NYASHA CHIKAFU	APPLICANT
and	
DODHILL (PVT) LTD	1ST RESPONDENT
and	
SIMON DONALD KEEVIL	2ND RESPONDENT
and	
MINISTER OF LANDS AND RURAL RESETTLEMENT	3RD RESPONDENT

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 24 March and 25 March 2009

Chamber Application

Mr *W. Bherebhende*, for applicant
Miss *F Mahere*, for respondents
Mr *K Gutu*, for third respondents

BERE J: Having heard the case involving the same parties in case number HC 1028/09 in chambers on 10 March 2009 I granted the following provisional order on 16 March 2009;

> "INTERIM RELIEF
>
> Pending the confirmation of this matter, the applicants re granted the following relief:
>
> (a) That applicants' possession, use and occupation of remainder of Dodhill in the District of Hartley (Chegutu) be and is hereby restored, so that the *status quo ante* prior to 5 February, 2009 is achieved,
>
> (b) That the second respondent and all other persons claiming occupation and possession through her not being representatives, employees or invitees of the applicants on the Remainder of Dodhill in the District of Hartely (Chegutu) shall forthwith vacate Remainder of Dodhill in the District of Hartley (Chegutu) and that all movable property introduced onto the property by them also be removed. Pursuant thereto, in the event that it becomes necessary or expedient to do so, the Deputy Sheriff is hereby authorised and empowered to enlist the assistance of any member of the Zimbabwe Republic Police who are directed to provide such assistance to him so as to ensure that the provisions of this order are executed and implemented in full."

It should be noted that in the application now before me the now applicant was the second respondent with the now second respondents having been the two applicants in the earlier case already referred to.

The background of this case can briefly be summarised as follows:-

In accordance with the promulgation of the constitutional amendment number 17/05 Dodhill farm which was originally owned by the applicants was acquired by government and subsequently allocated to the applicant. Whilst the applicants were still carrying out agricultural activities on the farm, the applicant occupied the farm in circumstances which prompted the two respondents to apply for a spoliation order which culminated in me granting them a provisional order as captured above.

Aggrieved by the provisional order granted against her applicant now seeks the leave of this court to enable her to formally lodge her appeal in the Supreme Court of Zimbabwe.

The thrust of applicant's case is that this court erred in granting the provisional order in favour of the respondents and that there are reasonable prospects of success on appeal.

Respondents have strongly opposed the application arguing *inter alia* that the order granted was not final in nature but merely an interim relief whose next appropriate step would be for the applicant to seek its discharge if she is not happy with it as opposed to seeking leave to appeal against same. It was also argued that there are no reasonable prospects of success on appeal. The third respondents opted to be bound by the court's decision.

It was conceded by the applicant through her counsel Mr *Bherebhende* that the applicant and her counsel had not read the reasons for the court's decision at the time this application was filed and heard. In the court's view, the assumption must be that before a litigant seeks to appeal or seeks leave to appeal against the decision of the lower court, one would have acquainted oneself with the reasons for the judgment because it is such reasons which invariably prompt an appeal, if at all.

In my view the approach adopted by the applicant through her counsel is cause for concern because it has the potential of encouraging litigants to file frivolous appeals.

Be that as it may, it is clear that the chamber application filed is predicated upon the provisions of s 43(2)(d) of the Act.[1]

A perusal of the provisional order granted clearly indicates that it was an order of an interim nature which order must under normal circumstances await either confirmation or discharge by this same court.

Section 43(2)(d) (*supra*) recognises that there may be occasions when a litigant feels very strongly that the interim remedy may not have been properly granted. In such a scenario,

[1] High Court [Chapter 7:06]

the litigant must then seek the leave to appeal from the judge who was seized with the matter. This is precisely what has happened in this case.

There has been conflicting signals from this court as regards the interpretation of s 43(2)d (*supra*). Others have expressed the view that the section allows any judge of this court to entertain such an application with another view being that such an application can only be heard by the judge who would have heard the main case. I am for the latter view.

For clarity's sake the section in question is worded as follows:-

"APPEALS FROM HIGH COURT

43. Right of appeal from High Court in Civil cases

(1) Subject to this section ……..

(2) No appeal shall lie –

(d) from an interlocutory order or interlocutory judgment made or given by a judge of the High Court without the leave of that judge or, if that has been refused, without the leave of a judge of the Supreme Court ……." (my emphasis).

It does not occur to me that this section should cause any confusion as "that judge" can only refer to the particular judge who would have handled the matter initially. It is clear to me that the responsibility of hearing an application for leave to appeal brought under this section cannot be mandated to any other judge except "that judge", who would have initially been seized with the matter.

This was not an issue in the instant case but I felt inclined to clarify the position.

REASONABLE PROSPECTS OF SUCCESS ON APPEAL

It was incumbent upon the applicant in this case to demonstrate or show on a balance of probabilities that she has reasonable prospects of success in the intended appeal. During his submissions in chambers counsel for the applicant, in response to a question as to why he had not sought to have the provisional order discharged, retorted that his client was worried about the effect of the provisional order on the applicant. Counsel also explained that there was merit in the decision of my brother UCHENA J in the case of *Andrew Roy Ferierra and Katambora Estates (Pvt) Ltd vs Bess Nhandara*[2] and that I erred in not following the reasoning therein.

It will be noted that in my judgment in the main case I dealt at length with the reasons which persuaded me not to follow the Andrew Roy Ferierra case (*supra*) and why I felt more inclined to grant the provisional order sought.

[2] HC 3995/08

Having reflected on my reasons in the main judgment in the light of the submissions made by the three legal practitioners in this case I remain convinced that there are no reasonable prospects of success in this case.

If anything, one gets the impression that the main motivating factor in the applicant bringing the instant application is a desperate attempt to avoid complying with the order of the court to have the respondents' status *quo ante* restored.

I think it would be a sad day if this court were to make orders which would aid litigants like the applicant to subvert full compliance with its own orders.

In the end, the application for leave to appeal is dismissed with costs.

Mavhunga & Sigauke, applicant's legal practitioners
Gollop & Blank, 1st and 2nd respondents' legal practitioners
Attorney General's Office, 2nd respondent's legal practitioners