ZAKEYO MEREKI
versus
BELL INN (PRIVATE) LIMITED
and
MICHAEL PETER BELINSKY
and
OFFICER COMMANDING MASHONALAND WEST

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 11 and 24 January 2006

Urgent Chamber Application

Mr *Chikumbirike*, for applicant
Mr *Paul*, for 1st and 2nd respondents
No appearance for 3rd respondent

KAMOCHA J: On 30 November 2005 the first respondent- Bell Inn (Pvt) Limited was granted a spoliation order by GOWORA J in the following terms:

> "INTERIM RELIEF GRANTED
>
> Pending determination of this matter, applicant is granted the following relief:
>
> 1. That 1st respondent is directed to remove himself and property and all persons holding through him from Arden Estate within 24 hours of the date of service of this order.
>
> 2. The Deputy Sheriff is authorised to evict 1st respondent and all persons holding through him from the farm.
>
> 3. That 1st respondent is interdicted from interfering with applicant's farming activities.
>
> 4. That 2nd respondent is directed to give the necessary instruments to Nyabira police to render all necessary assistance to the Deputy Sheriff in implementing his order should 1st respondent offer any resistance thereto.
>
> TERMS OF FINAL ORDER SOUGHT
>
> 1. That 1st respondent be interdicted from returning or visiting Arden Estate.
>
> 2. That 1st respondent pay the costs of application on a legal practitioner and client scale."

In that case Bell Inn (Pvt) Limited, the 1st respondent in the present proceedings was the applicant while Mr Zakeyo Mereki, the applicant in the present case was the 1st respondent and the Commissioner of Police was the 3rd respondent.

On that same day *id est* 30 November 2005 Mereki filed an application to suspend service of Bell Inn's application on himself. His application was heard in chambers on 5 November 2005 and judgment was handed down on 7 November.

The order that the court issued was as follows:

"TERMS OF RELIEF MADE

1. That the 2nd respondent be and is hereby ordered to suspend service of the order annexure "C" on the applicant.

2. That the applicant be and is hereby entitled to remain in occupation of subdivision 1 of Arden Estate in Zvimba District of Mashonaland West Province until the final determination of this matter and to carry on all farming activities which he was engaged in or intended to engage in consequent upon his right to occupation in terms of annexure "A" the letter dated 10th November 2005 from the acquiring authority.

TERMS OF ORDER SOUGHT

1. That the applicant be and is hereby declared to be the rightful occupier of No. 1 Arden Estate in Zvimba District of Mashonaland West Province in terms of the offer letter annexure "A" dated 10th of November 2005.

2. That the 1st respondent be and is hereby ordered to cease occupation of the subdivision 1 of Arden Estate in Zvimba District of Mashonaland West Province.

3. That the 1st respondent pay the costs of this application."

When Bell Inn's application was served on Mereki on 2 December 2005 he had already filed the above application seeking to prevent the Deputy Sheriff from effecting service on him. In the same application Mereki was seeking for a declarator. As already stated above the court handed down the judgment on 7 December 2005 wherein it declared Mereki as the correct occupier of the disputed piece of land.

Two days later Bell Inn filed a notice of appeal against that judgment. Mereki who is the respondent in the appeal contended that the appeal was a nullity. Hence the order that

he was granted remained operative. It could only have been suspended had the appeal been properly and validly noted against that judgment and order, so his contention went.

The appellant appealed against the granting of an interdict to the respondent. The respondent argued that when an interdict is granted it was not appellable. It was only the refusal of an interdict, which is appellable. Mr *Chikumbirike* who appeared on behalf of the respondent argued this point at some length citing some South African authorities. He concluded that the legal position on that point was as stated in the South African authorities and went on to submit that the appellant had misread the law. It turned out however, that it was him who had misread the law. There was no need for the respondent to refer to foreign authorities when our statutes have the answer to the question that falls to be decided. *In casu* the answer lies in section 43(2)(d)(ii) of the High Court Act. [*Chapter 7:06*] which recites that –

> (2) No appeal shall lie –
>
> (a) …….
>
> (b) ……..
>
> (c) ……..
>
> (d) from an interlocutory order or interlocutory judgment made or given by a judge of the high Court, without the leave of a judge, if that has been refused, without the leave of a judge of the Supreme Court, except in the following cases-
>
> (i) …….
>
> (ii) Where an interdict is granted or refused.

Quite clearly there was no need for the appellant to obtain leave of the judge in this matter. Its appeal was properly and validly noted and it suspended the judgment and order handed down on 7 December 2005. In this application Mereki sought confirmation of the Provisional order which the noting of an appeal suspended. That is clearly untenable.

There is another issue in this application which is a cause for concern. The applicant did not file a draft of the order that he sought. He merely stated what he was

seeking at the conclusion of his founding affidavit. As mentioned above, what he was seeking was the confirmation of the order which had been suspended by the noting of an appeal.

On realising that what he was seeking could not possibly be granted he, a day after the hearing then filed a draft order which was different from what he originally sought. This time around his interim relief read-

"TERMS OF RELIEF MADE

A (1) That the writ of execution issued by this Honourable Court on the 5th of January 2005 be and is hereby set aside pending the confirmation or discharge of the order reflected in "B" below.

(2) That not withstanding the noting of appeal in case no. HC 6286/05 and this case, the Provisional orders be operative with immediate effect."

This is completely new and was never addressed at the hearing in chambers. The application was defective because it did not comply with the peremptory provisions of the rules of this court in particular Rule 227(3) which reads-

"(3) Every written applications shall contain a draft of the order sought."

The applicant did not seek condonation from the court for failure to file a draft order with the application. When attention was drawn to this defect all that the applicant's legal practitioner could say was that applicant would have no problems with filing a draft order. He then went on to file a draft order which was totally unrelated to what was argued at the hearing. The application also fails for failure to provide a draft of the order sought.

In conclusion, I hold that the application fails on two grounds:-

(a) That the order in case No. HC 6286/05 was suspended by noting of an appeal on 9 December 2005; and

(b) That the application was defective in that it had no draft order for which no condonation was sought for the failure to do so.

In the result, I would dismiss the application with costs.

Chikumbirike & Associates, applicant's legal practitioners.

Wintertons, respondent's legal practitioners.