

MACHAKWI ESTATE (PVT) LTD
PIETER DANIEL BURGER (SNR)
SCHALK JACQUES BURGER
PIETER DANIEL BURGER (JNR)
COENRAAD JOHANNES BURGER
MARIA JOHANNA BURGER
QUENILDA INVESTMENTS (PVT) LTD
TRANSFLORA (PVT) LTD T/A
MACHAKWI TRANSPORT

versus

THE MINISTER OF STATE FOR NATIONAL SECURITY
RESPONSIBLE FOR LAND, LAND REFORM AND RESETTLEMENT
IN THE PRESIDENT'S OFFICE
BARRINGTON MAWERE
THE COMMISSIONER OF POLICE N.O
THE OFFICER IN CHARGE ZRP (KWEKWE RURAL)
THE PROVINCIAL MAGISTRATE
(O. MUDZONGACHISO)
THE MESSENGER OF COURT (MR M.B.P. NHAMBURO)
THE ATTORNEY-GENERAL N.O.

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 2, 4 and 2 June 2006

Urgent Chamber Application

D.P Drury, for applicants
Ms Mwatse, for 1st, 3rd, 4th, 5th and 7th respondents
Mr Mawere, for 2nd respondent

KAMOCHA J: On 12 April 2006 the 2nd respondent applied for and was granted an order *ex parte* on an urgent basis. The order that was granted was to the following effect -

- "(1) The respondent and all those claiming possession through him be and are hereby ordered to vacate subdivision 1 of Emelo forthwith.
- (2) The Messenger of Court Kwekwe be and is hereby ordered to evict respondent and all those who claim occupation through him from Emelo and give vacant possession to applicant or his agents forthwith.

- (3) The Officer-in charge Kwekwe Central Police and his officers are hereby ordered to assist the messenger of court to carry out the eviction forthwith.
- (4) Respondent to pay costs.

Interim relief

That this order operates as a rule *nisi* returnable to this court on 11 May 2006 for respondent to show cause why it should not be made final."

Armed with this order the 2nd respondent, the messenger of court, 4 uniformed policemen and numerous "youths" went to evict the applicants on Wednesday 19 April 2006 at 12.45 p.m. The applicants were not present at the property but nevertheless evictions were carried out. The main gate to the complex was forcibly entered at the instance and direction of the messenger of court. Padlocks were broken and entry was effected. The group then made their way to the residence. They forcibly gained entry into the residence by breaking a gauze screen to an open bedroom window to the main residence and thereafter unlocked doors to that residence from the inside of the house. As stated above the break in and entry took place when the applicants were not at the property.

When the parents of the deponent arrived back at the property at 4 p.m. the messenger of court told them that they were to vacate the property forthwith. Failing which the messenger of court would personally effect their removal and their property in such manner as he deemed appropriate. A request to be allowed reasonable time to arrange transport and personnel to effect an orderly vacation of the property fell on deaf ears.

As can be seen from the *ex parte* order that was granted, it clearly has the effect of a final order. That is why the messenger of court effected the evictions pursuant to it. The applicants were

evicted without being served with the application as it was *ex parte*. An order with the effect of a final order was granted in the absence of the applicants. This, the applicants contended, was incompetent and invalid. Eviction applications cannot be dealt with *ex parte*. Moreso when none of the requirements to warrant an *ex parte* application were satisfied and yet summarily and without adequate or lawful notice applicants had been evicted from their residence. They also had been deprived of means of livelihood when they have no other residence and no other means of livelihood. Moreover, no adequate time limits had been provided to them to settle their affairs.

Apart from the eviction of the applicants from the property, the 2nd respondent, with the apparent assistance of the police, lands officials, the messenger of Court and others claimed immediate right to use and appropriate farm equipment, machinery and materials. He did so with the simple assertion that the land and all improvements on it including movables were his because of the allocation of land to him on the strength of the offer letter.

None of the mandatory and peremptory procedures in terms of the Acquisition of Farm Equipment and Materials Act had been commenced or implemented. None of the movables was idle equipment.

Quite clearly the 2nd respondent's claim of a right to the use of the farm equipment and machinery and materials is without any legal basis and is *ipso facto* unlawful.

The applicants also submitted that their eviction from the property amounted to spoliation. They contended that the 2nd respondent with the assistance of the police, messenger of court and some youths took the law into their hands or acted without due legal process as the *ex parte* order they purported to rely on was a nullity and was therefore of no force or effect.

I am not with the applicants on that point because the respondents acted in terms of a court order albeit that the order was incompetent and bad in law. It remained in force and could be obeyed until it was set aside or declared a nullity by a court of law. See *Whata v Whata* 1994 (2) ZLR 277 at 281-282A

Before turning to the respondent's arguments I should point out that the offer letter that the 2nd respondent purported to rely on was withdrawn by the Minister of State for National Security, Lands, Land Reform and Resettlement in the President's Office on 20 April 2006. Consequently, 2nd respondent was forthwith required to cease all or any operations that he might have commenced thereon and immediately vacate the said property.

The 1st, 3rd, 4th, 5th and 7th respondents do not support him on that issue and neither do they support him on his claim of right to use the farm equipment, machinery and materials.

However, all the respondents contended that the applicants ought to have anticipated the return date of the Rule *nisi* in the Magistrates Court; and/or applied for a review of the ruling of the magistrate; and/or noted an appeal against the ruling. They went on to assert that the magistrate's court had the remedies that the applicants sought. That court could either rescind its judgment or stay the execution.

They argued that all the grounds advanced by the applicants had to do with the illegality or incompetence of the *ex-parte* order. It was submitted that the issue was not whether the Magistrate's Court should not have granted an *ex parte* eviction order. The issue was one of procedure, the applicants ought to have followed to redress their grievances with the Magistrate's Court ruling.

It was submitted that while the applicants might have had good grounds for stay of execution in the Magistrate's Court, review or

appeal in the High Court their case should be referred back to the Magistrate's Court for want of procedural compliance. They urged the court not to follow the case of *Nyandoro vs Sithole and Ors* 1999(2) ZLR 353(H) as that would establish a bad precedent where an aggrieved party would rush to the High Court to have a matter heard in the Magistrate's Court declared null and void without following proper procedure.

The respondents contentions seem to ignore the fact that the magistrate issued a final order on an *ex parte* basis. The final order was granted without hearing the applicants. In *UMB Zimbabwe Ltd v The Zimbabwe Independent & Anor* 2000(1) ZLR 234(H) at 244H to 245 B BARTLET J had this to say.

"I indicated earlier that I would comment on the effect of seeking what amounts to a final order on an *ex parte* basis. As stated by he GRANGE J in *Cleggy v Priestly* 1985(3) SA 950(W) at 954F-G it is a "fundamental principle of our law that the court will not make a final order that may prejudice the rights of a person without notice to him: *ef Network Video (Pty) Ltd v Universal Studies Inc & Ors* 1984(4) SA 379(c)" See also *Herbstein and Van Winsen* The Civil Practice of the Supreme Court of South Africa 4 ed at p 232.

Accordingly, if I am correct that the order sought was effectively a final order, the *ex parte* nature of the application precluded the granting of the order sought."

The respondents also chose to disregard the fact that the applicants were evicted pursuant to the court order granted on *ex parte* basis before the confirmation of the *Rule nisi*. It is not proper for a court to do so. In *Nyandoro v Sithole & Ors* 1999(2) ZLR 353(H) CHEDA J (as he then was) when dealing with a matter similar to the present one had this to say at 353H.

"I should say at the onset that it was not proper for a court to grant an *ex parte* application for eviction without the applicant being heard. The applicant could only be evicted after the provisional order was confirmed".

The learned judge further stated at page 356G that -
"It was also most irregular for the respondent to seek and obtain an order which provided for the eviction of the applicant even before the return day and before the applicant was heard. The Rules do not permit this."

The applicants were, in my view, entirely correct in submitting that the magistrates order was incompetent, null and void. When talking about actions or orders that are null and void MANYARARA JA had this to say in the case of *Minister of Lands & Anor v Mkushi* 1988(1) ZLR 209(SC) at 219C-E.

"I believe I have demonstrated that the purported cession of the lease to Mr Mkushi was a nullity and the purported consent thereto by a Ministry official was void because the procedure adopted offended against the Act See *Macfoy v United Africa Co. Ltd [1961]* 3 AU ER 1169 (PC) at 11721, where Lord Denning says:-

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding, which is founded, on it is so bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

The applicants preferred to have the magistrate's *ex parte* order declared a nullity by this court although they could have achieved the same result by having recourse to the provisions of section 39 of the Magistrates Court Act [*Chapter 7:10*] which provide -

- "(1) In civil cases the court may -
- (a)
 - (b) rescind or vary any judgment granted by it which was void *ab origine* or was obtained by fraud or by mistake common to the parties."

The applicants believed that the court order had been obtained mala fide and possibly corruptly because they were not given notice of the hearing and were evicted without being heard. Further the 2nd respondent was unlawfully claiming the right to use farm equipment, machinery and materials. They have been evicted following an incompetent order. It seems to me that ordering them to return to the same court for redress would perpetuate the suffering occasioned by an order which the court ought not to have granted.

This court has found that the proceedings in the magistrate court were *per se* unlawful, null and void.

In, my view, the above circumstance amount to special reasons why the applicants were justified to approach this court for the relief they seek and a declarator without exhausting the remedies in the magistrates court.

In the result I would grant the provisional order in terms of the draft order.

Gollop & Blank, applicant's legal practitioners

Civil Division of the Attorney-General's Office, 1st, 3rd to 7th
respondent's legal practitioners

Makonese & Partners, 2nd respondent's legal practitioners