

JOHN TENDAYI ENOCH MAPONDERA
versus
EZEKIEL CHAUNOITA
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 8, 11 and 22 May 2017

Urgent Chamber Application

T. Kuchenga, for the applicant
G. Dzitiro, for the first respondent
T. Shumba, for the second respondent

MUSAKWA J: The applicant and the first respondent are resettled farmers who are embroiled in a land dispute. This has prompted the applicant to seek the following interim relief-

“TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this court why a final order should not be made in the following terms

1. That the 1st respondent and all those acting through him be and are hereby interdicted from carrying out any farming activities at Subdivision 2 of Strathlone in Goromonzi District of Mashonaland East Province pending the finalization of HC 12708/16.
2. That the 1ST Respondent be and is hereby ordered not to interfere with Applicant’s farming activities.
3. 1st Respondent to pay costs of suit on an attorney and client scale.

INTERIM RELIEF SOUGHT

That pending the confirmation and discharge of the final order Applicant is granted the following

4. That the 1st Respondent and all those acting through him be and are hereby interdicted from carrying out any farming activities at Subdivision 2 of Strathlone in Goromonzi District of Mashonaland East Province.
5. That the 1st Respondent be and is hereby ordered not to interfere with Applicant’s farming activities.”

As stated at the beginning, the applicant and the first respondent are embroiled in a dispute over farm boundaries. This has culminated in a court application for an interdict being filed by the applicant under case number HC 12708/16. The application is yet to be set down for a hearing. The applicant's founding affidavit in the present matter was deposed to on his behalf by his cousin Farai Mapondera. It is averred that the applicant was allocated Subdivision 2 of Strathlone in Goromonzi District of Mashonaland East Province in 2006. The southern part of the farm borders that of the first respondent. The first respondent does not dispute conducting farming activities on that portion of the farm. The second respondent was roped in to resolve the dispute and a report was compiled following an inspection of the two farms. The report confirmed that the disputed land falls under the applicant's farm. Despite that confirmation the first respondent has remained in occupation. What triggered the present application was the averment that the first respondent commenced to plough on the disputed land on 20 April 2017.

In opposing the application the first respondent contends that the relief being sought is similar to that in the pending application under HC 12708/16. Therefore, the present application is *lis alibi pendens*. He also contends that the dispute between the parties is pending before the Land Commission as the first respondent challenged the findings by the second respondent. Thus a hearing was conducted by the Land Commission and a determination is awaited.

In his oral submissions, Mr *Kuchenga* stressed that the relief being sought is that of an interlocutory interdict. Such relief is sought pending the court application that was filed in HC 12708/16. This is because the applicant has no other remedy pending the determination of that case. It was his further submission that the balance of convenience favours the applicant. As for the requirements for such relief he cited the case of *Nyikavanhu Housing Cooperative v Minister of Local Government Public Works and National Housing and Another* HH-221-16.

Mr *Kuchenga* further submitted that the current function of the Land Commission is advisory. As such, it was never meant to usurp the powers of the second respondent. In any case, he was of the view that the court's jurisdiction cannot be fettered by the Land Commission.

Whilst conceding that the applicant and the first respondent share adjoining land, Mrs *Dzitiro* submitted that the diagram that was annexed to the applicant's papers does not show the land that is in dispute. She also submitted that a final interdict is being sought as opposed

to an interim one. Reference was made to the draft order. She further submitted that the applicant has two alternative remedies at his disposal. The first is the pending application under HC 12708/16. She was of the view that the present application is a duplication of HC 12708/16. Allied to that was the submission that the situation that existed since the filing of HC 12708/16 still obtains as there have been no new developments. The second is that the definition of boundaries is an issue the Land Commission is seized with. The contention is that the first respondent genuinely believes that he has an appeal that is pending before the Land Commission. On balance of convenience, Mrs *Dzitiro* submitted that it should be resolved in favour of the first respondent. This is because the first respondent has not yet harvested his crops.

Mr *Shumba* for the second respondent submitted the second respondent is not opposed to the relief sought. That is the position that has been adopted in HC 12708/16. He further submitted that the second respondent has been involved in clarifying the dispute on boundaries between the parties. Both the applicant and the first respondent were invited to participate in the exercise. A report on the exercise was compiled. The parties were told to confine themselves within their respective boundaries in terms of their offer letters.

As held in *Nyikavanhu Housing Cooperative v Minister of Local Government Public Works and National Housing and Another supra*, the requirements for an interlocutory interdict are-

1. a *prima facie* right, even if it is open to doubt
2. on infringement of such right by the respondent or a well-grounded apprehension of such an infringement.
3. a well-grounded apprehension of irreparable harm to the applicant, if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally.
4. the absence of any other satisfactory remedy.
5. that the balance of convenience favours the granting of an interlocutory interdict.

I now proceed to apply the law to the facts.

As regards a *prima facie* right, the land in question was allocated to the applicant although the first appellant is also laying claim. The applicant has an offer letter and the accompanying diagram apportions the disputed portion of land to him.

As regards the second requirement the applicant complains of an infringement by way of encroachment by the first respondent. In any event the first respondent does not dispute farming on the disputed portion.

Concerning irreparable harm, the applicant has been hampered from working on the land in preparation for the winter season. The applicant is being prejudiced in a number of ways. The applicant is paying tax and levies for land that he is not utilising. In a way he is subsidising the first respondent. In another context the applicant is losing out on potential income to be derived from the land.

As to the requirement that there must not be a satisfactory alternative remedy, it is noted that there is a pending application for an interdict. However, what the applicant seeks is an interlocutory interdict pending the setting down of the court application for an interdict.

On where the balance of convenience lies, I would resolve this in the applicant's favour. He is the one who was allocated the disputed land for which he is expected to pay rentals despite his rights being challenged by the first respondent. In any event, the verification that was conducted by a team set up by the second respondent concluded in the applicant's favour as evidenced by the report that was compiled.

This brings me to the issue about the Land Commission. The functions of the Land Commission as provided in s 297 (1) of the Constitution are-

- “a) to ensure accountability, fairness and transparency in the administration of agricultural land that is vested in the State;
- (b) to conduct periodical audits of agricultural land;
- (c) to make recommendations to the Government regarding—
 - (i) the acquisition of private land for public purposes;
 - (ii) equitable access to and holding and occupation of agricultural land, in particular—
 - A. the elimination of all forms of unfair discrimination, particularly gender discrimination;
 - B. the enforcement of any law restricting the amount of agricultural land that may be held by any person or household;
 - (iii) land usage and the size of agricultural land holdings;
 - (iv) the simplification of the acquisition and transfer of rights in land;
 - (v) systems of land tenure; and
 - (vi) fair compensation payable under any law for agricultural land and improvements that have been compulsorily acquired;
 - (vii) allocations and alienations of agricultural land;
- (d) to investigate and determine complaints and disputes regarding the supervision, administration and allocation of agricultural land.”

As can be noted from s 297 (1) (d) the Land Commission has the mandate to investigate and determine disputes on allocation of agricultural land. It is not clear what

exactly was presented before the Land Commission regarding the dispute between the applicant and the first respondent. However, this court's jurisdiction is not ousted by s 297. This is because this court is being requested to grant an interlocutory interdict pending the resolution of an application for a final interdict. In any event the decisions of the Land Commission may be reviewed by the High Court.

In the result, the application for an interlocutory order is granted with costs.

Makururu & Partners, applicant's legal practitioners

Mutumbwa, Mugabe & Partners, first respondent's legal practitioners

Civil Division of the Attorney-General's Office, second respondent's legal practitioners