

COMMERCIAL SUGAR CANE FARMERS ASSOCIATION

And

ZIMBABWE CANE FARMERS ASSOCIATION

And

ZIMBABWE SUGAR CANE DEVELOPMENT ASSOCIATION

And

HIPPO VALLEY PRODUCTIVE SUGAR CANE ASSOCIATION

And

MKWASINE SUGAR CANE FARMERS ASSOCIATION

Versus

THE MINISTER OF INDUSTRY AND COMMERCE

And

TRIANGLE LIMITED

And

HIPPO VALLEY ESTATES (PVT) LTD.

HIGH COURT OF ZIMBABWE

MAWADZE J

MASVINGO, 15 February and 7 March, 2017

Urgent Chamber Application

C. Ndlovu for all applicants

H. Magadure for 1st respondent

S. Moyo for 2nd and 3rd respondents

MAWADZE J. This matter was first placed before my brother *MAFUSIRE J* on 2 February 2017. The applicants successfully sought his recusal and since we are only two judges at the station the matter landed on my desk. I proceeded to set the matter down for hearing on 8 February 2017 but on that date I was advised that Counsel for all the respondents were not available due to earlier commitments. I was compelled to reschedule the matter for hearing on 15 February 2017.

The applicants are farmers' associations which represent sugar cane farmers in Chiredzi. The 1st respondent is the Minister of Industry and Commerce whose Ministry oversees the sugar industry. The 2nd and 3rd respondents are millers and also engage in sugar cane farming in the lowveld. The applicants and the 2nd and 3rd respondents have a commercial relationship in the production, milling and marketing of sugar. It would appear that this relationship is plagued by problems.

The applicants filed an urgent chamber application in which they seek an interdict couched in the following terms;

“TERMS OF FINAL ORDER SOUGHT

- (a) The 1st respondent's directive dated 28 November 2016 be and is hereby set aside
- (b) The parties shall continue to implement DOP at the rate of 82.65 to 17.35 % until the report by Ernest and Young is perfected and approved by all parties.
- (c) 1st respondent is ordered to pay costs.”

INTERIM RELIEF SOUGHT

The respondents are interdicted from implementing the DOP at rate of 77% to 23% until this application is heard.

SERVICE OF PROVISIONAL ORDER

The Deputy Sherriff or members of the Zimbabwe Republic Police are authorised to serve the copies of the provisional order on the respondents.”

The background giving rise to this application are more succinctly outlined in the opposing affidavit by the 1st respondent one Michael C Bimha [the Minister].

The commercial dispute between the parties has been going on for some considerable time. The applicants' members being sugar cane growers who do not have a mill of their own take their sugar cane to the mill owned by the 2nd and the 3rd respondents. The applicants' members are then paid by the 2nd and 3rd respondents on the basis of what is called the division of proceeds ratio (DOP).

In 1997 a review process of the DOP was carried out by Price Water House and it pegged the DOP rate or ratio at 73.5% to 26.5% in favour of farmers since 1999. The parties after sometime were involved in a dispute as regards the proper DOP rate. The applicants were alleging that the DOP rate set out in 1999 was no longer feasible. The parties were unable to agree on the DOP rate. This prompted the Minister to intervene by issuing a directive in terms of Section 10 of the Sugar Production Control, Act [*Cap 18:19*] and set an interim DOP ratio of 82.65% to 17.35% in favour of the farmers or applicants on 6 June 2014. This interim DOP rate was to subsist pending a review of the DOP ratio by Chartered Accountants or consultants. Ernest and Young (EY) were appointed as the consultants.

According to the Minister (this has not been contested by the applicants) the parties agreed then that;

- (a) they would respect and abide by the consultant's findings
- (b) in the event that the DOP ratio differed from the interim one the party to whom compensation is due would be provided with prompt and automatic compensation.

It is common cause that the review process was done by EY and completed in January 2016. As a result of that review the DOP ratio was pegged at 77% to 23% in favour of the farmers or the applicants. This ratio is about 4% higher than the 1999 ratio. This recommendation did not unfortunately put the matter to rest.

The parties still made representations to the Minister highlighting the possible shortcomings of the report by EY. Some of those alleged shortcomings are highlighted in the applicants' founding affidavit. The Minister apparently lent his ear to these concerns and agreed that the review process should continue. The Minister however directed that the DOP ratio of 77% to 23% in favour of the applicants or farmers be implemented pending another review process which would take on board the concerns raised by the parties. According to

the Minister this review process would take time and require resources hence the need to find an interim DOP ratio.

It is this directive by the Minister which has prompted the applicants to approach this court on a certificate of urgency seeking interim relief in the form of an interdict.

According to the applicants the Minister's directive defies logic in the Wednesbury sense and is irrational for a number of reasons which are;

- (a) that the Minister seeks to rely on a DOP ratio which he concedes is borne out of a flawed report by EY.
- (b) that the interim DOP ratio of 77% to 23% in favour of the applicants would result in applicants suffering irreparable harm which would mark the end of the sugar cane farming by indigenous farmers thus reversing the gains of the land reform programme
- (c) that the applicants would simply be financially ruined, swimming in debt and be totally incapacitated.

It is on this basis that the applicants contend that this matter is extremely urgent as the applicants have no other remedy. The applicants contend that the 2nd and 3rd respondents would not suffer any prejudice if interim relief is granted and that the balance of convenience is in favour of granting interim relief.

Both *Mr Magadure* for the Minister and *Mr Moyo* for the 2nd and 3rd respondents have raised points *in limine*. I allowed counsel for all the parties to make submissions both in respect of points *in limine* and the merits of the case out of expediency and convenience. I however indicated that in my ruling I would first consider whether this matter is urgent and that I would only deal with other points *in limine* if I considered the matter to be urgent. Needless to say I would only consider the merits of the matter if I find the points *in limine* to lack any merit.

The respondents took the following points *in limine*;

- (a) that this matter is not urgent
- (b) that the substance of this application is a review application which cannot be made by a way of an urgent chamber application

- (c) that this application is flawed as it does not raise grounds for review
- (d) that the deponents to the applicants' founding affidavits have not shown that they have authority to depose to those affidavits
- (e) that the certificate of urgency is fatally defective

I would want to deal with the last point *in limine* first simply because it determines whether there is a proper application before me.

The basis of the point *in limine* in respect of the certificate of urgency is that *Mr Frank Chirairo* certified this matter as urgent on 18 January 2017 when in fact the founding affidavits by the applicants were commissioned on 19 January 2017. This would mean that when *Mr Chirairo* certified the matter as urgent there were no founding affidavits upon which this application is premised. This point, in my view should not detain this court at all. I am inclined to give *Mr Ndlovu* for the applicants the benefit of the doubt that this is simply a typographical error on the dates in issue. I would however hasten to add that legal practitioners should take utmost care in drafting pleadings especially in urgent matters. A lot of time is wasted in some instances arguing or dealing with matters which simply are a result of lack of proper or due diligence by legal practitioners concerned. My view is that in view of *Mr Ndlovu's* submissions it may well have been a typographical error on the certificate of urgency and I am inclined to condone the error and deal with the matter. I now move on to consider if this matter is urgent.

The question of what constitutes urgency in matters of this nature is well settled in our law. The *locus classicus* is the case of *Kuvarega, vs Registrar General & Anor.* 1998 (1) ZLR 188 at 193 F (H). See also *Gifford vs Mazarire & Ors.* 2007 (2) ZLR 131 (H) at 134 (H) – 135 A.

In the case of *Bonface Denenga & Anor. vs Ecobank (Pvt) Ltd. and 2 Ors.* HH 117/14 at page 4 of the cyclostyled judgment, I summed up the question of urgency as follows;

- “The general thread which runs through all these cases is that a matter is urgent if,
- (a) It cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render nugatory the relief sought.
 - (b) There is no other alternative remedy.
 - (c) The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or sufficient reason for such a delay.

(d) The relief sought should be of an interim nature and proper at law.”

From the back ground facts of this matter which are not in issue the commercial dispute between the applicants and the 2nd and 3rd respondents have been in existence for a very long time and various solutions were proffered to resolve this dispute. What I find remarkable is that on 6 June 2014 the parties agreed to a road map on how this dispute should be resolved. They agreed that a consultant be engaged to decide the DOP rate. By then the DOP ratio was 73.5% to 26.5% in favour of the applicants or the farmers. As an interim measure pending the review process the parties were happy to accept a thumb stuck figure of 82.655 to 17.35% in favour of the applicants by the Minister. What has not been disputed is that the parties made an undertaking to abide by the findings made by the consultant and most importantly to accept that if the DOP rate differed from the interim one the prejudiced party would receive prompt and automatic compensation. The applicants were aware of this road map and probabilities since June 2014. The mind boggles why after the disputed report by EY the applicants want this court to believe that this eventuality which they were well aware of and anticipated as way back as June 2014 would be the basis to find urgency in this matter. In my view urgency cannot be found on what was always in existence since June 2014. That would amount to self-created urgency.

The other important point to note is that both the certificate of urgency and the founding affidavits do not show how if this matter is not heard on an urgent basis it would become a *brutem fulmen* and the specific irreparable harm the applicants would suffer. This point was hammered home by Makarau J.P. (as she then was) in *Document Support Centre (Pvt) Ltd. vs Mapuvire* 2006 (2) ZLR 240 (H) at 244 D when she said;

“In my view, urgent applications are those where if the courts fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant.”

Both the certificate of urgency and the founding affidavit vaguely refer to irreparable harm the applicants would suffer if the matter is not entertained on an urgent basis. There are bald assertions that the interim DOP ratio directed by the Minister based on some scientific assessment, albeit flawed report, would signal an end to sugar cane farming by indigenous farmers as they would be put in debt and be financially crippled. It is even said this is against

the land reform programme! The specific irreparable harm has not been demonstrated or when the deductions are to commence and at what level or rate.

It is for these reasons outlined above that I am of the firm view that this matter is not urgent and it must as a consequence be struck off the roll of urgent matters.

The respondents prayed for a special order of costs on the basis that the application for the recusal of my brother Mafusire J was made without prior notice. I am not satisfied that the respondents have made a case for a special order of costs and or for costs on a higher scale. It has not been disputed that *Mr Ndlovu* only became aware that this matter had been placed before my brother Mafusire J a day before the hearing. While I am not privy to the facts why the recusal for my brother Mafusire J was sought, my learned brother in his bountiful wisdom decided to recuse himself. I find no basis for punitive costs. All I can do is to order the applicants to pay the costs related to the abortive hearing before my brother Mafusire J and also relevant to this hearing.

In the result,

IT IS ORDERED THAT;

1. The matter be and is hereby struck off the roll of urgent matters.
2. The applicants shall pay the costs, inclusive of the hearing before Mafusire J.

Ndlovu & Hwacha Legal Practitioners – applicants’ legal practitioners

Civil Division of the Attorney General’s Office – 1st respondent’s legal practitioners

Scanlen & Holderness – 2nd and 3rd respondents’ legal practitioners.