JOHN PERCIVAL BAWDEN

VERSUS

THULANI NDEBELE

AND

SIKHUMBUZO MPOFU

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 28 JULY 2011 AND 15 SEPTEMBER 2011

Mr M Munjanja for applicant
Miss N Ncube for 1st respondent

Opposed Court Application

CHEDA J: This is an application whose draft order is couched in the following terms:

"IT IS ORDERED

1. Glenorchie farm, Insiza, held by Applicant under Deed No. 1888/1953 be and is hereby declared to be a property wholly privately owned by the Applicant.
2. That an order be and is hereby granted that First and Second Respondents and all who claim through them, are trespassing on Applicant's privately owned property, which property is more fully described as Glenorchie farm, Insiza District, held under Title Deed 1888/1953.
3. Alternatively to 2 above, an order be and is hereby granted that the First and Second Respondents unlawfully invaded Glenorchie farm in March 2008, and thereby perpetrated an act of spoliation, as neither Applicant or its authorised representatives ever authorised or consented that the Respondents could move their property or cattle into occupation of part of Glenorchie Farm, Insiza, as more fully described under Title Deed 1888/1953.
4. An order that First and Second Respondents, their cattle and property, and all other persons presently on Glenorchie farm, Insiza District (more fully described under Title Deed 1888/1953), who claim through them, be and are hereby immediately and forcibly evicted from and out of Glenorchie farm, Insiza, being a property declared above as privately owned by the Applicant.
5. An order that First and Second Respondents pay the costs of this application on an attorney and client scale".

Applicant is the owner of a property known as Glenorchie Farm (herein after referred to as the "the farm"). The founding affidavit was deposed to by one Jason Nuville Leanders, by virtue of a power of attorney filed of record given to him by applicants. The deponent is the son-in-law of applicant and is also the manager of the farm.

First respondent is described as "an invader" and second respondent is his foreman. I will come to this point later.

The brief facts which are largely undisputed, are that applicant holds title to the farm and first respondent has been allocated the same farm or part thereof.

It is apparent that there is a dispute as to the boundaries of first respondent' piece of land.

It is applicants' argument that he was in lawful and undisturbed possession of his property until he was dispossessed of it by first respondent.

Our law protects property rights, thereby preventing self-help. On that score applicant is indeed entitled to his property unless there are other lawful reasons for his dispossession.

First respondent raised two points in limine. That the matter is res judicata and that there is a non-joinder. The res judicata refers to case number HC 1634/08 which was adjudicated upon by this court.

I propose to deal with the last point raised being the non-joinder. The correct legal position in our law and indeed the Roman Dutch- Law is that the only cases in which a defendant has, as of right, entitled to claim a joinder of a third party is where the third party has a joint financial interest or proprietary interest, see *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 and *Morgan and another v Salisbury Municipality* 1935, A.D 167 at 171 Villers J. A. stated:

> "The South African practice was no doubt in the first instance founded on grounds of convenience or equity or in order to save costs, or in order to avoid oppression or multiplicity of actions, or no other similar grounds; but however that may be, the practice has in course of time so hardened as to confer on a defendant a legal right of demanding that the other joint owner, or joint contractor,

> or partner, shall be joined as a party to the action. Now the feature which is common to the cases of joint owners, joint contractors and partners, is that in all of them there is a joint financial or proprietary interest. It has been stated that the interest is indivisible as well as joint, but that point need not be here discussed. The feature to which I draw attention is the joint financial or proprietary interest. The position may therefore be broadly stated to be that by South African practice the only case in which a defendant has been allowed to demand a joinder as of right are the cases of joint owners, joint financial or proprietary interest, but that in other cases a defendant, as a general rule, has not been allowed to demand such joinder." (my emphasis)

The question to be asked in this matter is whether the Minister of Lands and Rural Settlement (herein after referred to as "the Minister") and Insiza District Council (herein referred to as "the Council") had a financial or proprietary interest in this matter.

Applicant has argued that the property was not gazetted under the provisions of the Land Acquisition Act [Chapter 20:10]. However, on the other hand, first respondent has argued that the property belongs to him on the basis of an offer letter from the Minister through the council. To me, it is essential for both the Minister and the council to be made part of the proceedings. This principle is clearly laid down by Herbstein Winsten in The Civil Practice of the Superior Courts in South Africa, 3rd ed at 167 which reads:

> "If a third party has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such order could not be sustained or carried into effect without prejudicing that party, he is a necessary party and should be joined in the proceedings, unless the court is satisfied that he has waived his right to be joinded".

See also, *Toekies Butchery (Edms) BPK Ltd v Stassen* 1974(4) SA 771 (T) and *Erasmus v Fourwill Motors (Edms*) BPK 1975 (4) SA 57 (T).

I hold the view that in view of the current legislation pertaining to the acquisition of land in Zimbabwe, the Minister is the acquiring authority and that authority legally resonates down to the council. In view of this, the Minister and council have a direct, substantial, financial and proprietary interest in any order the court may make with regards to the subject matter, in this

instance, the land. There is no evidence before me that either the Minister or council have waived their rights to be made part of the proceedings. In the absence of such waiver, it means that they are interested parties.

Failure to join them as parties to these proceedings will no doubt result in serious prejudice to them.

In light of this fact alone, I am of the view that this application is still born and it is not necessary to determine the question of res judicata at this stage.

Applicant describes first respondent as "an invader." The use of the word invader as opposed to occupier is deliberately used to impute some illegality. Fortunately, the reality of the situation on the ground does not support this serious yester-year misconception based on entrenched colonial bigotry on the part of applicant and John Neville Leanders. This unfortunate attitude will no doubt impede applicant in his quest to normalise race relations in this country but, if, anything will further detach him from the spirit of co-existence.

I am inclined to comment that it is high time those of like-mind engage their minds into self-introspection rather than dwelling in the past wishing the reversal of the land reform programme which all reasonable people in this country have embraced.

The application is accordingly dismissed.

Messrs Munjanja and associates, applicant's legal practitioners
Coghlan and Welsh, 1st respondent's legal practitioners