

SIMBARASHE MUTSAHUNI
and
BONA MUTSAHUNI
versus
THE MINISTER OF LANDS AGRICULTURE, FISHERIES
WATER AND RURAL RESETTLEMENT
and
WASHINGTON MATSAIRA

THE HIGH COURT OF ZIMBABWE
MUZOFA J, HARARE 23,26 July & 5 August 2021

S. Mukwekwezeka, for the applicant
M. A Chimombe, for the 1st respondent
K Kachambwa, for the 2nd respondent.

Urgent Chamber Application

MUZOFA J: The facts of this case are largely common cause. The applicants are beneficiaries of the land reform programme. They were issued with an offer letter on 22 June 2017 by the 1st respondent over a farm known as subdivision consolidation of RE of Sigaro Farm and Gwebi Wood of Sigaro Farm in the District of Mazowe in Mashonaland Province measuring 1 804 hectares ‘the farm’. In due course they were served with a notice of intention to withdraw the offer letter. Despite objections raised, the 1st respondent withdrew the offer letter. The applicants were issued with another offer letter over subdivision 1 on RE of Sigaro in Mazowe District Mashonaland Central Province measuring approximately 488 hectares in extent.

Dissatisfied by the decision to withdraw the offer letter the applicants filed an application for review under HC 2370/21 for the setting aside of the decision to withdraw the offer letter on the 19th of May 2021. The following day the 20th of May 2021 the applicants filed an urgent chamber application to interdict the 1st respondent from enforcing the withdrawal letter and the suspension of any offer letters issued over the farm under HC2438/21. The application was dismissed. According to the applicants, which facts are disputed the 1st respondent has commenced subdividing the farm and is likely to issue offer letters to other farmers who may disrupt their farming activities. In addition the 2nd respondent unlawfully evicted their workers from the farm. On those facts the applicants seek to interdict the 1st respondent from enforcing the withdrawal letter pending the determination of the application for review and an application under HC 3019/21 and spoliatory relief against the 2nd respondent.

Both respondents raised preliminary points in their opposing affidavits. On the day of hearing of the matter, the 1st respondent abandoned the preliminary points. The 2nd respondent raised the point that the matter is not urgent and that the court is *functus officio*.

Whether the court is *functus officio*

I must address the issue whether the court is *functus officio* first before delving into the question of urgency because if the court cannot be seized with the matter it is barred from considering any issues in respect of the matter.

It was submitted that after the applicants' offer letter was withdrawn they approached the court on an urgent basis seeking to interdict the 1st respondent from enforcing the withdrawal. The court dismissed the application after hearing argument. A final order was granted on the merits. The court cannot hear argument on the same issue, it is *functus officio*. I was referred to the case of *ZESA V Utah*¹ as authority for that proposition. It was argued that issue estoppel applies in this case on the authority of *Galante v Galante*². For the applicant it was submitted that the court is not *functus officio*. Although *Mr Mukwekwezeke* conceded that the relief sought is similar he argued that the issues for determination are different. Subsequent developments took place after the dismissal of the first matter. The 1st respondent has commenced subdividing the farm which had not taken place then. He did not dispute that the matter was heard on the merits but insisted that the application was dismissed because it had been filed prematurely.

In determining whether the court is *functus officio*, the court must invariably consider whether the matter is *res judicata*. The requirements for this plea are settled. For one to succeed he must show that the action is between the same parties, the actions must concern the same subject matter and the actions must be founded upon the same cause of action. See the case of *Flowerdale Investments (Private) Limited & Anor v Bernard Construction (Private) Limited & 2 Others*³. *Herbstein & Van Winsen*⁴ set out the requirements as follows:

"The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata*, which, in turn, are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint."

It is common cause that in respect of the interdict, the applications relate to the same parties. The relief also relate to the same subject matter, that is the suspension of the withdrawal letter in respect of the farm.

¹ SC 32/18

² HH 31/02

³ SC 5/09

⁴ *The Civil Practice of the Supreme Court of South Africa* 4th ed by Van Winsen, Cilliers and Loots at p 249

The only issue as submitted for the applicant is that the cause of complaint is different. I was not favoured with sufficient details of the differences. Under HC 2438/21 the applicants approached the court on an urgent basis seeking a provisional order to interdict the 1st respondent from enforcing the withdrawal letter and the suspension of any offer letters issued by the 1st respondent on the farm pending the determination of the application for review filed under HC779/21. The 1st applicant swore to the founding affidavit that the 2nd applicant associated with. The facts relied on for the relief sought were that the applicants were issued with an offer letter in June 2017. They invested a considerable amount in the farm and they call it home. The 1st respondent advised them of his intention to withdraw the offer letter, they objected but nonetheless the offer letter was withdrawn. They were not happy with the conduct of some officials of the 1st respondent, they complained but nothing happened. They filed an application for the review of the 1st respondent's decision and filed the urgent chamber application. The applicant's apprehension then was that, in the event the withdrawal by the 1st respondent is enforced and offer letters issued to other farmers, the farmers would disrupt the applicants' farming activities. Further to that the application for review would be rendered academic.

The substance of the provisional order the applicants seek in this matter is to interdict the 1st respondent from enforcing the withdrawal of their offer letter pending the determination of two applications under HC 2370/21 and HC3019/21, to be barred from issuing offer letters over the farm and to interdict anyone holding any offer letter from occupying the farm. The applicants aver that the 1st respondent has commenced pegging the farm with intent to issue offer letters to the potential farmers. They fear that once the new owners access the farm they will disrupt their farming activities. The applicants then set out how they have invested in the farm and how the withdrawal will affect the contracts they entered with partners in their farming enterprise.

The application before me is based on different circumstances. The applicants aver that the 1st respondent has commenced subdividing the farm. The presence of the 2nd respondent at the farm is also evidence of the enforcement of the withdrawal letter. In the initial application the cause of action was based on assumptions that the 1st respondent will parcel out land on the farm. Before me the 1st respondent has actually allocated part of the farm to the 2nd respondent. I am satisfied that the cause of action is different from the first application. The matter is therefore not *res judicata* and the court is not *functus officio*.

Urgency

What constitutes urgency is now trite. The matter must be such that any delay in dealing with the matter will result in irreparable harm. Any future intervention may not protect the applicants' interests as irreparable harm would have occurred. The applicant must treat the matter as urgent by taking action immediately when the harm is threatened or at the time the

harm materialises⁵. Two issues stand out for consideration as submitted for the 2nd respondent time and harm. The applicant must demonstrate he is likely to suffer irreparable harm and that he acted timeously to avert the harm. Where there is a delay in acting timeously, there must be a reasonable explanation for the delay. What defines timeous action depends on the circumstances of the matter no one size fit all definition can be made.

I am satisfied on urgency. Parties agree that the need to act arose on 30 June 2021. The applicants did not sit on their case, they engaged the 1st respondent by letter with a view to suspend the enforcement of the withdrawal. The applicants indicated that while they waited for the response from the 1st respondent they were despoiled. I was not persuaded by the submission for the 2nd respondent that the letter was not reasonable action because the 1st respondent had already made a decision. It was therefore pointless to engage the office. It may be so, but what is demonstrated by the conduct is that the applicant did not sit back they did something to protect their interests. It is only when they were despoiled that they realised the futility of the intended engagement and approached the court. The applicants cannot be penalised for the 14 days delay. There is a reasonable explanation for the delay.

Interdict

In order to succeed in an application for an interim interdict the applicant must demonstrate a clear right, or a *prima facie* right though open to some doubt. Where a clear right is established the applicant does not need to establish a well-grounded apprehension of irreparable harm. However where only a *prima facie* right is established, the second requirement must be established, namely, that there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and the balance of convenience favours the granting of interim relief; and the applicant has no other satisfactory remedy. See *Watson v Gilson Enterprises (Pvt) Ltd* 1997 (2) ZLR 318(H).

It is trite that an application stands or falls on the founding affidavit. The 1st applicant set out the *prima facie* right in paragraphs 32 to 35 of the founding affidavit. In summary the right is premised on their occupation of the farm from 2017. That they have invested thousands of dollars in the farm, they have crops to be harvested and livestock to be protected, that they have entered into a farming contract and that the farm is now home for the family.

It is difficult to appreciate how the applicants rely on their stay on the farm as a right. I am sure the right may be premised on the 2017 offer letter. The fact is that the offer letter that gave rise to their stay was withdrawn. The applicants do not have a valid offer letter in respect of the farm. Their right is now limited to the land set out in the valid offer letter. I find the expression of the applicants conduct synonymous with the appellant in the *Airfield Investments (Private) Limited v The Minister of Lands, Agriculture and Rural Resettlement & Others*⁶ case

⁵ Zimbabwe Anti-Corruption Commission v Siney Uhse HH534/15 ; Tonbridge Assets Limited And Ors v Livera Trading (Private) Limited And Ors HH574/16

⁶ SC36/04

.Although the appeal court was addressing provisions of the Land Acquisition Act the sentiments are apposite in this case , the court had this to say;

‘The appellant was not in a position to show the existence of *prima facie* rights of ownership in the land which the first respondent was about to infringe because at the time it applied for the interim relief all the rights of ownership it had in the land had been taken by means of the order of acquisition and vested in the acquiring authority. When the appellant lodged the application for the interim relief before the court *a quo* the acquisition of the land by the State was a *fait accompli*, all rights of ownership having been extinguished on its part. The acquiring authority having done everything it was obliged by the law to do to acquire the land for resettlement purposes, there was no outstanding act against the performance of which the acquiring authority could be temporarily interdicted.

An interim interdict is not a remedy for prohibiting lawful conduct. At the time the first respondent made the order by which the appellant was deprived of ownership of the land, he acted lawfully in the exercise of the power conferred upon him. Subsection (1) of s 8 of the Act gave him the power to make the order and its effect reflected the legal consequences of that lawful act.

To suspend the effects of the order of acquisition lawfully made and intended by the legislature would amount to striking down the Act of Parliament or rendering it completely ineffective, thereby creating a vacuum pending determination of the constitutionality of the impugned sections of the Act. That would be improper for the court to do...’

The case is authority for the following. Firstly that the applicant cannot claim a right that has been withdrawn by a lawful authority. The 1st respondent is the administrative body reposed with power to offer letters on state land and the concurrent power to withdraw such offer letters. Secondly, a court cannot interdict a lawful process. The 1st respondent’s withdrawal of the 2017 offer letter to the applicants was done in terms of the law. It is assumed to be lawful until set aside. Thirdly, pendency of litigation does not give rights to the applicant. The 1st respondent cannot be barred from conducting its duties based on pending litigation. In the final clearly the applicants failed to establish a *prima facie* right in the farm. As already stated their right is now based on the second offer letter and limited to the 488 hectares.

I inquired from *Mr Mukwekwezeka* if the pending litigation gave rise to some rights to the applicants. His response was that indeed it did and undertook to file case law in support of the submission. He filed two cases *Setlogelo v Setlogelo*⁷ the leading case on the requirements of an interdict. The second case relied on was *Chunguno v Minister of Lands, Agriculture and Rural Resettlement*⁸. In the *Chunguno* case the applicant’s offer letter had not been withdrawn, the two beneficiaries to the land were offered different portions of land. Thus the facts are

⁷ 1914 AD 221

⁸ HMT 9/18

distinguishable and the *ratio decidendi* in that case is not applicable in the circumstances of this case.

In respect of irreparable harm, the applicants submitted that the investment in the farm is likely to be damaged by the new offerees. There is no provision for compensation. Although the 1st respondent submitted that a written undertaking was made to compensate the applicants I do not think at this point there is irreparable harm that the applicants are likely to suffer. The 2nd respondent who is claiming title to the other part of the farm indicated that the applicants did not make improvements on the Gwebi Wood farm. The infrastructure on the farm is what he left and is actually in a dilapidated state. The applicants did not deny the assertions even though they had opportunity to do so. They also did not deny that, that part of the farm is not under use. It therefore means the assumed irreparable harm can only relate to the part that has not been offered to anyone. The applicants do not know when the allocation will take place.

Spoliation

Spoliation is a common law remedy meant to discourage members of the public from taking the law into their hands but to follow due process. It has been described as a wrongful deprivation of possession. The essential requirements for spoliation are set out in *Botha & Anor v Barret*⁹ where the court stated that:

“It is clear that in order to obtain spoliation order, two allegations must be made and proved. These are:

- 1.that the applicant was in peaceful and undisturbed possession of the farm;
and
- 2.that the respondent deprived him of the possession forcibly or wrongfully **against his consent.**”

(also see *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H), *Matimbura v Matimbura* SC 173/98, *Magadzire v Magadzire* SC 196/98, and *Karori (Pvt) Ltd & Anor v Brigadier Mujaji* HH 23-07.).The applicants have to establish their case on a balance of probabilities since the order sought is final in nature.

According to the applicants they were in peaceful and undisturbed possession of the farm until the 12th of July when the 2nd respondent removed their guards and brought in farming equipment to occupy the farm. Two affidavits were attached from security guards who confirmed the events that the 2nd respondent’s son actually went to the farm and threatened the guards. Maxwell Muranganwa the head security guard indicated that the 2nd respondent’s son brought in tractors and other farming equipment in the farm compound and indicated that they were taking over the farm. The facts were not denied by the 2nd respondent. However in his opposing affidavit the 2nd respondent justified his occupation on his title deed. His claim was

⁹ 1996 (2) ZLR 73 @79D-E

that he is the lawful owner of the Gwebi Wood Farm which was acquired from him. It was consolidated with the RE of Sigaro and offered to the applicants. His title deed was subsequently restored. He also indicated that he confined his occupation to the unutilised portion of the land. Photographs were attached showing a dilapidated farm house, unused chicken run and fallow land. *Mr Kachambwa* in his oral submissions weighed in that the applicants were not in possession of that part of the farm because they were not using it. Therefore there was no spoliation to talk of.

In *Superintendent Remembrancer Legal Affairs vs Anil Kumar*¹⁰ the court noted that a one size fits all definition of possession is difficult but it is agreed that possession has two essential elements actual power over the object possessed. i.e. *corpus possessionis* and intention of the possessor to exclude any interference from others. i.e. *animus possidendi*. Possession is factual as well as legal concept.

Although the applicants did not file an answering affidavit disputing the facts set out that the land occupied was unused, I do not take that as a ground to despoil them. In my view it is not in dispute that the applicants held an offer letter in respect of the farm. It is not in dispute that they exercised rights over the farm. The fact of the possession is confirmed by the presence of the security guards on the farm. The fact that the main house, the chicken run and the land on that part of the farm lay fallow does not mean there was no possession. Despite the withdrawal of the offer letter, the 2nd respondent is required to take occupation in terms of the law. Even if it can be said the applicants are now unlawfully occupying the land they must be protected from unlawful conduct. At this stage the court does not have to inquire into ownership, it is about possession only. See *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Another*¹¹.

In the final the applicants have failed in their quest for an interim interdict. The application partially succeeds in respect of the spoliation order sought.

Since the application partially succeeded each party must bear its costs.

Accordingly the following order is made

1. The provisional order for an interim interdict be and is hereby dismissed.
2. The application for spoliation is granted.
3. The 2nd respondent or anyone acting through him or under his instruction be and are hereby cease immediately all evictions of the applicants and removal of his property or farm workers.
4. The 2nd respondent is ordered to return any and all portions of the farm called Model A2, Phase II in respect of subdivision Consolidation measuring 1 804,9719 HA of RE

¹⁰ AIR 1980 SC 52

¹¹ HH16/09

of Sigaro & Gwebi Wood of Sigaro farm in the District of Mazowe Mashonaland Central Province.

5. No order as to costs.

Chimwamurombe Legal Practice Zenas Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners
Madzima, Chidyausiku & Museta, 2nd respondent's legal practitioners