CHRISTOPHER CHIWALO

versus

DOMINIC MUSEKIWA

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 05 October 2010

Mr *N.P. Goneso*, for the applicant

Mr *R.T. Maganga*, for the respondent

CHIWESHE JP: On 10 July 2007 my brother UCHENA J issued the following order against the respondent:-

“1. The respondent be and is hereby interdicted from unlawfully interfering with

applicant’s right of occupation and use of piece of land namely Rhodo 2, 26, 51

and 52 situated at Willesden Farm, Goromonzi.

1. The respondent be and is hereby interdicted from making any threats against applicant and his workers and or interfering with them in any manner.
2. The respondent is ordered to keep peace towards applicant.
3. The respondent shall pay costs of this application.”

The applicant has again approached this court. His complaint is that the respondent is in breach of the terms of this order and therefore in contempt of this honourable court. In his founding affidavit the respondent avers to the following effect. The respondent observed the terms of this order for a period of eighteen months after its grant. Sometime in December 2008 the respondent went on to Rhodo 2 and started cutting down trees seeking to create a field on which to grow his crops. A report was made to the police. The respondent was reprimanded following which he stopped his activities. In February 2009 the respondent made a similar move. He occupied Rhodo 26 and 52. He started cutting trees for purposes of cropping. He was in May 2009 again reprimanded by the police and re-served with the above order. That did not deter him. It was then that the police opened a docket for contempt of court. However the prosecution advised that the matter be referred to this honourable court. For that reason the applicant has filed the present application for contempt of court.

The applicant has mining rights on the land in question. He says that the applicant has interfered with his mining activities and threatened his workers. The applicant has approached the Mining Commissioner concerning the respondent’s activities. He was advised to get the respondent to comply with the above court order. The applicant says the respondent is wilfully failing to comply with that court order and must accordingly be censured by this court.

The respondent vehemently opposed this application. He avers that it is the applicant who is interfering with his farming activities. He says the order granted under the hand of my brother UCHENA J was granted in default. He has since filed an application for condonation for late filing of application of rescission of that judgment. That application is pending before this court. He states that he is a beneficiary of the land reform programme. He holds an offer letter to occupy and utilise subdivision 5 of Willesden Farm, Goromonzi. It is 100.08 hectares in extent. On that same land applicant was issued with a permit by the Mining Commissioner to carry out mining activities. He would be confined to 40 hectares. The respondent says the applicant is the one who is not complying with the Mining Commissioner’s directive as to how the two parties should co-exist. The Mining Commissioner’s recommendations are filed of record and read in part as follows:-

“Mr Chiwalo has got a lot of land which he can utilise for his mining activities without interfering with the farming activities of Mr Musekiwa and he should stick to those areas without causing unnecessary problems to the land owner. In light of this Mr Chiwalo should not encroach into 6 hectares of Rhodo 51 and should concentrate on the other side where he already has shafts.”

The respondent further states that he has been farming on this land since 2000. It is the applicant who has been fighting for his removal from the farm. He insists he is not in contempt of the order of court – rather he is pursuing its rescission. The applicant is disregarding the Mining Commissioner’s directive as he is seeking to mine on arable land leaving those areas indicated to him by the Commissioner.

The applicant insists that the respondent is in wilful contempt of a valid court order. This order has not been set aside. The fact that an application to have it rescinded is pending is neither here nor there. Until it is set aside it remains extant and must be complied with. I agree with the applicant in this regard and the pronouncements in the cases that he quotes in support of this application, for example, *Sabawu vs Harare West Rural Council 1989* (1) ZLR 47 (H).

In my view however the question to be asked is whether the respondent is in wilful defiance of this order – *Scheelite King Mining Co Pvt Ltd vs Mahachi 1998* (1) ZLR 173 (H).

The term “wilful” denotes disregard of the order given without lawful or other justification. The respondent must have set out to defy the order regardless of the consequences. Whilst technically the respondent may be in contempt I doubt if it has been shown that he is in wilful defiance. The applicant admits that for 18 months the respondent complied with this order. It is not clear why thereafter he then decided to act contrary to the terms of that order.

It is likely that he was encouraged by the Mining Commissioner’s recommendations the tenor of which clearly blames the applicant for encroaching on to the respondent’s portion of the land. Whilst such recommendations do not take precedence over valid court orders, they have a profound bearing on the conduct of the parties on the ground. Sight must not be lost of the fact that the applicant’s rights on the land in question derive from a permit granted in terms of the Mines and Minerals Act. This act is administered by the Minister of Mines through the Mining Commissioner. In granting an order such as the present order the court is to all intents and purposes protecting the rights conferred on the applicant by the mining authorities. Indeed such rights may be withdrawn or curtailed without reference to the court. It is an area that falls for determination by the executive branch of Government. Where therefore the executive or its representative issues the kind of recommendation that the Mining Commissioner did and communicates the same to a person in the position of the respondent, the effect on the ground is a dilution of the impact of the order granted by the court to the extent that such communication is seen to be departing from the terms of that order.

Secondly, both respondent and applicant have legitimate authority (again granted by the executive, be it from two different departments) to occupy this farm. Their activities on the same farm are as different as farming can be from mining. The applicant is expected to operate on 40 hectares of the 100 hectare farm. On paper it would appear that the respondent’s portion is that part of the farm which is arable. Without the maps/diagrams clearly indicating the boundaries, if any between the two portions of this farm and the manner in which either of the parties has encroached into each other’s territory, it might be difficult to ascertain whether the court order has been violated and wilfully so. Further, such violation or lack of it might be impossible to determine on the papers as they stand without hearing oral evidence.

Thirdly, it is common cause that the respondent seeks that the judgment granted in default be rescinded. Whilst that alone does not *per se* suspend the operation of the judgment sought to be rescinded, it is a fact which depicts the respondent in a different light – that of a party that seeks recourse to the courts rather than a party bent on defiance of the directions or orders of that same court. Indeed, the respondent may not even be aware that the application for rescission is only an application which may or may not be granted, and that, in the interim the default judgment remains in force.

The applicant should have included in its papers affidavits from the Ministers of Lands and Mines. He did not. For these reasons I would hold that the applicant has not made out a clear case for the order that he seeks. Whilst the respondent may be acting outside the terms of the relevant court order, it cannot be said on the papers as they stand that he is in wilful defiance of that order.

Accordingly it is ordered that the application be and is hereby dismissed with costs.

*Goneso & Associates*, applicant’s legal practitioners

*Maganga & Company*, respondent’s legal practitioners