DANIEL FRANCOIS DU TOIT
versus
GEORGE MUSHAMBI
and
THE SHERIFF OF THE HIGH COURT N.O

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 1 & 13 April 2022

Urgent Chamber Application

O. Kondongwe, for applicant
S.T. Mtema with J. Mugogo, for respondent

TAGU J: The Applicant approached this court on an urgent basis seeking an urgent temporary relief for stay of execution by interdicting the Second Respondent from proceeding with his ejectment from Lot 1 of Odzi Drift Estate in Mutasa District of Manicaland Province on the strength of a writ of ejectment issued under case No. HC 4742/21 pending the return date whereupon Applicant will seek the suspension of the said writ of execution pending the final and definitive determination of an application for rescission of the default judgment which has been filed by the Applicant under HC 2086/22.

The facts are that on the 15th of September 2021, the first Respondent who is a holder of a SPECIAL POWER OF ATTORNEY issued by the Executor to the estate of the Late Christopher Francis Mushambi to act over the affairs of a certain farm being ODZI DRIFT ESTATE, flied summons against the Applicant in this Court at Harare under HC 4742/21 for the eviction of the Applicant from the said farm on the basis that the oral joint venture agreement that the Applicant had with the late Christopher Francis Mushambi expired upon the demise of Christopher Francis Mushambi on the 15th of November 2020. The summons for eviction was served on the Applicant at his premises by "affixing to a screen gate after hooting and knocking". Having been served with the summons as aforesaid the Applicant's *dies induciae* of ten days within which to file a notice of appearance to defend expired. First Respondent proceeded to obtain a default judgment on the 10th of November 2021 and a warrant of execution subsequently issued against Applicant's property. This issue then came to the Applicant's light on the 25th of March 2022 when the Sheriff

of Court attended at Applicant's premises armed with a warrant of ejectment and carrying out the execution process.

The Applicant proceeded to file a court application for rescission of the default judgment under HC 2086/22 on the 22nd of March 2022. He proceeded to file the present urgent chamber application interdicting the second Respondent from proceeding with his execution from Lot 1 of Odzi Drift Estate in Mutasa District of Manicaland Province on the strength of a writ of ejectment issued under case No. HC 4742/21 pending the return date. The Applicant in his founding affidavit submitted that neither him, nor people residing at the said farm saw the summons hence he is not in willful default. Further he submitted that had he seen the summons he would have filed a notice of opposition since he has a defence to the main action under HC 4742/21 and the application for rescission under HC 2086/22 that he had an oral joint venture agreement with the late Christopher Francis Mushambi on the farm known as Lot 1 of Odzi Drift Estate in Mutasa District of Manicaland Province he entered into sometime in 2021 and was meant to subsist for five years.
The provisional order being sought by the Applicant is couched in the following terms-

"**TERMS OF FINAL ORDER SOUGHT**

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. The writ of ejectment sued out by the first Respondent pursuant to the court order granted in case number HC 4742/21 be and is hereby set aside.
2. The first Respondent shall pay costs of suit for this application.

INTERIM RELIEF GRANTED

Pending the return date, the Applicant is granted the following relief-

1. The writ of ejectment sued out by the first Respondent pursuant to the court order granted in case number HC 4742/21, be and is hereby suspended pending the outcome of HC 2086/22.
2. The second Respondent or any of his officers or agents be and are hereby ordered to forthwith desist with any and all execution process and not to eject the Applicant pursuant to the writ of ejectment sued out by the first Respondent under case number HC 2086/22.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served on the Respondent by the Applicant's legal practitioners or by a person in the employ of the Applicant's legal practitioners or by the Deputy Sheriff."

The first Respondent filed a Notice of opposition to the application. In the Notice of Opposition the first Respondent raised some points *in limine*. The first point *in limine* being that of lack of cause of action due to Statutory illegality, the second attacked the Form used as not

being in compliance with Form 25, and the third being that the relief sought in paragraph 2 is final and definitive in nature and that the matter is not urgent, hence the application is fatally defective. The Counsel for the Applicant made oral opposition to the points *in limine*. I will dispose of the points *in limine* first before dealing with the merits of the application.

The first Respondent's argument was that the entire Chamber Application is premised on the fact that the Applicant seeks to argue on the main that he has a valid oral joint venture agreement which oral agreement is illegal by reason of statutory prohibition and cannot found a cause. He said the Applicant is seeking to approach this Court on Urgent basis considering the fact that incidents being complained of do not warrant being placed in this forum on an urgent basis and he is clearly abusing of court process. He said the Applicant is well aware that an oral joint venture agreement is unlawful in terms of the provisions of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations 2014 which specifically prohibit the entering into partnerships farm without the approval of the Minister. He submitted that whatever oral agreement the Applicant had with the Late Dr. Christopher Francis Mushambi was void. The Applicant's so –called oral agreement does not meet the requirements of Agricultural Land Settlement (Permit Terms and Conditions) Regulations 2014 and is in direct breach of such regulations by its very nature. That illegal oral agreement cannot create urgency let alone give the Applicant a bona fide defence in the rescission because it is an illegality.

The counsel for the Applicant submitted that all the preliminary points taken have nothing to do with urgency for an application of this nature. He said the first Respondent is inviting the court to revisit merits on the substantive issues. He said further that on validity or otherwise of oral joint venture agreement this is an issue to be examined as substantive issue and not as point *in limine*. This court cannot make a finding on the validity of oral venture agreement. This point must be argued on the merits of the matter. The court must decide whether a prima facie case has been established. The application for rescission cannot be determined on prima facie case. He referred to the case of *Transfrontier Investments (Private) Limited* v *Bond Crown Investment* HH 671/21. Commenting on the Regulations that have been referred to, he said they do not expressly preclude oral joint venture agreements. He said the regulations say the Minister must consent in writing but this is not for this court to decide.

In response the counsel for the first Respondent argued that the counsel for the Applicant has conceded that there should be approval by the Minister in writing, and once it has been found as a fact that there is illegality the provisional order cannot be granted, mainly because even in the application for rescission there are no prospects of success hence the first preliminary point should be upheld. Reference was made to the case of *Hativagone & Another* v *CAG Farms (Pvt) Ltd & Others* SC 42/15.

Let me say on the outset that I am not dealing with the summons case HC 4742/21 nor the court application for rescission of default judgment HC 2086/21. However, in determining the preliminary points raised by the first Respondent I am forced to refer to documents attached by the Applicant and the first Respondent. It is trite that in general the court is always entitled to make reference to its own records and proceedings brought before it, and to take note of its contents, even in summary judgment proceedings. Hence I will refer to all documents filed in the record brought before me as I had occasion to read the whole record before setting this matter down for hearing. For this contention I refer to the case of *Mhungu* v *Mtindi* 1986 (2) ZLR 171 (SC). See also *The State* v *Munyaradzi Mawadze* HH-273/20 at page 7 of the cyclostyled judgment were the same authority was cited with approval by CHINAMHORA J.

The first preliminary point raised by the first Respondent is that there is no cause of action in the Applicant's application by virtue of illegality. The first Respondent submitted that the entire Urgent Chamber Application is premised on the fact that the Applicant seeks to argue on the main that he has a valid oral joint venture agreement which oral agreement is illegal by reason of statutory prohibition and cannot found a cause. He said the Applicant is well aware that an oral joint venture agreement is unlawful in terms of the provisions of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations 2014, in particular section 7 (1) (b) which specifically prohibit the entering into partnerships farms without the written approval of the Minister. It is the first Respondent's contention that that illegal oral agreement cannot create urgency let alone give the Applicant a bona fide defence in the rescission because it is an illegality.

I had occasion to read the Applicant's founding affidavit. In paragraph 10 the Applicant said he intended to defend the action under HC4742/21 as he was not in willful default. Further, in paragraph 11 he said in part-

> "Furthermore, I content that I have *bona fide* defence to the Respondent's action (in HC 4742/21). The defence arises from the following facts:
>
> 11.1**.** I had an oral joint venture agreement between myself and Respondent's late uncle, Dr. Christopher Francis Mushambi on the farm known as Lot 1 of Odzi Drift Estate in Mutasa District of Manicaland Province.
> 11.2. The Joint venture was entered sometime in 2021 and was meant to subsist for five years. In terms of the joint venture, I had occupied the farm and brought a lot of furniture into the homestead to commence. As such, Respondent has no basis to evict me especially without affording adequate notice of vacation."(my emphasis)

I again read the founding affidavit of the Applicant in respect of the application for rescission in order to establish if indeed the Applicant had a bona fide defence to HC 4742/21 that would entitle him to a stay of execution pending determination of HC 2086/21.

The Applicant reiterated in paragraphs 10 and 10.1 that he a bona fide defence, and had an oral joint venture agreement between himself and Respondent's late uncle, Dr. Christopher Francis Mushambi on the farm known as Lot 1 of Odzi Drift Estate in Mutasa of Manicaland Province respectively.

The first Respondent is preliminary point is that the oral joint venture agreement was illegal and cannot found a cause. In determining whether the Applicant had a cause of action and whether he has prospects of success entitling him to the relief of a provisional order suspending the writ of execution, I had occasion to read the provisions of section 7(1) (b) of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations (S.I. No. 53 of 2014. The Regulations read as follows-

> "A permit holder shall not –
> (a) cede, assign, hypothecate or otherwise alienate or sublet in whole or in part his or her allocated land or enter into a partnership for the working of the allocated without the consent of the Minister."

In casu the Applicant does not deny that he entered into an oral joint venture agreement with the Late Dr. Christopher Francis Mushambi without the Minister's written consent. Clearly whatever agreement Applicant had with the late Christopher Francis Mushambi without the written consent or otherwise of the Minister was an illegality. No cause of action can be founded on an illegality. I therefore uphold the first Respondent's point *in limine*. Having found as I did that the oral joint venture agreement was an illegality, I need not labour myself to deal with the other points *in limine* as these will not change anything. The Applicant enjoys no prospects of success either

in the main matter or the application for rescission of the default judgment. The general principle governing non-compliance with statutory provisions was concisely spelt out by INNES CJ in *Schierhout* v *Minister of Justice* 1926 AD 99 at 109:

> "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect…And the disregard of a peremptory provision in a statute is fatal to the validity of the proceedings affected."

See also ZMDC and *Kamative Mine* v *Jambata* HH 681/21.

Another point to illustrate that the Applicant does not enjoy prospects of success in the main or rescission application is that the Applicant said the oral joint venture agreement was entered sometime in 2021 yet the Letters of Administration which the Applicant attached says Christopher Francis Mushambi died on the 15th of November 2020, I do not see how the Applicant will reconcile this contradiction since he never challenged it.

IT IS ORDERED THAT

1. The point *in limine* that there is no cause of action based on illegality is upheld.
2. The application is dismissed.
3. Applicant be and is hereby ordered to pay costs.

Dube Manikai & Hwacha, applicant's legal practitioners
John Mugogo Attorneys, first respondent's legal practitioners.