

**MAZIKHETHELA BANANA**

**Versus**

**ABRAHAM MPUMELELO MABHENA**

**And**

**THE MINISTER OF LANDS, AGRICULTURE, CLIMATE CHANGE  
AND RURAL RESETTLEMENT (N.O).**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 8 OCTOBER 2021 & 14 OCTOBER 2021

**Urgent application**

*H. Shenje*, for the applicant

**DUBE-BANDA J:** This is an urgent application. This application was filed in this court on the 5<sup>th</sup> October 2021. It was placed before me and I directed that it be served on the respondent together with a notice of set down for the 8<sup>th</sup> October 2021. On the hearing date 1<sup>st</sup> and 2<sup>nd</sup> respondents were in default. Applicant seeks an order couched in the following terms:

Terms of the final order sought

1. The purported settlement by the 1<sup>st</sup> respondent on the property being Khami Outspan Farm be and is hereby declared illegal.
2. That consequent to the above the applicant be and is hereby given leave to evict the 1<sup>st</sup> respondent's from Khami Outspan Farm.
3. In carrying out such eviction leave be and is hereby granted for the applicant, through the Sheriff of the High Court of Zimbabwe, to destroy all such structures illegally erected at Khami Outspan Farm by the 1<sup>st</sup> respondent.
4. That the Sheriff of Zimbabwe in enforcing the order of this court as contemplated in paragraph 3 above shall, where necessary, enlist the support and services of the Zimbabwe Republic Police to ensure the maintenance of law and order during the destruction of the illegal structures or removal of any person or persons illegally settled on Khami Outspan Farm.

Interim relief sought and granted

5. That pending the finalisation of these proceedings an interdict be and is hereby granted restraining the 1<sup>st</sup> respondent from entering and proceeding with any

development on Khami Outspan Farm or having access to the illegal structures in such way as to interfere with the applicant's current rights in the property.

6. That service of the provisional order shall be effected by the Sheriff of the High Court of Zimbabwe.

### **Factual background**

This application will be better understood against the background that follows. Applicant contends that on the 21<sup>st</sup> August 2014, he applied for a piece of land from 2<sup>nd</sup> respondent. He entered into a lease agreement with 2<sup>nd</sup> respondent in respect of Khami Outspan Farm (Farm). He is in occupation of the Farm where he is doing cattle ranching and other farming activities. During one of his patrols, he discovered that a structure had been erected on a portion of the Farm. He noticed that a huge portion of the farm had been marked in what appears to be pegging for residential stands. The police carried out investigations regarding the person behind the structure at the Farm. On the 30 September 2021, the police informed applicant that the person who put a structure at the Farm is 1<sup>st</sup> respondent. It is against this background that applicant has launched this application seeking the relief mentioned above.

### **Application of the legal principles**

At the commencement of the hearing of this matter I asked Mr *Shenje*, counsel for the applicant whether the provisional order sought in this application was competent at law. I raised this issue with counsel because applicant approached the court seeking a provisional order, however, the order sought has all the hallmarks of a final relief. The provisional order ought to be this: that pending the finalisation of these proceedings an interdict be and is hereby granted restraining the 1<sup>st</sup> respondent from entering and proceeding with any development on Khami Outspan Farm or having access to the illegal structures in such way as to interfere with the applicant's current rights in the property.

My view is that once an interdict is granted restraining the 1<sup>st</sup> respondent from entering and proceeding with any development on Khami Outspan Farm or having access to the illegal structures in such way as to interfere with the applicant's current rights in the property, applicant would have achieved his goal. This is the final relief that he is litigating to achieve. His mission would have been accomplished. I have some difficulty envisaging that which

would happen on the return day of the so-called provisional order. See: *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 2009. There would be nothing to confirm on the return date. Applicant would have achieved this milestone under the guise of a provisional order.

A provisional order must be granted in aid of, and as ancillary to the main relief which may be available to the applicant on final determination of his or her rights in the proceeding. In *casu* applicant seeks a final order disguised as a provisional order. It is settled law that the standard of proof for a provisional order is different from that of a final order. A provisional order is established on a *prima facie* basis because it is merely a caretaker temporary order pending the final determination of the dispute on the return date. On the other hand a final order is obtained on the higher test of a clear right because it is final and definitive as it has no return date. Applicant seeks to obtain a final order on a *prima facie* proof, such is impermissible. See: *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368; *Chiwenga v Mubaiwa* SC 86/20.

The provisional order sought is final in nature. The impropriety of such an approach has received ample emphasis in this jurisdiction. In the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188, the court held that:

The practice of seeking interim relief, which is exactly the same as the substantive relief sued for and which has the same effect, defeats the whole object of interim protection. In effect, a litigant who seeks relief in this manner obtains final relief without proving his case. That is so because interim relief is normally granted on the mere showing of a *prima facie* case. If the interim relief sought is identical to the main relief and has the same substantive effect, it means that the applicant is granted the main relief on proof merely of a *prima facie* case ... if the interim relief were granted in the form in which it is presently couched, she would get effective protection before she proves her case.

This applies with equal force in this application. Although applicant has labelled his draft order as interim relief, it has all the hallmarks of a final relief. A proper reading of the interim relief sought reveals that applicant seeks a final relief. There is nothing interlocutory about the interim relief sought apart from its label. Once the 1<sup>st</sup> respondents is interdicted and restrained from entering and proceeding with any development on Khami Outspan Farm or

having access to the illegal structures in such way as to interfere with the applicant's current rights in the property that would mark the end of the dispute. There would be nothing more for remaining for the court to determine. Such cannot be achieved *via* a provisional order. The provisional order sought in this application is incompetent and bad at law.

Mr *Shenje* conceded that the interim relief sought in this application has a ring of finality. He then sought an amended of the draft provisional order. What exercised my mind was whether or not I should permit the amendment of the draft provisional order as prayed for by Mr *Shenje*. I take the view that it is not for this court to start panel beating an incompetent draft order. The applicant sought relief that was incompetent and a nullity at law. The entire application is a nullity. A nullity cannot be amended. The appropriate remedy would therefore, be to strike out the entire chamber application without any further ado. See: *Chiwenga v Mubaiwa* SC 86/20.

In passing I note that incompetent draft orders arising from "final reliefs disguised as interim reliefs" are continuing unabated. The intended guidance or correction in the pronouncements by the Supreme Court do not seem to have been taken heed of. It would appear that there might be need for remedial intervention for the conscientisation of legal practitioners in this regard. See: *S v Williams & 9 Ors* CC 14/17; *Chikafu v Dodhill (Pty) Ltd and Others* SC 16 / 2009; *Chiwenga v Mubaiwa* SC 86/20; *Blue Ranges Estates (Pvt) Ltd v Muduviri & Anor* 2009 (1) ZLR 368; *J.C. Conolly and Sons (Private) Limited v R.C. Ndhlukula the Minister of Lands and Rural Resettlement* SC 22/18.

### **Disposition**

As the applicant's claim is incompetent and a nullity at law, this court finds that it is not properly before it and it ought to be struck off the roll.

In the result, I make the following order: Accordingly, this matter is struck off the roll with no order as to costs.

*Shenje and Company*, applicant's legal practitioners