

SWEET SWEET
versus
JONATHAN NKANYENZI
and
BOY DUBE
and
DOUGLAS NDLOVU
and
MOFFAT NDLOVU
and
NTANDO DUBE
and
PATRICK TSHUMA

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 21 JUNE AND 23 JUNE 2016

Opposed Application

Applicant in person
G. Nyathi for the 6th respondent

MATHONSI J: The applicant was allocated subdivision 1B of subdivision 1 of subdivision B of Umguzaan Block Umguza District in Matabeleland North Province by the acquiring authority under the government's land reform programme, by offer letter dated 29 June 2006. The benefit of a farm of his own was not so sweet because, although he says when he received the farm it was already blessed with some chalets, some neighbours of his have coveted his farm if for no other reason but to derive benefit from the chalets in question.

One such neighbour is the sixth respondent who was encouraged by the first to the fifth respondents to move onto his farm and occupy one of the chalets even though he was allocated an adjoining farm being subdivision 2 of subdivision 1 of subdivision B Umguzaan Block Umguza. The respondents are said to be veterans of the war of liberation who are led by the first respondent and cherish domicile in Umguza District Matabeleland North.

On 11 December 2008 the applicant filed an urgent application in this court complaining about an act of spoliation which had allegedly been committed by the respondents at the farm. He said that they had arrived on 29 November 2008 in the company of a police officer called Mhlanga. They advised him that he was not welcome in that area and threatened him with death if he did not leave and retrace his steps to Mashonaland where he hails from. They told him to accept the sixth respondent at his farm and that the latter was to occupy one of the chalets, which the sixth respondent promptly did by moving in with his personal effects. This was done without the applicant's consent or authority.

Having resorted to self-help and displaying "some sort of regional xenophobia," the respondents had to be stopped and the *status quo ante* restored. On 18 December 2008 this court, per KAMOCHA J, granted a provisional order in the applicant's favour in the following:

"TERMS OF FINAL ORDER SOUGHT

- (a) The 1st to 6th respondents be and are hereby restrained and interdicted from interfering with applicant's possession, use and enjoyment of the farm known as subdivision 1B of subdivision B of Umguzan Block.
- (b) Except upon the invitation of the applicant, or upon carrying out any lawful activity, the 1st to 6th respondents be and are hereby interdicted from setting foot or visiting the said farm.
- (c) Respondents pay the costs of this application.

INTERIM ORDER SOUGHT (SIC)

Pending the confirmation or discharge of this order, that this order shall operate as a temporary order;

- (a) Directing the 6th respondent, within 24 hours of being served with this application in terms of this order, to remove himself and all his property of whatever kind from the chalet he is occupying at the farm known as subdivision 1B of subdivision B of Umguzaan Block."

Only the sixth respondent filed opposition to confirmation of the provisional order stating in his opposing affidavit that he was offered a farm known as subdivision 2 of subdivision 1 of subdivision B Umguzaan by offer letter dated 16 October 2002. The farm adjoins that of the applicant and ARDA which is subdivision 3 of subdivision B of Umguzaan Block. According to him the chalets are located on the ARDA farm and not on the applicant's farm. He has an

agreement with ARDA authorizing him to occupy some of the chalets. There is not a single chalet on the applicant's farm.

The sixth respondent insisted that he occupied the chalet in 2003 long before the applicant came to the area and with the consent and authority of ARDA which owns the farm on which the chalets are built.

What is of immediate concern is that the applicant obtained a provisional order on 18 December 2008, 8 years ago. He has been sitting on that order up to now and has not bothered to set the matter down for either confirmation or discharge of that provisional order.

Litigants are in the unacceptable habit of rushing to court on an urgent basis and, when they obtain interim relief, they bask under the comfort of such relief and do not bother to have the provisional order so granted to them confirmed or to have the matter finalized. It is an undesirable habit and legal practitioners representing litigants should be reminded of the need to finalise such matters instead of continuing to parade on borrowed robes for years. As it is now, the legal practitioner who obtained interim relief on behalf of the applicant has vacated the scene, and leaving the provisional order hanging. It also turns out that the provisional order which has endured for so long was obtained under false pretences.

The applicant, who appeared in person admitted that when he moved onto his farm in 2006 the sixth respondent was already occupying the chalet in question. He stated that they lived together on what he preferred to call "a homestead" from then until 2008 when they quarreled because the sixth respondent refused to contribute towards the electricity bill and the cost of pumping water. It is then that he started complaining attracting the attention of other war veterans who came to support the sixth respondent's continued stay there.

The applicant also admitted that the chalets are not located on his farm but on what he called no-man's-land. For that reason he submitted an application to the Minister of Lands for authority to occupy the chalets. That authority was only granted sometime in 2013, 5 years after his approach to this court on an urgent basis and on facts completely at variance with what he is now saying.

In fact *Mr Nyathi* for the sixth respondent produced a letter written by the Acting Chief Lands Officer on 30 November 2012 which confirms that the applicant approached the court with wrong facts. It reads:

“RE: Item 2 of your letter dated 26 July 2008 which reads the land containing the chalets compound be consolidated with Mr Sweet Sweet’s plot

Firstly Umguza District Land committee has no mandate to preside over A2 plots which have been issued with offer letters. The area in question is in subdivision 3 of subdivision B of Umguzaan Block which was issued to Arda. The understanding was that since there was no homestead in subdivision 1 of subdivision B of Umguzaan Block all beneficiaries were allowed to use the chalets and compound in subdivision 3 of subdivision B of Umguzaan Block. Ministry of Lands is totally against the consolidation of viable pieces of land and if Arda has no use for that piece of land the Ministry will gladly accept it and offer it to the numerous landless people on our waiting list. So the would (sic) be consolidation is not valid.”

So what was the applicant doing in 2008 telling the court that the chalets were in his farm? As if that was not enough he sought what was in fact spoliatory relief of the basis that the respondents had come onto his farm on 29 November 2008 while he was peacefully enjoying the comfort of his newly found farm and despoiled him amid threats to his life. Unmitigated falsehood and now he has been forced to eat humble pie.

This court has repeatedly stated that the utmost good faith must be observed by all those who approach it either *ex parte* or on an urgent basis. They are required to disclose to the court all the facts that are relevant and would be useful in the resolution of the dispute. Urgent applications punctuated by material non-disclosures or by outright falsehood must be discouraged at all costs and as a seal of disapproval the court will reward those who attempt to obtain court orders *ex parte* or on an urgent basis through material non-disclosures or falsehood with an award of admonitory costs against them. See *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H) 555 A-D; *N & R Agencies (Pvt) Ltd & Another v Ndlovu & Another* HB 198/11; *Moyo & Another v Hassbro Properties (Pvt) Ltd & Another* 2010 (2) ZLR 194 (H).

This application was predicated on falsehood. The applicant did not own the chalets. He found the sixth respondent in occupation when he moved in and as such there was no act of

spoliation whatsoever. The chalets are located elsewhere and not on his farm. All that he relied upon in seeking an order banishing the sixth respondent from the chalets was not true. He therefore obtained an order by misleading the court. For that he must be rewarded with an order of punitive costs.

In the result, it is ordered that:

1. The provisional order issued on 18 December 2008 is hereby discharged.
2. The applicant shall bear the costs of suit on a legal practitioner and client scale.

Sansole and Senda, 6th respondent's legal practitioners