GILBERT JONGA
versus
NYASHA CHABATA

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 10, 13 & 31 January 2016, 6 February 2017 & 14 March 2017

Urgent Chamber Application

R Peters, for the applicant
T P M Machiridza, for the respondent

CHATUKUTA J: The applicant seeks an interdict restraining the respondent from interfering with his farming operations at Subdivision 3 of farm 45, Glendale (the farm).

This is not the first time that the parties are before this court. The parties are fighting over who has the right to occupy the farm which belongs to the State. On 6 December 2016, the respondent successfully approached this court in case number HC 12380/16 on an urgent basis seeking spoliatory relief. On 9 December 2016, MATANDA-MOYO J ruled in favour of the respondent in case number HC 12380/16 and issued the following order:

> "**TERMS OF FINAL ORDER SOUGHT**
> That you show cause to this Honourable Court why a final order should not be made on the following terms:
> 1. The interim order be confirmed.
> 2. It be and is hereby declared that applicant, his representatives, employees and invitees are entitled to remain in peaceful and undisturbed possession, occupation and use of subdivision 3 of Farm 45 of Glendale in Mazowe District of Mashonaland Central measuring 36.21 hectares.
> 3. The respondent pays the costs of this (application) on the higher scale of legal practitioner and client.
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> **TERMS OF THE INTERIM ORDER GRANTED**
> Pending the finalisation of this matter, the applicant is granted the following interim relief –
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> 1. That the respondent restore to the applicant possession of subdivision 3 of Farm 45 Glendale in Mazowe District of Mashonaland Central measuring 36.21 hectares
> 2. The Deputy sheriff be and is hereby authorised and empowered to ensure that such restoration is done and that the applicant remain in peaceful and (undisturbed) occupation of the above property.

3. The respondent and all those claiming through him vacate the said property forthwith of which the Deputy Sheriff is authorised to evict same from the property.
4. That the respondent pays costs of suit."

On 13 December 2016 the applicant noted an appeal against the judgment of MATANDA-MOYO J. On 22 December 2016, the respondent destroyed part of the applicant's crop resulting in the present application.

The background to this application was articulated in case number HC 12380/16 in which the court found that the respondent is a holder of an offer letter for a portion of the farm measuring 36.21 hectares. The offer letter was issued on 6 November 2015. The applicant produced documents proving that he was in occupation of the Remaining Extent of Farm 45 (Truro) Glendale and Plots 1, 4, & 5 of Dunmaglas Farm in Mazoe. The court found that the portions allocated to the two parties are different. The applicant contended in HC 12380/16 and still contends in the present application that the portions are one and the same and he has a 99 year lease over the entire farm. He has been in occupation of the entire portions since 2002 well before the respondent was issued with the offer letter on 6 November 2015. Believing that the court in case number HC 12380/16 erred in holding that the portions are different and that he was not in possession of the farm, the applicant filed an appeal against that decision in SC 771/16.

The applicant avers in the present case that at the beginning of 3 October 2016, he entered into an agreement to grow 100 hectares of maize with the Government under the Special Programme on Maize Production for Import Substitution (popularly known as "the Command Programme"). He was given inputs under the Programme and during the first half of November 2016 and before the respondent had filed her application in case number HC 12380/16, he planted his maize. On 13 December, 2016 he filed the appeal against the decision. On 21 December 2016, the respondent returned to the farm and destroyed 7 hectares of the maize crop. Fearing that the respondent could proceed to destroy further hectarage, the applicant has approached this court on a certificate of urgency for an interdict.

At the commencement of the hearing, the respondent contended that the application was not urgent. The issue was abandoned during argument. Thereafter she raised four other preliminary points. The first issue was that there was no valid appeal before the Supreme Court because the order in case number HC 12380/16 was provisional and the applicant had not obtained leave of the High Court to launch the appeal. In support of her argument, she

relied on the decision in *Nyikadzino* v *Ashers & Ors* 2009 (1) ZLR 175, *Chikafu* v *Dodhill (Pvt) Ltd & Ors* 2009 (1) ZLR 293 and *Blue Rangers Estates (Pvt) Ltd* v *Muduviri & Anor* 2009 (1) ZLR 376 (SC).

The second issue was that the applicant commenced planting the maize crop in issue on 10 December 2016 well aware of the judgment in case number HC 12380/16. He was lawfully evicted by the Deputy Sheriff on 21 December 2016. He returned to the farm in spite of the order to vacate the farm and the eviction by the Deputy Sheriff. It was further alleged that he was therefore approaching the court with dirty hands. On this basis, it was argued that the court should refuse to entertain the court application until such time as the applicant had submitted himself to the law.

Thirdly, it was argued that the applicant ought to have joined the Minister of Lands who is the acquiring authority. Failure by the applicants to join the acquiring authority in these proceedings was fatal to the application. Lastly, it was submitted that the applicant had an alternative remedy precluding the matter to be heard on an urgent basis. It was contended that he can seek the discharge of the order in case number HC 12380/16 and in the alternative claim damages for any loss incurred.

The applicant submitted that the provisional order in case number HC 12380/16 was final in effect. It was therefore not necessary to seek the leave of this court to appeal. He further submitted that following his noting of the appeal in the Supreme Court, the provisional order was suspended. He was entitled to continue his farming operations and was therefore not approaching the court with dirty hands. Further, it was not fatal not to join the acquiring authority as the court could determine the issues in terms of r 187 without sighting the Minister. Regarding the existence of an alternative remedy, it was submitted that the discharge of the order was not adequate to stop the respondent from interfering with his operations on the farm.

I turn to the first preliminary point. I perceive the issue to be whether or not I can determine whether or not the appeal before the Supreme Court is defective. It appears to me that it is not the function of the High Court to determine the issue. The right of appeal lies to the Supreme Court. It is therefore the Supreme Court itself which is endowed with the power to hear and determine any alleged defect in an appeal.

In *Blue Rangers Estate (Pvt) Ltd* v *Muduviri & Anor* (*supra*) (which was cited by both parties as authority on whether or not the order in case number HC 12380/16 is interlocutory

and which case also discussed the decisions in *Nyikadzino* v *Asher & Others* (*supra*) and *Chikafu* v *Dodhill (Pvt) Ltd* ZLR (*supra*)), MALABA DCJ observed at 375 F -376 A that-

> "In *Pretoria Racing Club* v *Van Pietersen* 1907 TS 687 the respondent's legal practitioners took the point that no appeal lay to the Transvaal Provincial Division in the case because the spoliation order made by the Judge was, in terms of s 22 of Proclamation 14 of 1902 an interlocutory order not appealable without the leave of the Judge who made it. The full court consisting of INNES CJ, SMITH and CURLEWIS JJ accepted that it was for the court in which the appeal was noted to decide on the facts of each case what the nature of a particular order is in order to determine whether it fell within the category of final or interlocutory orders. At p 493 SMITH J writing for the full court said:
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> > 'The point, in my opinion would have been more properly raised as preliminary to the hearing of this appeal when a decision upon it would have been necessary.'
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> **It is clear that as the question would have turned on the construction of the terms of the enactment creating the right of appeal which in this case is s 43(1) read with s 43 (2) (d) of the High Court Act, it would have been a matter within the competence of the Supreme Court to decide in terms of s 21 of the Act.** The order striking the appeal off the roll could only be made following a finding on the nature of the order from which relief was being sought on appeal." (Own emphasis).

It would therefore be presumptuous of me to venture to determine the defectiveness of the appeal ahead of the superior court in light of the above pronouncement.

The principle that a litigant who fails to comply with a court order and therefore has dirty hands should be denied audience in the halls of justice is trite. (See *Deputy Sheriff, Harare* v *Mahleza & Anor* 1997 (2) ZLR 425 (H) and *ANZ* v *Minister of State for Information & Publicity & Ors* 2004 (1) ZLR 538 (S)). However, the applicant cannot be said to have approached this court with dirty hands by reason of failure to comply with a court order. He did not ignore the judgment in HC 12380/16. He filed an appeal. The noting of an appeal automatically suspends the operation of an order appealed against. (See *Econet (Pvt) Ltd* v *Minister of Information, Posts and Telecommunications* 1998 (1) ZLR 149 (H) at p 156C). The order having been suspended, it was within the applicant's right to return to tend to his crop.

The converse is in fact true regarding the respondent's conduct. It is the respondent, who despite being aware that there is an appeal now pending before the Supreme Court, insists on remaining on the farm arguing that the appeal is a nullity. As stated in *Mydale International Marketing (Pvt) Ltd* v *Dr Rob Kelly and Hammer and Tongues (Pvt) Ltd* HH 4-2010, it is not for the respondent to disregard the appeal on the basis that she is of the view that it is a nullity. She cannot be the judge in her own cause.

Turning to the no-joinder of the Minister of Lands, I do not agree that the non-joinder of the Minister was fatal to the application. The issue before me is not who has the right to occupy the farm. The issue is how to protect the maize crop on the farm, which had been partly destroyed by the respondent, pending the determination of the appeal.

Assuming that it was necessary to cite the acquiring authority, r 87 of the High Court Rules, permits the court to determine the issues as between the parties before it even where such joinder is required. Rule 87 provides:

> "No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and 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 the persons who are parties to the cause or the matter". (See *Rollex (Pvt) Ltd* v *Delta Beverages (Pvt) Ltd* HH 66-15.)

Misjoinder is not fatal to the current proceedings given my earlier observation that the dispute before me is about the respondent's conduct and is therefore resolvable without joining the acquiring authority.

The last preliminary point is whether or not the applicant has an alternative remedy. As rightly submitted by the applicant, the confirmation of the order in case number HC 12380/16 and a future award of damages will not prevent the respondent from continuing to interfere with the applicant's operations.

I now turn to the merits of the application, the requirements of an interdict are trite, that:-

a) there is a *prima facie* right even though open to doubt;
b) an injury has actually occurred or is reasonably apprehended;
c) the applicant does not have an alternative remedy; and
d) the balance of convenience favours the granting of the interim relief. (see *Setlogelo* v *Setlogelo* 1914 AD 221, *Airfield Investments (Pvt) Ltd* v *Minister of Lands & Ors* 2004 (1) ZLR 511)

It is not in issue that the applicant had a *prima facie* right, albeit one which is open to doubt. The applicant produced a letter dated 27 October 2015 from the Ministry of Lands confirming that his application for a 99 year lease over Reveille Farm & Farm 45 had been approved. The respondent conceded that whilst the applicant had not established a clear right to be on the farm, he had established a *prima facie* right. She conceded that in November 2015 the applicant had planted only 3ha of maize crop on the farm. This confirms that the applicant was already in occupation of part of the farm as her offer letter is dated 6 November 2015 and she only moved onto the farm in December of the same year.

Even assuming that it were to be found that the applicant does not have any right to occupy the farm, he would be entitled to tend to and harvest his maize crop as such crop does not attach to the land as a permanent fixture. (See *Bangure* v *Gweru City Council* 1998 (2) ZLR 396 (H) at 399 C – 400 D).

It is equally not in issue that an injury has already occurred. The applicant produced pictures showing areas with a thriving maize crop which had been ploughed under. The respondent conceded to have ploughed the crop under on instruction of the Deputy Sheriff. Both the applicant and the respondent produced documents from Agritex as to the extent of the damage. The applicant produced an assessment report dated 9 December 2017 of the total area planted as at 22 December 2016, (38.7ha), area ploughed under (4.6ha) growth stage of the maize crop (3 to 5 leaf stage). Although the report is dated 9 December 2016 (before the destruction of the crop) it tallies with the contents of the minutes produced by the applicant dated 11 January 2017. The minutes are of a meeting purportedly held on 23 December 2016 at the behest of the Command Programme Bindura committee following the destruction of the crop by the respondent. The minutes confirm the apprehension of all concerned of the harm that was to be caused if the respondent was to continue to destroy the crop.

This apprehension, in my view, confirms that the applicant does not have an alternative remedy other than to approach the court. The requirement on the existence of an alternative remedy is well explained in *Neptune (Pvt) Ltd* v *Venture Enterprises (Pvt) Ltd* HH 127/89. At page 8 ADAMS J quotes LEWIS J in *Reserve Bank of Rhodesia* v *Rhodesia Railways* 1966 RLR 451 that-

> "…..NATHAN, in his well known works on INTERDICTS, states the position as follows, at p 32-
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> > Lastly as Van der Linden says, there must be no other ordinary remedy by which the applicant can be protected with the same result… The most familiar example, however, which comes to a lawyer's mind is that of damages. It is clear that, if the applicant will have adequate compensation by the award of damages, he will have another ordinary remedy. …….Generally speaking, however, the fact that the applicant has a remedy open to him by way of action for damages is sufficient to bar an interdict where the interference or breach of a right is capable of measurement in money."
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> **The operative part of the quotation-in fact, the essence of it, really-is that there is an existing remedy for the protection of the applicant "with the same result**"…..if that is the situation, then, so it seems to me, the interdict should be refused." (own emphasis).

As alluded to earlier, there is no other remedy that would compel the respondent from interfering with the applicant's farming operations other than an order from this court.

The applicant has therefore satisfied the first three requirements.

Both the applicant and the respondent have invested time and other resources into the maize crop. The applicant is the one who expended time, effort and resources to obtain the inputs. He is the one who worked on the land, planted the crop and managed the crop until the respondent took over. The respondent has been managing the crop and has equally invested time and other resources since then. The issue is therefore where the balance of convenience lies.

The applicant submitted that he is the one who entered into an agreement under the Command Programme and is obliged to manage the maize crop and make deliveries in terms of the agreement. In the event that he fails to do so, he is likely to face a claim for damages as in *Rollex (Pvt) Ltd* v *Delta Beverages (Pvt) Ltd* HH 66-15.

The respondent relies on the resolution of the meeting on 23 December 2016 which resolution transferred the applicant's rights and obligations under the Command Programme agreement to her.

The applicant is beneficiary of the inputs under the Command Programme that are presently in the ground. He is the one who legally has rights and obligations under that programme. The agreement is still binding. The applicant, pursuant to the agreement under the Command Programme is and must be responsible for the maize crop. He has already lost part of the crop as a result of the respondent's conduct and may consequently fail to fully meet his obligations under the agreement and expose himself to a legal suit and requires protection by this court. Under the circumstances the balance of convenience weighs in his favour.

Despite the intervention of the Command Programme committee, the respondent is not privy to the agreement between the parties. The transfer of the crop to the respondent has no force of law as the resolution of the committee does not amend the agreement between the applicant and the State and cannot replace the agreement.

Although the parties went to great lengths to argue who has the right to occupy the farm, I have found it not necessary to dwell on the issue. As rightly noted by the applicant, that issue is, following the appeal, for determination by the Supreme Court. Other numerous submissions were thrown into the fray. I am of the view that the submissions only cloud the

issue at hand and it serves no purpose to allude to them. What is now common cause is the fact that the applicant has a crop in the ground, part of which was destroyed by the respondent. He has noted an appeal against the decision in HH 12380/16 which appeal is to be determined. The respondent cannot therefore proceed with the execution of the judgment in HC 12380/16 in the face of the appeal in SC 771/16.

The parties were agreed that in the event of an order being granted in favour of the applicant, it served no purpose for me to grant a provisional order. It was consequently agreed that I grant a final order. The applicant did not seek any costs and accordingly none are awarded.

In the result, it is ordered that:

1. Pending the determination of the appeal in case number SC 771/16, the respondent be and is hereby interdicted from interfering with the applicant's farming operations at subdivision 3 of Farm 45, Glendale, Mashonaland Central.
2. There is no order as to costs.

J Mambara & Partners, applicant's legal practitioners
Machiridza Commercial Law Chambers, respondent's legal practitioner