

JONATHAN DUBE  
**versus**  
SIYAPHUMELELA COLLECTIVE FARMING  
CO-OPERATIVE SOCIETY  
and  
DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 5 AUGUST 2016 AND 15 SEPTEMBER 2016

### **Urgent Chamber Application**

*S Chamunorwa* for the applicant  
*S Collier* for the respondent

**TAKUVA J:** This is an urgent chamber application wherein the applicant seeks the following interim relief:

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

1. The respondents be and are hereby interdicted from removing the applicant’s matter from the property known as certain piece of land being Lot 1 of Cophal Block 2 situate in the District of Gwanda in extent 4551, 524 hectares”

The facts are that, first respondent is a registered farming co-operative in terms of the law. It was duly registered in 1994. The applicant is a founding member of the first respondent. In pursuit of their objectives, first respondent’s members became cattlemen. Sometime in 1997 a problem of overgrazing arose within the organization. The applicant was the culprit in that he had 350 cattle on the farm as compared to 80 owned by the first respondent. The carrying capacity of the farm is 333 cattle. A resolution was then passed outlawing the keeping of personal beasts on the farm. Applicant refused to remove his cattle from the farm prompting the first respondent to approach this court under cover of case number HC 1554/00 seeking an order evicting the applicant from the farm. The order was granted per CHIWESHE J on 5 July 2002. The first respondent passed a resolution expelling applicant. Aggrieved applicant approached

the registrar of co-operatives who subsequently reinstated applicant's membership to the first respondent.

There is a dispute of fact as regards applicant's compliance with the court order cited above. Applicant states that he indeed complied and moved his herd to Roys Farm in Marula Figtree. When applicant's reinstatement as a member was effected in May 2004, he subsequently learnt that the first respondent set aside its earlier resolution barring members from keeping their personal cattle on the farm. He then brought back his cattle in 2006 and left them there up to this day. The first respondent has not sought to enforce the judgment under case number HC 1554/2000 until 20 July 2016 when he was informed that second respondent had left a notice for the ejection of his cattle from the farm. The notice was left around 1700 hours and the next day he consulted his practitioners who filed this application on the 22 July 2016.

On the other hand the respondent contended that applicant never complied with the court order since 2000, while denying that the resolution by first respondent barring members from keeping personal cattle on the farm was set aside, first respondent conceded that all the members brought back their personal cattle to the farm after the judgment had been granted. This is the current position.

Applicant's basis for the relief he seeks is that, first respondent is not entitled to proceed in terms of the judgment under case number HC 1554/2000 as it was overtaken by events in that;

- (a) he complied with the judgment and moved his cattle out of the farm.
- (b) his cattle were brought to the farm under a new dispensation in which the resolution which had caused his eviction had been rescinded and members were allowed to bring their cattle to the farm.
- (c) alternatively, he averred that his cattle have been on the farm with the express knowledge and acquiescence of the first respondent
- (d) currently, other members of the first respondent have their cattle on the farm including non-members
- (e) if the first respondent now holds the view that applicant should not keep his cattle at the farm, then it ought to institute fresh proceedings showing the basis upon which his cattle ought to be removed from the farm, instead of relying on a writ of execution which was

fully complied with. The moving of the cattle back onto the farm in 2006 constitutes a fresh act not the subject of the earlier judgment which was complied with.

As regards urgency applicant submitted that the application is urgent in that he has 368 cattle on the farm and if he is evicted, he does not have another place to put them. He will therefore suffer irreparable prejudice as there is a real risk that the cattle might be lost or stolen. Further applicant contended that he does not have a satisfactory alternative remedy other than the interdict, in that a claim for damages is not efficacious as suing first respondent is equivalent to applicant suing himself as a member of first respondent. Damages are also not a satisfactory remedy as it would punish innocent members of the first respondent.

Applicant further contended that the balance of convenience is in his favour than the first respondent in that he has been in occupation of the farm for more than ten years without incident and the harm he stands to suffer is immeasurable and incurable. On the other hand, so the argument went, first respondent is unlikely to suffer any prejudice if the ejection is stayed. There is no discernible urgency in the eviction since it has waited since 2006 after the order was already in its hands.

*Mr Chamunorwa* for the applicant relied on *CFI v Manyika* SC 8/2016 and *Mukonoweshuro's* case HH 711/15. He further argued that first respondent was not properly before the court in that its representative lacked authority to represent it.

On the other hand *Mr Collier* for the first respondent in opposing the application argued two points *in limine*. Firstly he submitted that the applicant has approached the court with dirty hands in that he has not complied with the court order. Secondly, it was argued that the relief sought is improper in that applicant prays for an interdict instead of a stay of execution.

On the merits, first respondent argued that since the judgment in case number HC 1554/2000 is still extant, it could be enforced, hence the first respondent's decision to evict the applicant from the land. It was conceded that the basis of this court's judgment in case number HC 1554/00 was the resolution that had been passed by first respondent's members. It was also admitted that applicant will suffer prejudice if his cattle are removed from the farm. Further, it was contended that what is at the heart of this case is that "the applicant insists on keeping 400 of his personal cattle on the land in question." This is hugely disproportionate to the number of

cattle that the other members of the co-operative have. The applicant has not justified why he is entitled to special treatment.

The applicant's point *in limine* on *locus standi* is not well taken in my view. I say so for the following reasons:

- (a) It is the applicant that cited the first respondent, an association which was represented by its treasurer one Canaan Sibanda. It appears in my view incompetent to challenge his capacity to appear – see *Mudzengi and Others v Hungwe and Another* 2001 (2) ZLR 179(H).
- (b) Canaan Sibanda as a member and treasurer of the first respondent has a substantial legal interest in the administration and welfare of the first respondent – see *Stevenson v Minister of Local Government and Others* 2002 (1) ZLR 498(S)

Turning to the respondent's points *in limine* I find as follows:

- (a) The dirty hands doctrine does not apply in *casu* because the procedure and relief applicant has adopted and sought are provided for by the law. The proper meaning of the doctrine was stated by CHIDYAUSIKU CJ in *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information and Publicity and Others* 2004 (1) ZLR 538 (S) in the following terms:

“---It was not for litigants to decide which laws are unconstitutional. The principle that a citizen who disputes the validity of a law must obey it first and argue afterwards is founded on sound authority and practical common sense.”

- (b) While I agree that in principle, there is no difference between a litigant who is in defiance of a court order and a litigant who is in defiance of the law, there is a distinct difference between a litigant who, like in *casu*, strenuously disputes defiance, and one like in the ANZ case who admits its open defiance of the law. I take the view that a court should exercise its discretion to exempt the former from the application of the dirty hands principle.

Respondent's second point *in limine* relates to the competency of the order sought. The argument is that since an interdict has different requirements from those of an application for

stay of execution, the applicant should have applied for a stay of execution instead of an interdict. This argument has no merit in that respondent is simply splitting hairs. There is nothing final about the interim relief prayed for in *casu*.

For these reasons, the points *in limine* are dismissed.

On the merits, the requirements of an interdict are well known

They are;

- (a) a *prima facie* right, even if it be open to some doubt,
- (b) a well grounded apprehension of irreparable harm if the relief is not granted;
- (c) that the balance of convenience favours the granting of an interim interdict; and
- (d) that there is no other satisfactory remedy – see *Shabtai v Bar and Others* 2014 (2) ZLR 862 (H) and *Tribac (Pvt) Ltd v Tobacco Marketing Board* 1996 (1) ZLR 289(S).

In the present case, there is no doubt that applicant as a member of the first respondent has a right to enjoy the benefit of his membership. There is in my view, good grounds for an apprehension of irreparable harm if the relief is not granted in that applicant's cattle may be stolen, die or be exposed to diseases. Quite clearly, the balance of convenience favours the granting of the interdict in that if it is not granted, applicant will suffer huge and incurable financial harm. On the other hand, if it is granted, first respondent is unlikely to suffer any prejudice at all. I must state that I agree with *Mr Collier* when he submitted that the central issue is that applicant has a hugely disproportionate number of cattle on the farm. This, it appears is the major grievance by the first respondent's members. However, this situation has been allowed to exist for years and I am of the view that first respondent will not suffer any appreciable prejudice pending the confirmation or discharge of the interim relief. It does not look like there is any other satisfactory remedy that can protect applicant in an effective manner. Clearly damages are not a satisfactory remedy in that it appears the rest of first respondent's members are poorer than the applicant. Therefore, they are not likely to compensate applicant by way of damages in the event that he is eventually successful.

In the circumstances, I find that the applicant has satisfied the requisites of an interdict.

Accordingly, it is ordered that;

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

1. The respondents be and are hereby interdicted from removing the applicant's cattle from the property known as certain piece land being Lot 1 of Cophal Block 2 situate in the District of Gwanda in extent 4551,5214 hectares.

*Calderwood, Bryce Hendrie and Partners*, applicant's legal practitioners  
*Messrs Webb, Low and Barry*, 1<sup>st</sup> respondent's legal practitioners