BRODRICK MUNJARI
versus
DIDYMUS NYAUMWE
and
INNOCENT DZVIFU

THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 18 February 2025 & 10 June 2025

Application for an interdict

T Mabulala, for the applicant
Ms *M Sachikonye,* for the respondents

DUBE-BANDA J:

[1] This is an application for an interdict, in which the applicant seeks an order couched in the following terms:

i. The respondents be and are hereby interdicted from disturbing the applicant's peaceful possession and use of subdivision 4 of Lot 34 AB of Middle Sabi, Chipinge District.
ii. The respondents shall not verbally, or physically threaten to assault, kill or prevent the applicant, his family, his workers, contractors or agents from carrying out any farming activities on subdivision 4 of Lot 3B AB of Middle Sabi, Chipinge District.
iii. The respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved.

[2] The dispute in this matter turns on subdivision 4 of Lot 34 AB of Middle Sabi, Chipinge District ("the farm"). The applicant was on 28 April 2008 offered the farm under the land Reform and Resettlement Programme. The same farm had on 3 February 2005, under the same programme been offered to one Jesca Dzvifu. Both the applicant and Jesca Dzvifu are in possession of offer letters in respect of the farm. The second respondent, whose correct name is Austin Dzvifu, is said to be managing the farm on behalf of his sister Jesca Dzvifu. There is a contestation about the ownership and possession of the farm, and the applicant, through this application seeks to elbow out the other party from the farm.

[3] In his opposing affidavit, the first respondent took six points *in limine*, *viz* wrong citation of a party; material dispute of facts; clear right not established; absence of a well-grounded apprehension of irreparable harm; availability of an alternative remedy, and that this matter has been brought to the wrong court.

[4] At the commencement of the hearing, Mr *Sachikonye* counsel for the respondent abandoned the following as points *in limine*, clear right not established; absence of a well-grounded apprehension of irreparable harm; and the availability of an alternative remedy. In the first instance these did not qualify to be points *in limine,* I say so because a point *in limine* proper, is a technical legal point, which, if successful, is dispositive of the matter prior to the consideration of the merits. These points taken by the respondent could not qualify as points *in limine* because their resolution required consideration of the merits of the case. In respect of the wrong citation of party, the first respondent contends that he has his own plot and has no interest in the farm at the center of the dispute. Again, this does not qualify as a point *in limine* as its resolution requires consideration of the merits.

[5] Regarding the point that there are material disputes of fact which cannot be resolved in motion proceedings, I take the view that a robust and common-sense approach can lead to the resolution of this matter without causing injustice to either of the litigants. This point *in limine* is refused. The contention that the applicant brought this matter to the wrong court in that it is an administrative issue which can be dealt with by the Zimbabwe Land Commission, or the Administrative Court has no merit. I say so because this court has original jurisdiction on all civil matters, unless its jurisdiction is constitutionally or legislatively ousted. The points *in limine* taken have no merit and are refused. I now turn to the merits.

[6] It was submitted on behalf of the applicant that the applicant has complied with all the requisites of a final interdict and has in particular proved a clear right in respect of the relief sought and that, consequently, this court should grant final relief against the respondent. *Per contra,* the respondents submitted that the applicant has failed to meet the requirements of an interdict.

[7] The first inquiry is whether the applicant has established a clear right. The applicant has an offer letter to the farm, and Jesca Dzvifu has an offer letter to the same farm. The applicant emphasised that the offer letter issued to Jesca Dzvifu was withdrawn. He attached to his answering affidavit a letter dated 17 September 2024 from the Ministry of Lands, Agriculture, Water, Fisheries and Rural Development ("Ministry") saying Jesca Dzifu's offer letter was withdrawn in 2007. It is trite that an application stands or falls on its founding

affidavit. See *Fuyana* v *Moyo* SC 54-06; *Muchini* v *Adams & Ors* SC 47/13. I attach no weight to the letter from the Ministry, mainly because it was introduced *via* an answering affidavit. This prejudiced the second respondent, in that he was not able to deal with the issue in the opposing papers. In any event, this letter would have still carried no weight even if it was introduced through the founding affidavit because it was addressed to "whom it may concern" not to Jesca Dzvifu. There is no letter addressed to her informing her of the withdrawal. There is no evidence that the so-called withdrawn was communicated to her. Therefore, both parties have offer letters to the same farm, and worse still the one for Jesca Dzvifu pre-dates the one for the applicant.

[8] In addition, on one hand, by his own version, the applicant has, since the date he was offered the farm, he has been unable to work on it. On the other hand, the second respondent and her sister have put twenty hectares of the land under wheat irrigation at the farm. In addition, there is evidence that they sold farm produce to the Grain Marketing Board. The applicant has not been in occupation of the farm, instead it is Jesca Dzvifu through the second respondent who is in occupation of the farm.

[9] Both parties have presented offer letters in respect of the farm. In such a case, the seat of the *onus* becomes decisive, i.e., the party with the *onus* would not have discharged it as required by the law. The applicant bears the burden of proof and in such a case cannot be said to have discharged such burden. In the circumstances, the applicant has not established a clear right as required by the law. The absence of a clear right signals the end of this matter, and no useful purpose would be served by dealing with the other requirement of an interdict.

[10] In addition, this application would still have failed on the basis that the second respondent is in occupation of the farm. It is trite that the primary objective of interdictory relief is to prevent or prohibit future unlawful conduct. The courts have long recognized that an interdict is not anappropriate remedy for the past violation of rights but is aimed at preventing future unlawful conduct. In *National Council of Societies for the Prevention of Cruelty to Animals* v *Openshaw* 2008 5 SA 339 (SCA) 346 H para 20 it was held that an interdict is not a remedy for the past invasion of rights but is concerned with present or future infringements. It is appropriate only where future injury is feared, and where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. The court noted that an interdict is meant to prevent future unlawful conduct. An interdict seeks preventive rather than retributive justice.

[11] A closer scrutiny of the applicant's case shows that he is seeking the eviction of the second respondent by means of an interdict. A remedy of eviction cannot be obtained through an interdict. Regarding the first respondent, the facts of this case shows that he is just a mere neighbour and has no interest in this matter. It is for the above reasons that this application must fail.

[12] The applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The respondents are entitled to their costs. The respondents sought costs on a legal practitioner and client scale. Such costs are not for the mere asking. Something more underlies the practice of awarding costs on a legal and practitioner scale, than the mere punishment of the losing party. In other words, a litigant is not mulct with costs on a legal practitioner and client scale for being unsuccessful in the litigation. Such costs require proper explanation grounded in the law. See *Railings Enterprises (Pvt)* v *Luwo & Ors* 2020 (2) ZLR 51 (H); *Kangai* v *Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). No case has been made for such costs in this case. Costs on a party and party scale will meet the justice of the case.

In the result, I order as follows:

The application is dismissed with costs of suit.

DUBE-BANDA J:……

Mabulala & Dembure, applicant's legal practitioners
Nyamwanza & Associates, respondents' legal practitioners