm. The lease agreement described the leased property as "... *a homestead on Lot 21A N.R.A in on land [sic] measuring +/- 224m² approximately situated in the district of Mwenezi as depicted on the map attached hereto. The site with the said buildings and improvements in hereinafter referred to as ["the leased premises"]*" [sic].

The first respondent complained that the applicant was refusing to move out. He instituted ejectment proceedings in the magistrate's court. After a full trial, the order of eviction was granted. In the course of his judgment the magistrate said:

"There is therefore evidence to conclude that the homestead which is the subject matter is the one on the map and that it is occupied by the first defendant."

The applicant appealed. He attacked the magistrate's findings and the order of eviction. The one ground of appeal nearest in relevance to the proceedings before me said that the magistrate had erred at law by ordering the applicant's eviction from "*a homestead*" without a proper description as to whether the homestead referred to one residential dwelling,

or several residential dwellings, and that this rendered the eviction order a *brutum fulmen* and therefore not executable. The applicant sought that the appeal be upheld with costs; the judgment of the court *a quo* set aside and substituted with an order dismissing the claim for ejection.

The first respondent countered by applying for execution pending appeal. The application was granted. Following that, the first respondent issued a warrant of ejection. It was that warrant that the second respondent was executing when the applicant brought the present proceedings.

At the hearing, the second respondent denied that he was taking orders from the lands officer in executing the warrant. He explained, both by affidavit and through oral submissions, that when he got to the farm to execute the warrant, it was the applicant's manager, one Lilian van Beek [*"Lilian"*], who showed him the homestead the subject of the eviction. It comprised the main dwelling, which he said was a mere shell that had been razed to the ground by fire; and the adjacent buildings referred to in the applicant's founding affidavit. He said Lilian also showed him a compressor and some two big generators which she wanted to know whether the applicant could carry them away with him. The second respondent said on those "*removables*" he referred her to the lands officer who was there present with him.

The second respondent also said he did not intend to evict anyone from the manager's house which was some considerable distance away from the homestead. He wondered why this structure had ever been referred to in the application. He said Lilian's major concern on the day had been whether she and her staff would be given the mandatory forty-eight hours' notice to vacate, as had been advised by their lawyer. He had said yes.

The second respondent also said that Lilian had agreed to do some money transfer into his bank account to cover the costs of eviction, but that she appeared to have reneged on that promise. He would then have to attach so much of the movables at the homestead as would satisfy his costs.

On the basis that the messenger of court was straying outside the confines of the court order, the applicant sought two sets of orders, one couched as interim relief, and the other as final. But they were exactly the same, word for word. They read:

“[a] The ejection of the Judgment [*sic*] under Case No. Ev 04/15 be and is hereby confined to a homestead on LOT 21A NUANETSI RANCH A in Mwenezi measuring +/- 224m² as per the Court Order dated 25 November, 2016.

[b] That if ejection had already been effected in respect of any property or building not stated on the Court Order, that it be reversed and vacant possession be restored forthwith to the Applicant.”

The application failed on two major, but inter-related grounds.

The first was that the relief sought was incompetent. It was effectively a final relief. You do not seek a final order through an urgent chamber application.

It has been stated time and again that the object of an urgent chamber application is to get interim protection. Because of the urgency that may be manifest on the papers, the application is allowed to jump the queue of cases awaiting determination at the courts. But the issues are not interrogated to any great depth. As long as an applicant shows a *prima facie* right, even if this be open to some doubt; a well-grounded apprehension of an irreparable harm; that the balance of convenience favours the granting of an interim interdict; that there is no other satisfactory remedy; and that there are reasonable prospects of success in the merits of the main case, the applicant should be entitled to relief: see *Setlogelo v Setlogelo*¹; *Tribac [Pvt] Ltd v Tobacco Marketing Board*²; *Hix Networking Technologies v System Publishers [Pty] Ltd & Anor*³; *Flame Lily Investment Company [Pvt] Ltd v Zimbabwe Salvage [Pvt] Ltd and Anor*⁴ and *Universal Merchant Bank Zimbabwe Ltd v The Zimbabwe Independent & Anor*⁵.

I can do no better than quote the seminal statement by CHATIKOBO J in *Kuvarega v Registrar – General & Ors*⁶:

“The practice of seeking interim relief which is exactly the same as the substantive relief sued for, and which has the same effect, defeats the whole object of interim protection. In effect a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case. This, to my mind, is undesirable where, as here, the applicant will have no interest in the outcome of the case on the return day.”

See also *Women & Law in Southern Africa & Ors v Mandaza & Ors*⁷

¹ 1914 AD 221

² 1996 [1] ZLR 289 [SC]

³ 1997 [1] SA 391 [A]

⁴ 1980 ZLR 378

⁵ 2000 [1] ZLR 234 [H]

⁶ 1998 [1]ZLR 188 [H] at p 193A – B

⁷ 2003 [2] ZLR 452 [H]

Justice delivery requires that in every case the real or main dispute between the parties be determined finally. It is like surgery. The main dispute is the cyst or boil or ulcer that is threatening the social harmony that must exist between people. That ulcer must be opened up and treated. The patient has to be booked for surgery. It may take time. The patient has to wait in the queue, just like in ordinary application or action proceedings. Until the ulcer is removed, the pain may remain. The ulcer may actually lead to other complications.

It often happens that pending the determination of the main dispute, i.e. the treatment of the ulcer by surgery, other side issues or disputes may develop. But these are mere symptoms of the main problem. They may not require elaborate surgery. A simple prescription may be all that is necessary to provide interim relief. That simple pain killer is the provisional order that may be granted in an urgent chamber application. But it is granted on the understanding that the main surgery to deal with the real problem is awaiting determination.

In this case, for both interim and final relief, the applicant sought that the eviction be confined to a homestead measuring +/- 224m² and that if the ejection had already taken place, that it be reversed.

Although imprecisely stated, the nature of the relief sought by the applicant belied an underlying problem. That problem was simple. It was this: what precisely was meant by homestead? The term, in this case, might or might not have borne the same dictionary meaning.

Ahead of the hearing both parties had *Googled* "homestead". They had come up with definitions that suited their stand-points. The applicant said a homestead was a single dwelling that, in the context of their case, was +/- 224m² on the farm in question. Anything outside +/- 22m² was straying outside the four corners of the court order.

On the other hand, the first respondent said in ordinary parlance, and by definition, a homestead is a farm house and its adjacent buildings. It is a cluster of houses. In the context of their case, it comprised not only the main farm house, that had been razed to the ground by fire and in which nobody was still living, but also the rest of the outbuildings mentioned in the applicant's papers, save for the manager's house which was, in effect, a separate homestead on its own, some appreciable distance away from the main homestead.

So evidently, the main dispute between the parties, the ulcer, on that narrow issue, was what was the nature and extent of that homestead? Was it a single building +/- 224m² in extent? Or was it a cluster of buildings at the same location?

This main dispute had to be determined someday, if that had not been done already. Since the parties could not agree on what comprised a homestead it meant a court or tribunal somewhere would have to arbitrate on it and pronounce judgment. After that there should be no dispute as to the reach of the warrant of ejection.

The one major weakness with the applicant's application was that the determination of that main dispute was pending nowhere. It is true that there was an appeal against the magistrate's order of eviction. But in that appeal the court was not being called upon to determine what "homestead" meant. It was being called upon to reverse the eviction order on grounds completely unconnected to the meaning of homestead. In a nutshell, the applicant was challenging the loss of his farm.

In the one ground of appeal in which he said the magistrate had erred by ordering eviction from a homestead without a proper description of what homestead meant, the applicant was not calling upon the appeal court to define that term for them. Instead, he was calling upon the appeal court to brand the magistrate's order as an unenforceable *brutum fulmen*. So, nowhere was surgery pending to remove the ulcer. That means the urgent chamber application hung on nothing

Determining what was meant by homestead was not the task before me. The task before me was, or ought to have been, if a *prima facie* case had been proved, to give interim relief to the applicant by stopping the eviction, pending the resolution of the main dispute, namely determining what homestead meant. That was the point lost to the applicant.

The other point lost to the applicant – and this was the second reason for the dismissal of the application – was that, in effect, what homestead meant had already been determined by the court *a quo*. It was disingenuous for the applicant to try and push through the argument that homestead was a single dwelling merely +/- 224m² in extent. The lease agreement did not just say "... homestead ... measuring +/- 224m² ..." and stop there. It also said "... approximately situated in the district of Mwenezi as depicted on the map attached hereto ..." [my emphasis]. That was not all. It also said "... the site with the said buildings [not just building] and improvements ..." would be "... the leased premises ..."

So the lease agreement itself, the bedrock of the eviction proceedings, recognised that the homestead was more than just one dwelling.

Then the magistrate concluded that there was evidence that the homestead was the one on the map. That map was also produced in the proceedings before me. It referred to a

rectangle with a cluster of buildings. It was not in dispute that those were the structures mentioned in the applicant's founding affidavit.

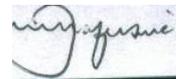
Above all, and at any rate, the dictionary meaning of "homestead" is a farmhouse and the adjacent buildings. Wikipedia, the free encyclopaedia, says:

"A homestead is a dwelling, especially a farmhouse, and adjacent outbuildings, typically on a large agricultural holding such as a ranch or station."

Having won an order of eviction in the main proceedings, and having been granted leave to execute pending appeal, the first respondent was entitled to enjoy the fruits of his success. The second respondent was not straying outside the boundaries of the court order. The manager's house would not be included in the ejection. The object of the urgent chamber application was manifestly to frustrate a legitimate process. It was designed to throw the parties back to the position that they had been in before litigation had started. That was wrong.

It was for the above reasons that I dismissed the application with costs.

6 March 2017



Saratoga Makausi Law Chambers, legal practitioners for the applicant
Kwirira & Magwaliba, legal practitioners for the first respondent