AMBASSADOR CHIMONYO
versus
ROUTE TOUTE BV
and
PENINSULAR PLANTATIONS (PRIVATE) LIMITED
and
MATANUSKA (PRIVATE) LIMITED
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT
and
THE MINISTER OF FOREIGN AFFAIRS

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 15 AND 26 JANUARY 2010

URGENT CHAMBER APPLICATION

Mr. *G. N Mlotshwa*, for applicant
Ms *Mahere*, for first, second, third and fourth respondents
Fifth and sixth respondents in default

MUSAKWA J: This is an application for stay of execution of the judgment granted in case number HC 6541/09 on 5 January 2010.

The background to this matter is that Fangudu farm was acquired from respondents by the fourth respondent. A portion of the farm was allocated to applicant. Whilst a dispute regarding the acquisition was still going on applicant moved onto the farm. Applicants sought a spoliation order by way of urgent chamber application and this was granted in case number HC 7170/06. This provisional order was confirmed by PATEL J in judgment number HH 128/09 which was handed down on 21 December 2009. The order by PATEL J was declaratory in nature.

After the granting of the provisional order in case number HC 7170/06 it is accepted that applicant moved out of the farm in compliance. Subsequently, persons acting on the authority of the applicant reoccupied the farm, thereby giving rise to another spoliation order granted by KARWI J on 5 January 2010.

In his founding affidavit applicant contends that process that gave rise to the second spoliation order was not served on him. Process was served on the second respondent. This is despite the fact that he is currently based in Tanzania in his capacity as Zimbabwean ambassador to that country. The second respondent had no mandate to accept service on his behalf.

As regards prospects of success, applicant's contention is that the issue hinges on a point of law. Essentially, it is contended that in view of the divergence of opinion on whether illegality constitutes a defence to a charge of spoliation applicant has prospects of success in seeking a rescission of the default judgment.

In his submissions Mr *Mlotshwa* pointed out no opposing papers were filed in answer to non-service of the application and notice of set down on applicant. Whilst it is not a requirement in urgent matters to file opposing papers, it was his submission that the inescapable conclusion is that what is alleged by applicant stands unopposed. He further highlighted that when the parties appeared before KARWI J Mr *Mutsonziwa* made it clear that he was representing the Minister of Lands and Rural Resettlement and Minister of Foreign Affairs only. It was incumbent on Mr *Drury* to have sought a postponement in order to effect service on applicant. He also submitted that Mr *Drury* was aware that his firm was representing the applicant. That is why they sought to serve the papers on his firm albeit under the *caveat* of abundance of caution.

Mr *Mlotshwa* also submitted that different judgments have emanated from this court regarding occupation of gazetted land. The divergence of opinion was noted by CHIDYAUSIKU CJ in the case of *Nyasha Chikafu v (1) Dodhill (Private) Limited (2) Simon Donald Keevil (3) The Minister of Lands and Rural Resettlement* SC 28/09. At the very least applicant's prospects of success are balanced because of the uncertainty that has emerged in the law.

On the other hand Ms *Mahere* submitted that a stay of execution may be granted where real and substantial justice so demands. In support of this proposition she cited the case of

Mupini v Makoni 1993 (1) ZLR 80. An applicant for stay of execution has to establish that injustice and irreparable harm will be occasioned if such relief is not granted. She also referred to the case of *Santam Insurance Company Limited v Paget* 1981 ZLR 132 which is cited in the *Mupini* case.

On the aspect of real and substantial justice Ms *Mahere* referred to the judgment by PATEL J supra. It was her contention that the judgment sets out the respective rights of the parties. Most importantly, it was pronounced that applicant has no right to occupy the farm in question. In such a case real and substantial justice demands that due process be followed before applicant occupies the land. She pointed out that there is nowhere in applicant's papers that he has addressed the requirement of real and substantial justice. This is particularly so taking into account applicant's self-help conduct as shown by his negation of due process. In addition, there is no demonstration of how applicant will suffer irreparable harm.

On irreparable harm, Ms *Mahere* cited the case of *Chibanda v King* 1983 (1) ZLR 116. In this regard she submitted that it is not enough for applicant to allege hardship. The only hardship applicant may suffer relates to his employees. However, the employees occupied the farm after the judgment by PATEL J had been handed down.

Ms *Mahere* also submitted that applicant enjoys limited prospects of success in light of the judgment of PATEL J. Applicant did not oppose the particular application and as at the date of hearing of the present application, it was submitted on respondents' behalf that there was no indication that applicant had appealed against that judgment.

On service of the application in case number HC 6541/09 Ms *Mahere* submitted that applicant's address for service in Harare was not known. That is why the application and other process was served on the Ministry of Foreign affairs. The Ministry accepted service and there was no indication that they would not notify applicant. Out of abundance of caution counsel for respondents attempted to serve the papers on applicant's legal practitioners but the offices were closed. However, there had been no indication from applicant's counsel that he had instructions to accept service.

Ms *Mahere* also submitted that applicant had not filed any opposing papers to the provisional order that was granted on 5th January 2010. In respect of the draft provisional order to the present application paragraph (b) was said to be incomprehensible. This is because Police and the Deputy Sheriff cannot be expected to attend to the execution of an order of stay of execution as sought. Finally, it was also submitted that applicant had an alternative remedy as he could have filed opposing papers and anticipated the return day.

In the case of *Mupini v Makoni* supra GUBBAY CJ had this to say on stay of execution, at p 83:-

"Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as in casu, the judgment is for ejectment or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See Cohen v Cohen (1) 1979 ZLR 184 at 187C; Santam Ins Co Ltd v Paget (2) 1981 ZLR 132 (G) at 134G-135B; Chibanda v King 1983 (1) ZLR 116 (H) at 119C-H; Strime v Strime 1983 (4) SA 850 (C) at 852A."

In the earlier case of *Santam Insurance Co. v Paget* supra GUBBAY J (as he then was) had this to say at p 134:-

"I turn now to a consideration of the merits of the application. As observed by GOLDIN J, as he then was, in Cohen v Cohen (1), 1979 RLR 184 (GD); 1979 (3) SA 420 (R) at 423B-C, the court enjoys an inherent power, subject to such rules as there are, to control its own H process. It may, therefore, in the exercise of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also Graham v Graham, 1950 (1) SA 655 (T) at 658. The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused him or, to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice."

The applicant has averred that the application and notice of set down leading to the default judgment were not served on him in accordance with the rules of court. The papers were served on the Ministry of Foreign Affairs. An attempt was made to serve applicant's legal practitioners but it seems no return of service was ever filed with the court. Order 5 Rule 39 (2) of the High Court Rules provides that:-

" (2) Subject to this Order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways—
(*a*) by personal delivery to that person or his duly authorized agent;
(*b*) by delivery to a responsible person at the residence or place of business or employment of the person on whom service is to be effected or at his chosen address for service;
(*c*) in the case of process other than a summons or an order of court, by delivery to that person's legal practitioner of record;
(*d*)……
(e)……
(f)……"

It is clear from a reading of the above rule that the application in issue was not properly served on applicant. I am sure service of the application on applicant's employees at the farm would have sufficed. That is why the provisional order was served at the farm.

The applicant has also brought up a different argument on the subject of spoliation. This is in the wake of the judgment in the case of *Nyasha Chikafu v (1) Dodhill (Private) Limited (2) Simon Donald Keevil (3) The Minister of Lands and Rural Resettlement supra*. In that case which was an application for leave to appeal CHIDYAUSIKU CJ granted the application after noting that there was a divergence of decided cases on spoliation within this jurisdiction. At p 7 of the cyclostyled judgment the learned Chief Justice had this to say:-

"Can unlawful occupation constitute a defence to a claim for mandament van spolie? It is quite clear that the authorities are divergent on this issue. One line of authorities, which includes judgments of the High Court of Zimbabwe, supports the contention that unlawful occupation can be a defence; while other authorities that include High Court of Zimbabwe judgments as well, are to the effect that unlawful occupation is irrelevant. Given this situation, whichever party lost in the High Court had prospects of success as its contention is supported by a line of decided cases."

In light of the sentiments expressed in the above cited case, it cannot be said that applicant has no prospects of success in his intended application for rescission of the default judgment. It means that the rights of the parties to the farm in question are evenly balanced. Accordingly, the application is granted as follows:-

INTERIM RELIEF

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

(a) The operation of and execution of the default order handed down by Honourable Justice Karwi in case number HC 6541/09 be and is hereby stayed.

(b) The applicant shall file his application for rescission of judgment granted in case number HC 6541/09 within seven days of the granting of this order.

GN Mlotshwa & CO, applicant's legal practitioners
Gollop & Blank, first, second, third and fourth respondents' legal practitioners