N & R AGENCIES (PVT) LTD

And

MARK ANDROLIAKOS

Versus

THABANI NDLOVU

And

MACLEAN BHALA

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 & 15 DECEMBER 2011

R Moyo-Majwabu for the applicant
R Ndlovu for respondents

Judgment

MATHONSI J: In this urgent application filed on 5 December 2011, the 2 applicants seek the following relief.

"Terms of final order sought

That you show cause to this honourable court why a final order should not be made in terms of the following terms (*sic*);

It and is hereby ordered that:

1. The eviction and removal of the applicants from subdivision 1 and subdivision 2 of Marcedale Farm due to be effected on 6 December 2011 be and is hereby set aside.
2. The judgment of the court in HC 1539/11 is hereby set aside.
3. The respondent shall pay the costs only in the event that he opposes this prayer.

In the alternative

1. The execution of the judgment entered in favour of the respondent against the applicant on the 6th October 2011 in case number HC 1539/11 be and is hereby

stayed pending the outcome of the applicant's application for rescission of that judgment.

2. The first and second respondents shall pay the costs of this application.

Interim relief granted

Pending the return date the applicant be and is hereby granted the following relief:

A. The eviction and removal of the first and second applicants be and is hereby suspended pending the return day of this provisional order.
B. The Deputy Sheriff of this court is instructed not to assist the respondent to remove the applicants and their goods and possessions from subdivision 1 and subdivision 2 of Marcedale farm.
C. The property will not be interfered with pending the return day and should not be sold or otherwise disposed of, or encumbered by the applicants or the respondent"

In his founding affidavit the 2nd applicant states that on 30 November 2011 the Deputy Sheriff served the applicants with a notice of ejectment from the farm, subdivision 1 and 2 of Marcedale Farm in Bulilima District of Matabeleland South and a writ of ejectment from the said farm. This was in pursuance of an order of this court granted on 6 October 2011.

The order in question interdicts the applicants and those claiming through them from continuing with the illegal occupation of the 2 pieces of land. It also directs the Deputy Sheriff to evict the applicants and those claiming through them from the land. That order was issued following the applicant's failure to file heads of argument in a summary judgment application made by the respondents in case number HC 1539/11 resulting in them being automatically barred.

Following a chamber application made by the respondents in case number HC 2203/11 an order was made on 19 September 2011 granting them leave to set down case number HC 1539/11 on the unopposed roll resulting in the order of 6 October 2011 I have already referred to.

Although the applicants were aware of the pending eviction on 6 December 2011 from 30 November 2011, it was not until the 11th hour, that is, 5 December 2011, that they filed this urgent application. The matter was placed before NDOU J who directed that it be set down for hearing on 13 December 2011 and that the application, together with a notice of set down, be served upon the respondents.

It has since come to my attention, through submissions made by Mr *Ndlovu* for the respondents, that the application and the notice of set down aforesaid were only served upon him barely 2 hours before the scheduled time of hearing. In fact, the notice of set down was only filed on the date of hearing, 13 December 2011.

It has also been brought to my attention that eviction was carried out on 6 December 2011 as scheduled and the Deputy Sheriff's return of service to that effect has been submitted. In spite of that development, the applicants have not seen it fit to revise their application to reflect the latest developments. More importantly they have not disclosed those facts at all. Throughout his submissions, Mr *Majwabu* for the applicant made no reference whatsoever to the eviction of the applicants, contenting himself with leading evidence from the bar, as it were, on the number of families and cattle on the farm and the inconvenience they will suffer as a result of eviction, an eviction which has already taken place. There has been serious material non-disclosures in this application and if service upon the respondents had not been ordered, I would have determined the matter without knowing that the applicants have already been evicted.

The utmost good faith must be observed by litigants making such applications. They are enjoined to place all the material facts before the court in order to equip the court with sufficient information to arrive at a just decision. *Graspeak Investments* v *Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551 (H) at 554D; *Qalisa (Pvt) Ltd* v *ZIMRA & Anor* HB-106-11.

The applicants seek interim relief for a stay of execution which has already taken place. No attempt has been made to amend the claim in recognition of the fact that it is no longer possible to stay execution. As it stands, the relief sought is clearly incompetent.

As if that was not enough, one would assume that execution would be stayed for purposes of allowing the applicants to make an application for rescission of judgment. Usually such application would be filed at the same time the application for a stay of execution is made. A full week had lapsed at the time of hearing but no application for rescission had been made epitomizing the lackadaisical manner in which the applicants have conducted themselves throughout this litigation. It is that lack of diligence which resulted in them being barred and judgment being entered in default.

One would be inclined to cast a sympathetic view on this application if, on the merits, there was something for them to argue. Regrettably I am not persuaded the applicants have any case even on the merits.

The farm occupied by the applicants was gazette as state land in July 2002. The 2 respondents are holders of offer letters issued to them by the acquiring authority in terms of

the law, in respect of the 2 pieces of land occupied by the applicants. They therefore possess the right of occupation of the land in question which right has been lost by the former farm owner.

The applicants have sought to argue that they occupy the land in terms of a bilateral agreement between the government of Zimbabwe and that of Germany, which agreement permits them as German nationals, to occupy Marcedale Farm. This is the sole defence advanced in the applicants' plea in case number HC 1019/11.

However, that issue, along with others, has long been determined by the Supreme Court to the extent that there is nothing else to be argued before this court. In *Commercial Farmers Union & Ors* v *Minister of Lands and Rural Resettlement and Ors* S-31-10 (as yet unreported) Chief Justice Chidyausiku stated as follows in respect of Bilateral Investment Protection Agreements at page 17.

> "The effect of section 16B of the Constitution is that it renders agricultural land occupied under Bilateral Investment Protection Agreements (BIPAs) liable to compulsory acquisition if the acquiring authority considers that it is required for resettlement purposes or any other purpose as prescribed under section 16B (2) (a) (iii) of the Constitution."

On the continued occupation of farm land by former occupiers, he stated at pages 21-22 as follows:

> "On the other hand section 3 (of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]) of the Act criminalises the continued occupation of acquired land by the owners or occupiers of land acquired in terms of section 16B of the Constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the language of section 3 of the Act that the individual applicants as former owners or occupiers of the acquired land have no legal right of any description in respect of the acquired land once the prescribed period has expired."

On the rights of holders of offer letters, the Supreme Court stated at page 23 as follows:

> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the rights of possession or occupation on it. The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights."

As holders of offer letters the respondents approached this court seeking the eviction of the applicants from the farm. This court has granted that relief and for the applicants to rescind that judgment they must show more than just the lack of diligence by their legal practitioners in failing to file heads of argument. After all, the cornerstone of our justice system is that there must be finality to litigation.

It would be an improper exercise of discretion for this court to stay execution of judgment in circumstances where the respondents' claim is unassailable, in order to allow the applicants to file a rescission of judgment application which is unlikely to succeed. Before a judgment of this court is rescinded it behoves an applicant to show, not only the lack of willingness in the default, but also the *bona fides* of the applicant's defence on the merits. I am not satisfied that the applicants' intended rescission of judgment application passes that test. Perhaps that explains why they have failed to put it together and file it up to now.

I therefore come to the conclusion that this application is devoid of any merit.

Accordingly, the application is dismissed with costs on an attorney and client scale.

Webb, *Low & Barry*, applicant's legal practitioners
R Ndlovu & Company respondent's legal practitioners