ROLLING RIVER ENTERPRISES PRIVATE LIMITED
and
JACOBUS JOHANNES OOSTHUYSEN
and
RICHARD GRAVETT OOSTHUYSEN
and
PHILLIP CHARLES ALEXANDER OOSTHUYSEN
and
SOPHIA OOSTHUYSEN
versus
THE MINISTER OF STATE
(for National Security, Land Reform and Resettlement)
and
FREDERICK SHAVA
and
SENATOR SHADDY SAI
and
THE COMMISSIONER OF POLICE N.O.
and
THE OFFICER IN CHARGE ZRP POLICE
Kwekwe Rural N. O.
and
THE PROVINCIAL MAGISTRATE
E A Kadye
and
THE PROVICIAL MAGISTRATE
C. Mudzongachisvo
and
THE DEPUTY SHERIFF N. O.
and
THE ATTORNEY GENERAL N. O.

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE 2, 5 and 8 May and 12 June 2006

Urgent Chamber Application

D Drury for the applicants
C Chinyama with *T C Masawi* for the second and third respondents
Miss *L Mwatse* for the 1st, 4th 5th 6th 7th and 9th respondents
No appearance for the 8th respondent

GOWORA J: On 22nd May 2006 I issued a Provisional Order in favour of the applicants. I have now been requested to furnish reasons for judgment by the second and third respondents. These are they.

This matter was initially set down for hearing before me on 2nd May 2006. At the hearing I directed that the matter be stood down to Friday to allow the respondents to file heads of argument as Mr *Drury* on behalf of the applicants had filed heads of argument. On the 5th May the respondents were not ready and the matter was rolled over to the following Monday. Mr *Chinyama*, properly in my view, offered to pay the costs occasioned by the need to have the matter postponed. When the hearing resumed Mr *Chinyama* had with him Mr *Masawi* who was in fact the legal practitioner of record for the second and third respondents.

The background to this matter is as follows. The first applicant is a registered company which is carrying on farming activities on Rolling River Ranch in Kwekwe. The other applicants are directors in the first applicant. The 3rd and 4th applicants are brothers, whilst 2nd applicant and 5th applicants are the father and mother of the other two. They have, collectively, been in occupation of the farm since 1954. The 2nd to 5th applicants all reside on Rolling River Ranch. On 11 April 2006 the 2nd 4th and 5th applicants were summarily ejected from their residences pursuant to an *ex-parte* order granted by the Provincial Magistrate at Kwekwe under Case No 271/06. They relocated to the residence of the 3rd applicant which is also on Rolling River Ranch. On 13 April 2006 all the applicants were ejected from the 3rd applicant's residence pursuant to another *ex-parte* order for ejectment again issued by a Provincial Magistrate at Kwekwe under Case No 298/06. In neither case were the applicant given notice of either the application or the eviction. The orders in question were issued following applications made by the 2nd and 3rd respondents. The two are now in occupation of the respective

residences and those portions of the farm on which the residences are situate.

The applicants have, as a result, approached this court on a certificate of urgency on the basis that the orders that were granted and resulted in their eviction were invalid and that the eviction amounts to a spoliation. Alternatively they pray that an order of *restitutio in integrum* be granted so that status quo ante may be restored.

The 2nd and 3rd respondents in their opposing papers have raised a number of points in *limine.* First they contend that the applicants have come to this court prematurely. They contend that the matter is pending in the Magistrates Court in Kwekwe and that effectively what the applicants are seeking is to have proceedings in Magistrates Court quashed before those same proceedings have been completed. The respondents' view is that the applicants should have allowed for this process to be completed before they could be entitled to approach the High Court for relief.

On 13 April 2006 an effort was made by the 2nd applicant's legal practitioner to anticipate the *rule-nisi* under Case No 271/06. The application to anticipate was dismissed for lack of compliance with the rules of the Magistrates Court. I am informed by Mr *Drury* from the bar that another attempt to have the *rule-nisi* anticipated was still-born as the Magistrate then recused himself from dealing with the matter. It does not seem as though there was an attempt to have the matter set down before another magistrate.

The requirements for a successful plea of *lis pendens* are that the subject matter must be the same and between the same parties and founded upon the same cause of action. There is no dispute that the matter before me concerns the same parties that are before the Magistrates Court in Kwekwe. However a defence of *lis pendens* is not an absolute bar to an action or as in this case an application. The

matter is in the discretion of the court which is guided invariably by considerations of convenience and fairness. The court has a discretion whether to stay the action or to refuse to uphold the defence of *lis pendens* on the grounds that it would be more just and equitable that the matter proceed. (See *Les Marquis (Pty) Ltd v Marchand & Ors* 1989 (2) SA 651; *Yekelo v Bodlani* 1990 (3) SA 970. The court may also refuse to uphold the defence where the balance of convenience favours such refusal. (See *Geldenhuys v Kotze* 1964 (2) SA 164. Given the manner in which the orders for eviction were obtained and executed it would only be fair in the circumstances for me to hear the application despite the matter being in the Magistrates Court in Kwekwe. In my view, the balance of convenience also favours that I refuse to uphold the defence and instead, that I determine the matter. I note also, which is a factor that I must consider, that the learned Magistrates who issued the *ex-parte* orders have filed affidavits in opposition of the relief being sought. In my view they have taken positions in the cause wherein they seek to defend the orders which they issued. Would they change their stance if the matters were brought back before them? I find no proper justification for a judicial officer to depose to an affidavit in defence of a decision he or she would have made. He or she should not involve himself or herself in the merits of the decision being challenged. (See *Blue Ribbon Foods Ltd v Dube*[1]).

The next point by the respondents is that the applicants have adopted the wrong procedure. In heads of argument filed on their behalf by Messrs *Masawi Mangwana & Partners* the submission is made that the applicants in effect are seeking that the High Court review the decisions of the magistrates on an urgent basis and that it is unprecedented for this Court to exercise its powers for review on an urgent basis.

[1] 1993 (2) ZLR 146 at 149 C-D

The same point, in a somewhat differing manner is made by the respondents represented by Miss *Mwatse* in the heads of argument filed by her. She submits that the applicants have approached the wrong forum. She submits that the Magistrates Court has the remedies that are being sought by the applicants and they should have sought a stay of the execution of the judgment or its rescission. Unhappily this argument does not find favour with me. The applicants cannot seek a stay on a judgment that was effected and executed before the application was launched and that is the very reason for them approaching the court. They cannot stop a process that has already been executed. She argues further that the applicants have not given cogent reasons as to why they did not proceed for relief in the Magistrates Court. In approaching this court they should have applied for a review or have appealed against the ruling in the Magistrates Court.

The terms of the final order being sought by the applicants are not for me to determine at this stage. It will suffice for me to state that what is sought is a declaration on the rights of the applicants in relation to their occupation of the farm, the farm equipment situate thereat as well as the validity or otherwise of the orders issued by the Magistrates Court in Kwekwe. This court has the jurisdiction to issue declaratory orders and since the final relief is not before me I cannot say whether or not what the applicants seek is a review. Nor, can I, at this stage indicate to the applicants that they should have approached the court for relief on an application for review as suggested by Miss *Mwatse* on behalf of the majority of the respondents. In an urgent application the applicant must show on a *prima facie* basis, that there is a risk of irreparable harm to the applicant if the relief being sought is not granted and, in my view, the applicants have discharged the onus that is upon them. They have shown that irreparable harm will ensue if the application is not granted. The nature of the relief they seek in the

interim order is not in the form of a review and I am certainly not precluded from dealing with the interim relief being sought which does not seek a review of the proceedings in the lower court.

I now turn to consider whether the applicants are properly before me in seeking an order for their immediate return to the farm, or whether they should have either noted an appeal or launched review proceedings against the orders issued by the Magistrates Court in Kwekwe. The applicants seek that both orders be declared null and void on the grounds that the *ex-parte* orders for eviction were unlawful. The contention by the applicants, which contention finds favour with me, is that the Magistrates Courts Rules do not permit the grant of an order for eviction *ex-parte*. Order 22 Rule 1 is to the following effect;

> 'Except where otherwise provided, an application to the court for an order affecting any other person shall be on notice.'

Apart from infringing this rule in a fundamental way, the orders granted for the eviction of the applicants from the farm without notice of the application to them also violate the rules of natural justice. It is a negation of the *audi alteram partem* rule. There are exceptions when the court may entertain an application *ex-parte* but this is not one of the exceptions. In *Nyandoro v Sithole & Ors*[2] CHEDA J (as he then was) had no hesitation in declaring null and void an *ex-parte* order for eviction granted by the Magistrates Court. He stated that it was most irregular for the respondent in that case to seek an order which provided for the eviction of the applicant even before the return day and before the applicant had been heard. I respectfully agree. In my view, the orders issued for the immediate ejectment of the applicants from the farm are on a *prima-facie* view null and void.

There are other fundamental and disturbing features to this case. All the applicants were evicted based on the orders granted against the

[2] 1999 (2) ZLR 353

second applicant. The previous title holder was the first applicant and the other applicants were in occupation of the farm through the first applicant. They could only therefore be evicted either by being cited personally or through the first applicant. They were neither cited nor were they evicted through the proper person. They cannot have been evicted through the second applicant because that is not how they derived their rights of occupation.

In his heads of argument Mr *Drury* on behalf of the applicants addressed issues which I believe go to the final relief being sought against the respondents. It is in my view the purview of the court determining the final relief to delve into those issues. I cannot determine those issues at this stage of the matter. In my view the applicants have made out a case for the granting of the interim relief they seek.

Part of the relief being sought is the release to the applicants of the equipment that was obtaining at the premises when they were summarily evicted. Miss *Mwatse* on behalf of the Minister indicated that the equipment had not in fact been acquired. This statement did not elicit any response from the second and third respondents. I will as a consequence issue an order in final terms for the equipment to be released to the applicants and further that they may be permitted in terms of this order to retrieve from whomsoever may be in possession of the same.

A Provisional order is issued in terms of the draft.

Gollop & Blank, legal practitioners for the applicants

Civil Division of the Attorney-General's Office, legal practitioners for the 1st, 4th 5th 6th 7th and 9th respondents

Chinyama & Partners, legal practitioners for the 2nd and 3rd respondents