

ALICE SUNGA & 32 OTHERS
versus
DERON MUTENGWA

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 11 and 19 September 2007.

OPPOSED APPLICATION

Mr *M Hungwe*, for applicants
Mr *G Mtisi*, for respondent

MAKARAU JP: In or about 2000, the applicant and 32 others whose names she lists in an annexure to her affidavit occupied a farm in Nyabira. The exact name and description of the farm they occupy is in dispute as I shall show later. They have been in occupation ever since. Also in occupation of the land was one Chris Murove, against whom this court granted an order of ejectment at the instance of Landscapes Estates (Pvt) Ltd and Inveragus (Pvt) Ltd in case no HC 4281/03.

From the applicant's founding affidavit, it would appear that Landscapes Estates (Pvt) Ltd and Inveragus (Pvt) Ltd then attempted to use the court order obtained under HC 4281/03 to evict the applicant and the 32 others that are in occupation of the land, alleging that these were occupying the land through Chris Murove. The efforts to evict them from the land prompted the applicant to bring this application on her own behalf and purportedly on behalf of the other occupants, seeking an order couched in these terms:

- “1. Applicant and thirty-two (32) others listed in Annexure “A” are protected occupiers of Landscape Farm, Nyabira in terms of the Rural Land Occupiers Act (Protection from Eviction) Act No13/02 who shall not be evicted from the farm either by the Zimbabwe Republic Police, Messenger of Court and /or Deputy Sheriff.
2. Applicant and thirty-two (32) others listed on annexure “A” should not be evicted or affected by the court order of 19th November 2003 in case No 4281/03 to which they are not parties.
3. Respondent shall pay the costs of this application on a legal practitioner and client scale.”

Also attached to the applicant's application is a copy of an offer letter in favour of one C T Mutusva in respect of Subdivision 9 of Sunnyside Central Farm. No offer letter in favour of the applicant is attached.

In his notice of opposition, the respondent avers that he is a shareholder in Inveragus (Pvt) Ltd which owns Lot 2 of Sunnyside and the Remainder of Landscape Estate. He denies that the companies of which he is a director ever owned Landscape farm which is referred to in the applicant's founding affidavit. He attaches the deeds of transfer by which title to land from which Chris Murove was lawfully evicted is held. He then avers that applicant and the other 32 persons on the farm are "part of Chris Murove and his big family" and should be evicted from the land on the basis of the order in HC 4281/03.

This was the state of the papers when the matter was called up before me for argument. Despite his initial stance to stand by the papers and heads of argument filed of record and moving for the granting of the draft order attached to the application, Mr *Hungwe* graciously conceded that the application was fatally defective in one or two respects and appropriately in my view, tendered to withdraw the application. He did not tender costs with the withdrawal but argued that the respondent should be denied an order of costs in his favour notwithstanding the withdrawal.

On the turn and after hearing Mr *Gatsi* on the question of costs only, I declined to make an order of costs against the applicant and advised that my reasons for so doing would follow. I now set them out.

The main ground upon which Mr *Hungwe* felt constrained to withdraw the application was the incorrect citing of the respondent. The respondent is but a director and member of the two companies that were the plaintiffs in HC 4281/03. The order evicting Chris Murove and all those occupying through him from Landscapes and Sunnyside Farms was granted in favour of these two companies and none other. It was thus an error to cite the respondent before me in the present application as the order which is allegedly threatening the applicant with eviction is not in his favour and cannot therefore benefit him in any manner.

In view of the concession made by Mr *Hungwe* in respect of this point when I highlighted it to him, it becomes unnecessary in my view to detail the other shortcomings that I raised for his comments. I decline to detail these especially in view of the fact that Mr *Hungwe* has intimated that he may bring another suit in the future on the same facts but presumably against the correct respondents.

The withdrawal of the application was thus premised on a point that the respondent himself had not raised in his opposing affidavit or in his heads of argument. The respondent himself had sought to support the eviction of the applicants from the land on which they are farming on the bald allegation that they are part of Chris Murove's big family. Even accepting that in Zimbabwe we have big families, this appears to me to be an exceptionally big family and in any event, there is no factual basis laid tending to support such a position. It was my view that baldly asserted as it was, the defence before me would not have succeeded even if there were no other defects attendant upon the application.

It is trite that the award of costs is entirely in the discretion of the court. In exercising this discretion however, the court is guided by a number of settled principles which all support the *raison d'etre* of the justice delivery system of achieving fairness and justice between the feuding parties. In this jurisdiction, costs are awarded to a party that is successful as a way of vindicating their approach to the courts. In a way, the award of costs, though hardly sufficient to fully indemnify the successful party, is to penalize the unsuccessful party for being unreasonable and not conceding a validly raised claim or defence. In times when legal costs, have escalated beyond the reach of many, an award of costs may mean financial ruin to the mulcted party. Thus, in my view, the question of costs must not be dealt with lightly and routinely but must be considered carefully and awards made in deserving cases and on recognized and settled principles of the law and where the substance of the judgment and not merely the wording of the order determine clearly who the successful party is.

I therefore viewed the question of costs in light of the above and of the further fact that neither party would have succeeded in the manner in which they were proceeding before me. In the premises, it presented itself to me as fair and just that neither party be mulcted with an order of costs consequent upon the withdrawal.

Hungwe & Partners, applicant's legal practitioners.
Sawyer & Mkushi, respondent's legal practitioners.