JOSEPH BAKURU TAYALI
and
BENJAMIN MANGWENDE
versus
UMGUZA RURAL DISTRICT COUNCIL

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 13 JUNE 2016 AND 18 AUGUST 2016

Urgent Chamber Application

B Ncube for the applicants
S Chamunorwa for the respondent

TAKUVA J: First applicant sought an interim relief in the following terms:

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

1. The respondent be and is hereby ordered to release the 1st applicant's Nissan UD truck, registration number ABT 5093 upon service of this application and provisional order.
2. Failing compliance with paragraph 1above, the Sheriff of Zimbabwe or his lawful assistant be and is hereby directed to recover applicant's Nissan UD truck, registration number ABT 5093 from the respondent's custody or from wherever located.
3. The 1st applicant, to safeguard the respondent's possible monetary claim be and is hereby directed not to dispose or alienate the Nissan UD truck registration number ABT 5093."

The common cause facts are that on 20 May 2016 along 3rd Avenue Bulawayo, the second applicant was driving first applicant's Nissan UD truck loaded with river sand. He was approached by respondent's officers who after identifying themselves asked him to produce a permit authorizing him to carry or move river sand. The second applicant failed to produce such a permit claiming that the river sand was from first applicant's farm in Shangani. Respondent's agents then issued an invoice demanding payment of a penalty in the sum of US$500-00. They also impounded the vehicle and the riversand.

Applicant claimed that the source of the river sand was Shangani farm. He seemed to be labouring under a misapprehension that if the sand was from his farm, he would be exempt from obtaining a permit. As to how the truck which was destined for Parklands passed that suburb and ended up in the city centre, applicants' explanation is that the truck developed "mechanical problems" and the second applicant needed to change the tyres before returning to Parklands. Later, first applicant's lawyers wrote a letter to the respondent demanding the release of the truck. Part of the letter reads as follows:

"The riversand was taken from Mr Tayali's Shangani Farm and was destined for construction at one of his properties within Bulawayo and there is proof to that effect. Respondent refused to release the vehicle, arguing that applicants must produce a valid permit.

Aggrieved, applicant filed this application on the following grounds:

(1) the respondent has no factual or legal basis to hold on to his vehicle.
(2) the respondent cannot resort to self help.
(3) the riversand was never taken from Umguza Rural District Council jurisdiction but from Shangani farm which falls under Insiza Rural District Council. Therefore, respondent has no lawful or factual right to claim US$500-00.
(4) the demand for US$500-00 is arbitrary and not supported by any statutory instrument or known law.
(5) the truck is used at the farm and "for hire purposes" generating US$100-00 – US$300-00 per day.
(6) failure to release the truck will result in applicant suffering irreparable harm and the balance of convenience favours the release of the truck.

The respondent strongly opposed the application. A number of points *in limine* were raised in its opposing affidavit. Firstly, it was contended that the certificate of urgency is fatally defective in that it does not disclose why the matter is urgent, beyond simply alleging financial prejudice. Secondly, it was argued that the second applicant has not established his *locus standi* in that since the vehicle belongs to first applicant, it ought to be first applicant instituting proceedings in his own name for relief. Thirdly, respondent submitted that the chamber application is fatally defective as to be a nullity in that it does not comply with the proviso to

order 32 rule 241. The point being that the applicant used the wrong format. Reliance was placed on the following cases; *Zimbabwe Open University* v *Mazowe* 2009 (1) ZLR 101 (H) at page 103 C and *Marick Trading (Pvt) Ltd* v *Old Mutual Life Assurance Co. of Zimbabwe (Pvt) Ltd and Another* HH 667/15 where MAFUSIRE J stated:

> "I observe in passing that the format of the application used by the applicant seems so popular among legal practitioners in this jurisdiction. I do not know where it comes from. But all that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with modifications. If the application is a chamber application that needs to be served on interested parties …. The courts, both in this jurisdiction and elsewhere have repeatedly drawn attention to the need to follow the rules on this. It is not a "sterile" argument about forms."

Finally on preliminary points, it was submitted that the applicants contravened the provisions of SI179 of 1996 and SI7 of 2007. The former is the Umguza Rural District (Communal and Resettlement Land) (Land use and Conservation) Bye-laws, 1996. Section 8(1) (j) states;

> "Protection of vegetation and natural resources.
> The council may, within communal or resettlement areas, make orders controlling all or any of the following matters—
> (a) ----
> (b) ----
> (c) ----
> (d) -----
> (e) -----
> (f) -----
> (g) -----
> (h) -----
> (i) -----
> (j) the collection or removal of stone, river and pitsand."

Section 3 (1) of SI 7 of 2007 states—

> "No person shall, excavate, remove, possess or licence the removal of clay or sand deposit for commercial purposes without a licence issued by the agency.
>
> (2) Any person who wishes to extract, possess or licence the removal of sand or clay shall apply to the agency in Form EMA and the application shall be accompanied by an appropriate application fee.
> (3) ------

(4) Any person who contravenes subsections (1)(2) or (3) shall be guilty of an offence and liable to a fine not exceeding five years or to both such fine and imprisonment."

Further on 1 January 2013, respondent in terms of section 8 of SI 179/1996 made Order No 8 of 2013 whose provisions are that

"2. This order shall apply wholly to the Umguza Rural District Council's area of jurisdiction.
(3) No person shall, within the Council area, move;
(a) stones,
(b) pit sand,
(c) river sand,
(d) -----
(e) -----

without a permit from the Council in collaboration with the Environmental Management Agency.

(4) Any person who contravenes this order shall be liable to a fine of not exceeding $500-00.
(5) ----."

As regards the merits, it was contended that the request for a permit was made while second applicant was in Mbembesi, and repeated when he was apprehended and also when replying to the letter of demand. Respondent relied on the affidavit of Alfred Mhlanga, who is employed as a senior Ranger. According to Mhlanga, on 20 May 2016 he was on duty along the Bulawayo-Harare road in Mbembesi which falls within respondent's area of jurisdiction. Whilst there and in the company of other officers, he observed the second applicant who was transporting river sand. Applicant was requested to stop but he refused and drove towards Bulawayo. They gave chase in respondent's truck until they caught up with him along 3rd street in the Bulawayo Central Business District and effected an arrest. The second applicant was still in possession of the truck carrying river sand. He failed to produce a permit either from respondent or Insiza Rural District Council.

It is trite that the criteria by which urgency is determined is that the applicant himself must treat the matter as urgent- See *Madzivanzira and others* v *Dexpoint Investments (Pvt) Ltd and Another* 2002 (2) 316 (H). Where a situation has existed for a significant time before an

application is made, such an application could not be said to be urgent – *Gwarada* v *Johnson and others* 2009 (2) ZLR 159(H).

In *casu*, applicant allowed the situation to exist from 20 May 2016 until 31 May 2016 before making this application. It should be noted that this is a delay of 11 days. In *Kuvarega* v *Registrar General and Another* a delay of seven (7) days was held to be inordinate. It was also held in that case that where there is a delay such delay must be explained. In the present case applicant did not bother to explain his delay.

For these reasons, I find that in this application, urgency has been alleged but not established in both the legal practitioner's affidavit and the first applicant's founding affidavit.

In respect of the format, it is common cause that the applicant did not comply with order 32 rule 241. However quite surprisingly applicant's counsel attempted to justify his conduct by saying that he in fact used Form 29C. This does not assist applicant's case at all in that Form 29C is for a provisional order which must in terms of the rules be annexed to a chamber application which in turn must comply with rule 241. As a result, I agree with Mr *Chamunorwa* for the respondent that applicant failed to comply with rule 241.

From the relevant statutory instruments cited *supra* and the material facts, it is clear that there is a *prima facie* criminal case against the applicants. The truck and its load are potential exhibits in the prosecution of the applicants. To order the release of the exhibits before the trial is finalized will be tantamount to interference with due process of the law. I must hasten to point out that the applicant has an alternative remedy in that the Criminal Procedure and Evidence Act [Chapter 9:23] has provisions dealing with how articles or vehicles used in the commission of crimes are forfeited or not forfeited to the state.

In *Setlogelo* v *Setlogelo* 1914AD 221 at 227 INNES JA accepted that the requisites for the right to claim an interdict were first, a clear right, secondly, an injury actually committed or reasonably apprehended; and, thirdly, the absence of similar protection by any ordinary remedy- See also *CB Prest The Law and Practice of Interdicts* (1993) page 35. On the other hand, the requirements for a temporary or interim relief are;

(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, thought open to some doubt;
(b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
(c) that the balance of convenience favours the granting of interim relief, and
(d) that the applicant has no other satisfactory remedy – *L.F Bosttoff Investments (Pvt) Ltd* – v- *Cape Town Municipality* 1969 (2) SA 256 (C) at 267 A-F.

In *casu*, while it is clear that first applicant is the owner of the truck, the same cannot be said about the river sand. There is a dispute of fact on the papers before me as regards the source of the sand. In such a case, the proper approach is to take "the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain a final relief at the trial. Next, the facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right *prima facie* established may only be open to some doubt "*C.B Prest" supra*.

In the present case, the undisputed facts show that applicant was transporting sand without a permit. Applicant admits this but says there was no legal requirement to obtain one since the sand does not belong to the respondent. In my view the second applicant's explanation for driving into the Central Business District is laughable, curious and urgency in probable in that on his way from Shangani, he passed Parklands and drove into the CBD. Not only that, he said he wanted to offload the truck in order to amend the tyre(s), load the truck and then drive back to Parklands. The onus to establish a *prima facie* case and ultimately a *prima facie* right is on the applicant and going by the affidavits placed before me, I am not satisfied that he has discharged the onus resting upon him. It seems to me that there is a clear violation of the law by the applicant and this constitutes a valid basis for not granting an interdict because the respondent has acted lawfully in arresting the applicant and impounding the truck. See *Patz* v *Greene & Co*

1907S; *Rudolph and another* v *Commissioner for Inland Revenue and others* 1994 (3) SA 771 (W) and *Batista* v *Commanding Officer Sanab, SA Police, Port Elizabeth and others* 1995 (4) SA 717(E) where MULLINS J said;

> "Unfortunately, there is a rapidly increasing tendency on the part of litigants to invoke the provisions of the Constitution in order to seek protection for conduct which, in terms of existing laws, statutory or otherwise, would be unlawful or even criminal. ----."

In *casu*, applicants' conduct is *prima facie* criminal. Further, the balance of convenience favours the refusal of an interim relief in that if it is granted, the respondent's capacity to prosecute applicants is dealt a fatal blow. Applicants are most likely to continue transporting sand unlawfully. Whereas if the relief is declined and the applicants are acquitted, they will be able to recover damages from the respondent for malicious prosecution and or loss of income. Put differently the court is involved in the process if striking a balance of the risk of doing an injustice.

Equally so, since applicant's prejudice is purely financial it cannot be said that he has no alternative adequate remedy. He can sue for damages in the event that he is found not guilty of the charges. The question is 'Is it just in the circumstances that the applicant should be confined to his remedy in damages? In my view the answer is in the positive in that, applicant in paragraph 4.6 of his founding affidavit stated;

> "4.6. I used the truck for farming activities at the Shangani Farm and also for hire purposes and I generate US$100-00 –US$300-00 per day and I am suffering <u>financial prejudice</u>." (my emphasis).

Quite clearly, a remedy in damages would suffice. Applicant's claim is one of inconvenience and expense. It should be noted that while this is never in itself sufficient ground for confining the applicant to a claim for damages, that fact is one of a number of factors which may influence the court in exercising its discretion whether or not to grant an interdict.

For these reasons, the application is dismissed with costs.

Lunga Gonese attorneys, applicants' legal practitioners
Calderwood, Bryce, Hendrie and partners, respondent's legal practitioners