

BLEAT ENTERPRISES (PVT) LTD

And

CANDICE CHRISTINE BRADFILED

Versus

BETSERAI W.B. CHIKURA

And

**THE MINISTER OF LANDS, AGRICULTURE, WATER, FISHERIES AND
RURAL RESETTLEMENT N.O.**

And

MESSENGER OF COURT MASVINGO N.O.

And

SHERIFF OF THE HIGH COURT N.O.

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 21, 22 September 2023 & 5 October 2023

Urgent chamber application

J. Tshuma, for the applicants
T. Chakabuda, for the 1st respondent

DUBE-BANDA J:

[1] This is an urgent chamber application. The applicants seek a declaration of rights in respect of the land known as Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo. The *declaratur* sought in respect of its acquisition; offer letters; and the eviction order granted at the magistrate court. The provisional order sought is couched in the following terms:

Terms of the final relief sought

That you show cause to this Honourable Court why a final order should not be made on the following terms:

- i. That the provisional order be and is hereby confirmed.

- ii. It be and is hereby declared that the property described in Government Gazette dated 29 September 2017 being subdivision 12 of Lot 15 Nuanetsi Ranch A does not correspond with the description of the applicants' property being Lot 4AB Nuanetsi Ranch A.
- iii. Consequently, the applicants farm being Lot 4AB Nuanetsi Ranch A was not properly acquired by 2nd respondent.
- iv. The property described in the offer letter being Lot 1 subdivision 12 of Lot 16 of Nuanetsi Ranch A does not correspond with the description of the applicants' property which is Lot 1 of Lot 4AB Nuanetsi ranch A.
- v. The property described in the court order and writ of ejectment issued pursuant to the ruling under EV05/23 being Lot 1 of subdivision 12 of Lot 16 Nuanetsi Range A does not correspond with the property which is owned and occupied by the applicants which is Lot 1 of Lot 4AB Nuanetsi Ranch.
- vi. Consequently, it was incompetent for the 1st and 3rd respondent to cause the eviction of the applicants from Lot 1 of Lot 4AB Nuanetsi Ranch A on the basis of a court order and writ of ejectment issued to the ruling under EV05/23.
- vii. In the premises, it be and is hereby ordered that the 1st respondent and all those claiming occupation through him shall remove or cause the removal of themselves and all such persons occupying of Lot of 1 of Lot 4 AB Nuanetsi Ranch within 48 hours of the service of this order.
- viii. Failing such removal, the Sheriff of the High Court be and is hereby authorized and directed to evict the 1st respondent and all persons claiming occupation through and under him of Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo.
- ix. The 1st respondent to pay costs of suit.

Interim relief granted

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

- i. The applicants and their employees be and are hereby allowed to access Lot 1 of Lot 4AB Nuanetsi Ranch A in the district of Masvingo for the purposes of caring for their crops which includes watering, fertilizing and spraying of chemicals as well as harvesting the remainder of the crops.
- ii. The 1st respondent, his employees, assignees or any other persons claiming occupation through him are hereby ordered not to interfere with the applicants in carrying out the activities described in 1 above.

Service of this application and provisional order

That the service of this provisional order and application shall be served on the parties as follows:

- i. On the 1st respondent by email to his legal practitioners of record being Mutumbwa Mugabe & Partners, email address: nmandplegal@gmail.com
- ii. On the 2nd respondent c/o Attorney General Civil Division Masvingo.
- iii. On the 3rd respondent at their offices located in Masvingo.
- iv. On the 4th respondent at their offices located in Masvingo.

[2] The application is opposed by the first respondent. The second, third and fourth respondents did not participate in these proceedings and I take it that they have made a decision to abide by the judgment of court.

[3] This application will be better understood against the background that follows. In the founding affidavit it is averred that the first applicant purchased a piece of land known as Lot 1 of Lot 4AB Nuanetsi Ranch A from the Mutirikwi Sugar Company Private Ltd. The property has not been transferred into the name of the first applicant. The applicants have been in occupation of the property since its purchase. In 2017 the first respondent approached the applicants with an offer letter dated 17 July 2017, and claimed that he was offered the first applicant's farm. The offer letter was not supported by a Government Gazette in terms of the Land Acquisition Act. And because of what the first applicant considered the discrepancies between the description of its farm and the farm offered to the first respondent, resisted the occupation. On 29 September 2017 a property held under Certificate of Registered Title (CRT) 4151/2000 described as Lot 12 of Lot 16 of Nuanetsi Ranch A measuring 61,327 ha. was published for acquisition in the Government Gazette. The applicants aver that the CRT number of the Gazetted farm coincides with the CRT number of the first applicant's farm, however, the description of the Gazetted farm does not correspond with the applicants' farm. Sometime in 2019 the first respondent approached the applicants with a second offer letter, and in this letter the property allocated is described as Subdivision 1 of Lot 12 of Lot 16 Nuanetsi Ranch A. The applicants aver that the second offer letter does not relate to the first applicant's farm, in that the property described therein differs from the first offer letter the first respondent was in possession of. It is also averred that from the

listing in the Government Gazette and it differs from the property as described in the CRT upon which the first applicant's property is registered.

[4] The first respondent sued out an application for the eviction of the applicants from the farm, and the application was, on a preliminary point granted in default. On 29 August 2023 the applicants filed an application for rescission of judgment. The rescission application was heard on 8 September 2023, *albeit* on the preliminary points, and a ruling is pending. On 22 August 2023 a writ was issued for the ejection of the applicants from the property described as Subdivision 1 of Lot 12 of Lot 16 of NRA Mwenezi District Masvingo. The writ of ejection was executed on 31 August 2023 and the applicants were evicted from the property. It is against this background that they launched this application.

[5] The applicants seek a declaration of rights in respect of Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo. The contention is that there are three distinct lots from which subdivisions were drawn that are in close proximity to one another, being Lot 15; Lot 16 and Lot 4Ab. The further contention is that a reading of the CRT illustrates that the land that is owned by the first applicant was subdivided from holding 4AB thereby creating Lot 1 of Lot 4AB. It is further contended that a reading of the first respondent's offer letter illustrates the land which he was allocated was subdivided from Lot 12 of Lot 16 thereby creating Subdivision 1 of Lot 12 of Lot 16. The argument is that Lot 1 of Lot 4AB and Subdivision 1 of Lot 12 of Lot 16 were subdivided from two different lots and these descriptions do not relate to the same piece of land. According to the applicants, save for the CRT number, the description of the property in the Government Gazette being Lot 12 of Lot 16 Nuanetsi Ranch A, does not correspond with the description of the property in the first applicant's certificate of registered title being Lot 1 of Lot 4AB Nuanetsi Ranch A.

[6] The applicants contend that the property described in the offer letter and the eviction order is Subdivision 1 of Lot 12 of Lot 16 NRA Mwenezi District Masvingo. While the property occupied by the first applicant is Lot 1 of Lot 4AB Nuanetsi Ranch A. Therefore, it is contended that the offer letter and the eviction order pertain to a property that is not known or occupied by the applicants. According to the applicants all the documentation relied on by the first respondent to take occupation of the applicant's farm does not refer to the farm owned by the first applicant as described in the farm's certificate of registered title. The

documentation relied on by the first respondent refers to a property that is not owned or occupied by the applicants. It is on this basis that the applicants seek a declaratur to the effect that the property described in the Government Gazette dated 29 September 2017; the property described in the first respondent's offer letter dated 17 April 2019; and the property described in the court order and the writ of ejectment do not correspond with the property that is owned and occupied by the first applicant. It is therefore contended that the eviction of the applicants from the property known as Lot 1 of Lot 4AB Nuanetsi Ranch A using the court order was incompetent.

[7] The applicants seek a provisional order allowing them to access the farm until the return date.

[8] Mr *Chakabuda* Counsel for the first respondent attacked the application on four grounds; it was argued that this application is not urgent and does not merit a hearing on the roll of urgent applications. Counsel argued further that this is an incompetent application in that the applicants seek consequential relief in an application for a *declaratur*. It was submitted that in an application for a *declaratur* in terms of s 14 of the High Court Act [Chapter 7:06] a litigant cannot seek consequential relief. Counsel argued further that the applicants have no *prima facie* right, in that the property from which they were evicted is not registered in their names, but in the name of Mutirikwi Sugar Company Limited. According to Counsel the applicants have no rights to protect, in that the first respondent holds an offer letter and an eviction order in his favour. It was argued that this application is an attempt to seek a rescission of the magistrate's court order through the 'back-door' as it were, while the application for rescission itself is at judgment stage at the magistrate's court. Mr *Chakabuda* submitted that this application ought to be dismissed.

[9] I asked Mr *Tshuma* Counsel for the applicants to address the issue whether it was competent and appropriate for this court to intervene as a court of first instance in a matter that is still playing out at the magistrate court. To put my enquiry into context, on 7 August 2023 the magistrate's court granted an order for the eviction of the applicants from Subdivision 1 of Lot 12 of Lot 16 NRA Mwenezi District, Masvingo. The order was executed and the applicants were accordingly ejected. Aggrieved by the magistrate's court order for

eviction, the applicants sued out a rescission of judgment and such application is pending and awaiting a ruling at the magistrate's court.

[10] The applicants were evicted from the farm on the strength of a court order issued at the magistrate's court. It is clear that the provisional order sought in this matter, if granted will stay the execution of the magistrate's court order. In fact, the effect of the provisional order will be that the applicants will be reinstated at the farm from which they were ejected. I say so because the provisional order sought in this matter is that the applicants and their employees be allowed access to Lot 1 of Lot 4AB Nuanetsi Ranch A in the district of Masvingo for the purposes of caring for their crops which includes watering, fertilizing and spraying of chemicals as well as harvesting the remainder of the crops. And that the first respondent, his employees, assignees or any other persons claiming occupation through him are hereby ordered not to interfere with the applicants in carrying out the activities described above. No matter what one chose to name the farm, the fact is that the applicants seek to be reinstated to where they were ejected. Furthermore, the application for rescission of judgment is still pending and awaiting a ruling at the magistrate's court.

[11] Mr *Tshuma* submitted that the applicants seek a *declaratur* and the magistrate's court has no jurisdiction to adjudicate an application for a *declaratur*. Counsel argued further that the order issued by the magistrate court does not relate to the property of the applicants, it is an invalid and incompetent order. Counsel submitted that it follows that if the order is invalid and incompetent the writ of ejection is also invalid.

[13] I have noted above that the granting of the provisional order sought by the applicants will result in the stay of execution and the reinstatement of the applicants to the farm. The general rule is that applications arising from execution of warrants issued out of the magistrate's court are for that court to determine. The magistrate's court has its own rules dealing with such matters. Rules of the High Court cannot be used to determine issues relating to execution of warrants against property issued out of the magistrate's court. (See *Chipadze v Mutema & Ors* HH 283-18). In exceptional circumstances this court may, as a court of first instance adjudicate on writs issued out at the magistrate's court. (See *Palmer v Kanyeze* HH 16/20). This matter is distinguishable from the *Kanyeze* case in that in the latter (*Kanyeze*) the processes at the magistrate's court had been finalised. The decision of the

subordinate court had been appealed and such appeal was pending before this court. In this case, the dispute is still playing out at the magistrate's court. The applicants applied for a rescission of judgment and the matter was heard, *albeit* on preliminary points and the ruling was reserved. The magistrate's court is still seized with the matter, it still has jurisdiction to hear the matter. This court must be very slow, as a court of first instance to intervene and entertain a matter that is still playing out before a subordinate court. In *Zvomatsayi & Ors v Chitekwe No & Anor* 2019(3) ZLR 990 (H) this court, as a court of first instance declined its jurisdiction to adjudicate a matter that was still playing out before a presiding officer in terms of the Police Act [Chapter 11:10]. Hearing this matter and determining it on the merits will result in this matter playing out in two courts simultaneously. Such is undesirable. The processes at the magistrate's court must be allowed to run their full circle, without any intervention and interference by this court.

[14] Mr *Tshuma* placing reliance on *Manning v Manning* 1986(2) ZLR 1 (SC) submitted that that the ruling of the magistrate's court is a nullity. I make no finding whether the ruling is a nullity or not, what I do not agree with is that a matter may play out simultaneously both at the magistrate's court and at this court. The submission that the magistrates court has no jurisdiction to hear an application for a *declaratur* is inconsequential. I say so because the 'name' of the application aside, the applicants may still make the same submissions in their application for rescission, stay of execution and reinstatement at the farm if so advised. The magistrate's court has jurisdiction to hear all such applications. What I see in this application is an ingenious attempt to get a stay of execution and restatement at the farm under the umbrella of an application of a declaratory order.

[15] In fact, litigant cannot be permitted to participate in processes at the magistrate's court, gets an unfavorable ruling, apply for rescission of judgment and when that application is still pending make a turn and say the processes of that court are a nullity. And turn to this court as a court of first instance on the very issues that are before the magistrate's court. The magistrate's court is a court of law established in terms of Magistrates Court Act [Chapter 7:10], in general this court must defer to it on matters that are still pending before it. No special circumstances have been shown to clothe this court with jurisdiction to intervene in a dispute that is still live at the magistrate's court. It is for these reasons that this application cannot succeed. Therefore, the appropriate order is to strike this application off the roll.

[16] Having found that this court cannot as a court of first instance adjudicate this matter while it is still pending at the magistrate court, it is therefore not necessary for me to consider all the other issues taken by the applicant and the first respondent nor to delve into the merits of the application. Such will serve no useful purpose.

[17] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicants must pay the first respondent's costs.

In the result, I order as follows:

- i. This court declines its jurisdiction in this matter.
- ii. The application be and is hereby struck off the roll with costs of suit.

Webb Low & Barry INC. Ben Baron & Partners, applicants' legal practitioners
Mutumbwa Mugabe & Partners, 1st respondent's legal practitioners