KHB ESTATES (PVT) LIMITED
and
KENNETH RONALD BARTHOLOMEW
versus
FELIX PAMBUKANI
and
MR NDOKERA – PROVINCIAL MAGISTRATE CHEGUTU
and
THE MINISTEER OF LANDS, LAND REFORM AND RESETTLEMENT
and
THE MESSENGER OF COURT N.O.

HIGH COURT OF ZIMBABWE
MAVANGIRA J.
HARARE, 1, 7 and 9 September and 5 October 2011.

Urgent Chamber Application

T. Mpofu, for the applicant
T. Dzvetero, for the first respondent.
S. Chihuri and T. *Mashiri* on 1 September only and *S. Maposa* thereafter, for the third respondent.
No appearance for the fourth respondent.

MAVANGIRA J: The first applicant is the former owner of Wakefield Farm, Chegutu, measuring 688.64 hectares in extent. The second applicant resides on a portion of the farm measuring 353.06 hectares. The first applicant is the holder of the offer letter in respect of sub division 2 of Wakefield, 280 hectares in extent.

The first respondent, through his legal practitioners, issued out a writ for the ejectment of the applicants from subdivision 2 of Wakefield Farm. The writ was predicated upon an order issued by the second respondent in which leave was granted to execute the applicants' ejectment notwithstanding the noting an appeal to the High Court against the judgment. When the application was filed the relief sought was stated as follows:

"DRAFT ORDER

IT IS ORDERED

1. That the judgment and order of ejectment of the second applicant from "a residence" on Sub-Division 2 of Wakefield Farm, Chegutu District handed down by the second respondent on 7 July 2011 under Chegutu Case No 1379/10 be and is hereby set aside in its entirety.
2. That the judgment handed down by the second respondent concerning leave to execute an ejectment against the second applicant and all other persons claiming occupation of Sub-Division 2 of Wakefield Farm Chegutu on 29 July 2011 be and is hereby set aside in its entirety.
3. That it be and is hereby declared that the Writ of Ejectment marked Annexure "F" to this application is invalid and of no force or effect for want of compliance with the Order of the second respondent rendered on 7 July 2011 and additionally by reason of the incompetence of such order and Judgment.
4. That the costs of this application be paid by the first respondent."

By the time that the respondents' opposing papers were filed, the applicants had already been ejected from the farm. At the hearing the applicant's counsel with the consent of the other parties, filed an amended order, which this time was in the form of a provisional order. The relief sought is:

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause why the following order should not be made, that,

1. The execution of the Ejectment order from the Chegutu Magistrates Court granted under case number 1379/10 be and is hereby stayed pending the determination of the review proceedings filed of record under case number HC8104/11.
2. Respondents shall not take any such steps as may prejudice the rights of the applicants which rights may be confirmed or restated under case number HC8104/11 and shall not take any such steps as may interfere with the operations of the applicants at their portion of Wakefield Farm
3. First respondent shall pay costs of suit

INTERIM RELIEF GRANTED

Pending the determination of this matter on the return date it is ordered that

> "Applicants be and are hereby restored to occupation, possession and use of a portion of Wakefield Farm which comprises dwelling and other immovable structures from which they were evicted pursuant to an order of the court of the Magistrate's sitting at Chegutu which is now the subject of an application for review under case number HC8104/11. "

It is the applicant's contention that they are entitled to the relief that they seek because the second applicant has had meetings with the then acting Minister of Lands and in those

meetings the second applicant was advised that on 22 August or soon thereafter, a decision would be made at Presidential level as to which area he should continue to operate on. They also contend that at the said meetings the second applicant was advised that proceedings for his ejectment before the Chegutu Magistrates Court should be stayed. Notably, the proceedings before the magistrate's court at Chegutu were in fact not stayed. Secondly, by the time that this matter was heard in chambers, 22 August had since passed and there was no indication that either of the applicants had since been issued with lawful authority to remain in occupation of the piece of land in issue.

The first respondent's legal practitioner on the other hand contended that there were preliminary issues that the court had to consider first and on the basis of which there would be no justification for the applicant to be heard on the merits. The first such preliminary issue was that the matter ought not to be heard on urgent basis as the certificate of urgency does not comply with the Rules of Court.

The certificate of urgency dated 19 August 2011 and authored by a legal practitioner reads in part:

> "I am a legal practitioner of this Honourable Court….
>
> I consider this application for stay of Execution pending the outcome of review proceedings, to be lodged at the same time as this application, to be urgent in that:
> My ejectment from a portion of Wakefield Farm and ejectment of my workers and their families – numbering 500 or more persons – is imminent
> Neither my workers or myself have alternate places of residence or means to a livelihood.
> Irreparable damage and harm will be occasioned if execution is allowed to continue notwithstanding the noting of appeals and the review of the Magistrates decisions mentioned in the review application which accompanies this application (*sic*)
> A continuation of the Magistrates Court ejectment process will also subvert a current administrative decision by the Minister and other Government officials to confirm or regulate my stay on a portion of Wakefield which determination is set to take place next week at Presidential level as indicated to me by the Minister of Lands and Resettlement on Thursday 18 August 2011."

The preliminary point that the certificate of urgency does not comply with the rules as it *inter alia* relates to the legal practitioner and his workers being about to be ejected is raised in paragraph 6 of the first respondents opposing affidavit. No attempt is made in the applicants' answering papers to respond to this point. Neither was any attempt made at the hearing to do so.

In *General Transport and Engineering (Pvt) Ltd and Others v Zimbabwe Banking Corporation Ltd* 1998 (2) ZLR 301 at 302E GILLLESPIE J stated:

> "Where the rule relating to a certificate of urgency requires a legal practitioner to state his own belief in the urgency of the matter that invitation must not be abused. He is not permitted to make as his certificate of urgency a submission in which he is unable conscientiously to concur. He has to apply his own mind and judgment to the circumstances and reach a personal view that he can honestly pass on to a judge and which he can support not only by the strength of his arguments but on his own honour and name. The reason behind this is that the court is only prepared to act urgently on a matter where a legal practitioner is involved if a legal practitioner is prepared to give his assurance that such treatment is required." (emphasis added)

In *casu* it is not the legal practitioner's ejectment that is imminent. To that extent the certificate of urgency is of no relevance to the matter before the court. Alternatively, and this appears to be more probable, the legal practitioner did not apply his mind to the contents of the certificate of urgency when he affixed his signature to it. In the *General Transport and Engineering (Pvt) Ltd* case (*supra),* it was stated at p 303 A:

> "It is, therefore, an abuse for a lawyer to put his name to a certificate of urgency where he does not genuinely hold the situation to be urgent."

In *casu,* I would venture to say that it is equally an abuse for a lawyer to put his name and affix his signature to a certificate the contents of which he has not addressed his mind to. This, *in casu,* is taken in conjunction with the absence of an attempt to regularize or explain the contents of the certificate despite the raising of the issue by the first respondent in his opposing affidavit, that it related to the imminent ejectment of the legal practitioner and his workers and not to that of the applicants.

Sight is also not lost of the fact that the certificate of urgency related to an application in which was sought, *inter alia*, stay of execution of the ejectment order issued by the Magistrates Court at Chegutu. Yet the relief now being sought from this court is restoration to the applicants of occupation, possession and use of a portion of Wakefield Farm from which they were evicted pursuant to the order of the Magistrates Court. Thus, in addition to earlier observations made herein, there is no certificate of urgency pertaining to the application now purportedly before this court. Furthermore, it is of significance that the second applicant states in para 12 of the founding affidavit:

> "Should the ejectment proceed, this will effectively amount to a final order."

This statement was made when the application was for stay of execution. When the application was amended to seek different relief, the ejectment referred to had in fact "proceeded" or taken place.

As stated in the *General Transport and Engineering (Pvt) Ltd* case (*supra)*, the extension of protection as a matter of urgency is relief available from this court as a matter of discretion. It appears to me, on a reading of the rules, that the consideration by the court whether or not to exercise that discretion is triggered by the certificate of urgency by a legal practitioner. The *General Transport and Engineering (Pvt) Ltd* case (*supra)* also appears to confirm that position. If I am correct in this construction and also in the finding that there is no certificate of urgency pertinent to the application now before the court in consequence of the amendment of the relief sought, then there would be no basis for this court to consider whether or not there is justification for exercising its discretion as to whether to treat this matter as urgent or not. On that basis it would be incumbent upon this court to find that this matter is not urgent in the context provided for by the rules.

The second preliminary point raised by the first respondent was that the matter is not urgent as it has been overtaken by events in the form of the actual ejectment of the applicants. Concession was made at the hearing that the amended order now sought disposes of the point.

The third preliminary point raised was that the matter is not urgent because there is no potential irreparable harm to the applicants. It was contended that no potential harm can be occasioned by the stopping of unlawful activities or the stopping of a criminal offence. Furthermore, that as the applicants have no lawful authority as defined in the Gazetted Land (Consequential Provision) Act [*Cap 20:28*], their continued occupation amounts to a criminal offence. In the circumstances the stopping of a criminal offence by the eviction of the applicants cannot occasion irreparable harm to them.

The applicants' contention on the other hand is that their occupation is not unlawful in view of various documents in terms of which their occupation was sanctioned. It is stated that the said documents were furnished to the magistrate consequent to his decision to grant the first respondent leave to execute the applicants' ejectment. It appears to me that for this very reason, the applicants' contention becomes undone. In *Commercial Farmers Union and Others v The Minister of Lands and Rural Resettlement and Others* SC 31/10 CHIDYAUSIKU CJ held that a

court of law cannot authorize on individual to commit a criminal offence. In *casu* the magistrates order that the applicants be evicted as well as the decision granting the first respondent leave to execute pending appeal are extant. They have not been set aside. In any event, documents that, as alleged, may have been furnished to the magistrate after he or she had made their determination would not have been properly before him or her and could not be relied on for any purpose. In the event, the applicants' contention has no basis and must fall away.

This, in my view, dovetails into the fourth preliminary issue raised by the first respondent, namely that the applicants have no *locus standi* to make this application and the application for review as they are not the owners of the land. The applicants on the other hand contend that by reason their *de facto* possession and use of the property, buttressed by authority from the Minister, they have necessary *locus standi*.

The facts revealed by the papers before this court are that the land in question was acquired by the State. The first respondent was issued with an offer letter. The applicants' allegation that they have lawful authority or alternatively that the third respondent has promised to regularize their occupation of the piece of land is not borne out by the papers. In the opposing affidavit filed on behalf of the third respondent on 1 September 2011 the following is stated *inter alia*:

> "4. Ad paragraph 9-1
>
> The application is opposed on the grounds that there are no prospects of success on review.
>
> 4. Ad paragraph 11-12
>
> It is not in dispute that the applicants have no lawful authority to remain on the property in question and lawful authority has been defined in the Gazetted Land (Consequential Provisions) Act [*Cap 28:10*] as an offer letter, permit or lease.
>
> 5.1 The applicants do not have any of these forms of lawful authority
> 5.2 They cannot seek to extend or legalize their stay through the courts.
>
> 5. Ad paragraph 13
>
> Any deliberations regarding applicants' stay do not amount to lawful authority. Applicants should comply with the law and the magistrate's ruling which was in accordance with the law. Should the deliberations result in an offer letter, the applicants will be entitled to occupy and utilize the property in question."

In the affidavit filed on 7 September 2011 on behalf of the third respondent the following is stated:

> "2. Following the request to clarify the position of the Ministry in the above matter, I reiterate that the Ministry supports the holder of an offer letter in his/her efforts to evict anyone from the land allocated to him/her.
>
> 3. While it is not in dispute that a meeting was held, it did not culminate in the issuance of an offer letter to the applicant. If and when it does, he will then be authorized to occupy the property in question"

From the above, it is clear that the applicants have no lawful authority to remain in occupation of the piece of land. Not only has the third respondent said so; the Magistrates Court has so ordered.

In the Commercial Farmers Union case CHIDYAUSIKU CJ stated at p 25

> "It was submitted that some of the individual applicants and other former owners or occupiers of acquired land have court orders issued by the Magistrates Courts and the High Court authorizing their occupation of acquired land after the prescribed period. If such orders were issued, they would have the effect of authorizing the doing of something that Parliament has decreed should not be done. This Court, or any other court for that matter, has no jurisdiction to authorize the doing of that which Parliament has decreed would constitute a criminal offence."

On the basis of the above, it appears to me that the applicants have no *locus standi* to bring the instant application, being the application for the restoration of their occupation of the piece of land in issue. The application for review is not before me and I make no pronouncement in relation to it.

In the result I find that the matter is not urgent. In addition the applicants have no *locus standi* to bring this application. Consequently, I shall not consider the merits of the matter. With regard to the first respondents counter applications, Mr. *Dzvetero* conceded that the first respondent's counter-application ought to have, but did not comply with rule 229A. He however urged the court to condone the non-compliance in terms of r 4C. The problem with this request is that the papers are in such a state as to cause confusion regarding which papers form the counter application. As the opposing papers are not paginated I am unable to refer to specific pages. But, there firstly appears an opposing affidavit which at the bottom of the fourth page has a heading "Counter Claim". Thereafter there is an Annexure and immediately thereafter the "First

Respondent's Notice of Opposition" after which follows an opposing affidavit. It is also dated 31 August 2011 as the earlier opposing affidavit referred to. Attached to it are a number of Annexures. A certificate of urgency then follows. In my view this is not a proper matter for the invocation of r 4C. I find that the counter application is not properly before this court.

Gollop and Blank, applicant's legal practitioners
Antonio and Associates, first respondent's legal practitioners
The Civil Division of the Attorney-General's Office, third respondent's legal practitioners