ISAAC TAMUKA MAHACHI
versus
ZONDIWA NYAMANDE
and
CHITUNGWIZA MUNUCIPALITY
and
MANYAME RURAL DISTRICT COUNCIL
and
MINISTER OF LANDS, AGRICULTURE, WATER, FISHERIES, CLIMATE AND RURAL DEVELOPMENT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 May and 1 June 2022

Urgent Chamber Application for Spoliation

P. Mufunda, for the applicant
T. *Tabana,* for the 1st respondent
N. Mangoi, for the 2nd respondent
D. Chemhere, for the 3rd respondent
D. Machingauta, for the 4th respondent

TAGU J: The applicant approached this court on a certificate of urgency for spoliation.

The background facts to the application being that the applicant is in possession of an offer letter for subdivision 6 of Braemar Farm in Seke District under the jurisdiction of Manyame Rural District Council. The offer letter is still operational and extant. The land in question was Gazetted as a farm land on 3 September 2004, no 97. The applicant was given the offer letter to subdivision 6 as an agricultural land and that position has not been changed. On 5 May 2022 at around 3.00pm the first respondent Zondiwa Nyamande dispatched his workers and instructed them to build a two –roomed house and a dura-wall in the applicant's cattle grazing area. The first respondent's workers rapidly made trenches for the dura-wall and completed the two roomed house where he intend to build a school. The first respondent just pegged the area he

wanted in the applicant's farm without any consultation and without disclosing where he got the authority to do so. On being approached by the applicant to stop the first respondent's workers refused and actually threatened the applicant with assault. Upon enquiries the applicant got the first respondent's phone numbers. The applicant phoned and the first respondent confirmed that he was the one who sent the people working on the site in the farm. Applicant requested for a meeting with the first respondent after ordering first respondent's workers to stop, but first respondent failed to come to the farm for the meeting. From the brief telephone conversation with the first respondent, the first respondent indicated that he had been given the land by the second respondent CHITUNGWIZA MUNICIPALITY and the third respondent MANYAME RURAL DISTRICT COUNCIL. The applicant promptly reported the matter to the Police but the Police absurdly ordered applicant to bring the first respondent to the Police Station. It is the applicant's contention that the second respondent has no authority to transfer any part of the applicant's land to third parties because the second respondent is under Harare Province and cannot administer issues of land which is under Mashonaland East Province. In any case the second, third and fourth respondents cannot cancel the applicant's offer letter as it is a Presidential prerogative. If the second and to the fourth respondents had arbitrarily done so, this would vitiate the Constitution of Zimbabwe. No proper due process of the law was followed. Hence the invasion of the applicant's farm on 5 May 2022 was unlawful and forceful since it was done without a court order thereby despoiling the applicant who was in undisturbed peaceful possession of the part of the farm land. The actions of the first respondent therefore created a danger to the applicant's beasts and the grazing area. In the event that violence was to break up there will be injury to people and destruction of property. Hence the applicant approached the court on an urgent basis seeking the following relief-

"IT IS ORDERED THAT:

1. The first respondent and those claiming occupation through him are hereby ordered to vacate subdivision 6 of Braemar Farm belonging to the applicant and give full possession of the same to the applicant within 48 hours of being served with this order failure of which the Sheriff of the High Court of Zimbabwe is hereby authorized to assist in effecting their removal.
2. The first respondent is hereby ordered to remove any structure(s) he might have built on the farm and refill any trenches made with soil failure of which the applicant is authorized to do the same.
3. The first respondent is hereby ordered to pay costs of suit on a client legal practitioner scale."

Having been served with the urgent chamber application the respondents filed their Notices of Opposition and raised preliminary points. The first respondent's preliminary points were that there is no cause of action, that there is no application before the court, and that the matter is not urgent. The second respondent's points *in limine* were that the relief sought is incompetent and that the application is not urgent. The third respondent's preliminary points were that of Non-joinder and that the matter is not urgent. The fourth respondent's point *in limine* was that the matter is not urgent.

All the preliminary points were opposed by the applicant. I will dispose of the preliminary points first before dealing with the merits of the application.

THE RE IS NO CAUSE OF ACTION

The first respondent's submission is that the land to which Applicant is entitled is different from the land that he occupies which is not a farm but designated for a primary school. He said the Applicant is entitled to occupation and possession of subdivision 6 of Braemar Farm while he is in occupation of Stand Number 7727 Nyatsime Township as appears from the lease agreement entered into between him and the second Respondent. He said Stand Number 7727 Manyame is not a farm but a planned urban settlement which falls under the jurisdiction of the Manyame –Chitungwiza Joint Committee (Braemar, Longlands, Cawdor, Edingburg, Tantallon and Dunotta) established in terms of *Statutory Instrument* 211 of 2021. He further submitted that the Applicant was never in peaceful and undisturbed possession of the land on which he is conducting construction. To that extent he said the Applicant has no cause of action against me

regarding the complaint for spoliation. He produced the Statutory Instrument in question as well as site plan for the area.

In response the Applicant submitted that he has a cause of action. He said he is the sole occupier of subdivision 6 which by virtue of the offer letter the first respondent does not deny. He further submitted that the first respondent does not deny that Braemar Farm subdivision number 6 is a farmland. He produced Annexure "A" a Subdivision layout of Braemar under Seke District in Mashonaland East Province. To the Applicant there is no indication by what legal process the portion of the so called stand number 7727 "Nyatsime Township" was obtained to be in within subdivision number 6 of Braemar Farm. According to the Applicant this is clearly an illegal and corrupt process which has no legal sense such that the first respondent ought to be arrested as a land baron of the property. He further submitted that there is no such thing as Nyatsime Township. He challenged the first respondent to produce the gazette establishing such township in terms of the law. He therefore said the joint committee is not intended to become a municipality-rural district council within a municipality and rural district council to replace the Urban Councils Act and Rural District Councils Act. Hence there is no authority to establish an urban settlement in a farm which has been offered to a citizen. To that extent the lay out plans produced by the first respondent are a nullity. To him no due process was followed by the respondents unless it is abject corruption.

I in deed had cite of *Statutory Instrument* 211 of 21. The joint committee was established to administer Braemar, Longlands, Cawdor, Edingburg, Tantallon and Dunotta areas. While the first respondent suggested that he occupies stand number 7727 of Nyatsime Township, he does not dispute that the Applicant occupies a portion of Braemar Farm. He did not state in which of the lands referred to in the S I 211 of 21 does he occupy. *In casu* the Applicant is alleging that the first respondent is building in Braemar Farm. Assuming the area the first respondent is occupying is outside subdivision 6 of Braemar Farm, he cited second, third and fourth respondents in this case who authorized him to be where he is constructing a school. Clearly the Applicant has a cause of action against these respondents who may have authorized the first respondent to be where he is constructing. There is no way the Applicant would not have cited the first respondent as well as this would have resulted in a non-joinder. Whether or not the first

respondent is occupying a different portion of the land this will be decided on another day. There is therefore cause of action against the first respondent. The first point *in limine* is therefore dismissed.

THERE IS NO APPLICATION BEFORE THE COURT

The first respondent attacked the Form used by the Applicant. He said there is no application before the court for want of form and grounds therefore. He said an urgent chamber application ought to be on Form 25 and must set out in summary the basis of the application. Form 23 is for an ordinary court application hence he prayed that the application be struck of the roll of urgent matters with costs on a higher scale.

The Applicant submitted that the counsel for the first respondent misread the Rules. He read Rule 60 (1) and the proviso thereto. He therefore submitted that Form 23 was used and there is no defect at all.

I had occasion to read the Form used by the Applicant in this case. It is clear that Form 23 was used and not Form 25 which was to be served on another person. There was sufficient compliance with the Rules. The rules of the High Court were misinterpreted in S.I. 202 of 2021 as rule 60 (1) the provison is clear what ought to be done. Where the application is to be served one proceeds in terms of form 23 where there is no requirement for grounds to be put I agree with the counsel for the Applicant that Rules were misread. This point *in limine* has no merit and it is dismissed.

THE MATTER IS NOT URGENT

In his Notice of Opposition the first respondent submitted that the Applicant claims to have been despoiled in respect of subdivision 6 of Braemar Farm in circumstances where he is in occupation of a designated stand number 7727. He said urgency in this case is self- created. He further said the Applicant ought to have joined the Minister of Local Government and Public Works or the Manyame-Chitungwiza joint committee in order to verify his plot boundaries as opposed to dragging first respondent to court with wrong facts. According to the first respondent's counsel in his oral submissions the Applicant's Offer letter was withdrawn on 7

February 2015 and that is when the Applicant should have acted. Asked by the court if he had the copy of the Notice of Withdrawal, counsel for the first respondent said the forth respondent will be useful on that. He did not have proof that the Applicant's Offer letter was in deed withdrawn on the date he referred to.

Counsel for the second respondent submitted that the application is not urgent at all as the dispute between the parties has been on –going for a long time. She said the Applicant is trying to revive judgment number HC 568/17 through the back door which matter he failed to set down within the specified time frames and is now approaching this court on an urgent basis for a matter which could have been resolved timeously. The counsel for the second respondent must have been mistaken about the citation. I had occasion to read HC 568/17 and noted that this case refers to totally different parties, that is, Anywhere Kapfinya vs Minister of Home Affairs & 8 Others HC 568/17 and Applicant was never a party to those proceedings. She further submitted in her oral submissions that this matter is not urgent because there has been non-disclosure by the Applicant of cases HC 5560/14 and HC 4118/21. Her submission was that in HC 5560/14 the Applicant approached the court on withdrawal of offer letter and matter was removed from the roll by Justice Chitapi. She said the Applicant abandoned his case after being served with letter of withdrawal. The Applicant then filed HC 4118/21 and withdrew it. Hence the Applicant was as far as 2015 knew he was no longer in peaceful possession and that the land had been handed over to the first respondent through Ministry of Local Government. For her contention that matter is not urgent she referred the Court to the case of Kuvarega v Registrar General and Anor 1998 (1) ZLR 188. Again the court had occasion to read the two cases and its clear they had nothing to do with the withdrawal of the Applicant's offer letter but attempts by the second respondent to unlawfully and corruptly offer other people portions of land in Applicant's land.

The third respondent also submitted that the matter is not urgent. Its contention being that the Applicant avers that this matter is urgent based on the fact that there is potential of violence. According to the third respondent no plausible evidence has been presented to the court showing that any of the Respondents have violent tendencies. Based on the lack of evidence in that regard the 3rd Respondent prays for a dismissal of this application with costs.

Not to be out done the forth respondent also submitted that the application is not urgent by virtue of non-compliance with principles of an urgent chamber application. The forth respondent submitted that the Applicant has failed to capture the essential of an urgent chamber application as provided by law. It attacked the certificate of urgency deposed by one Cuthbert Chengeta. Its contention being that the certificate of urgency should have been deposed to by another legal practitioner. Hence the urgency is self-created and cannot be sustained at law.

The application before the court is one for spoliation. The Applicant in para35 of his founding affidavit stated the two requirements that must be established in order to succeed in an application of this nature. He followed by articulating the same requirements in his heads of argument, i.e. that he was in peaceful and undisturbed possession of lot 6 of Braemar Farm and that he was unlawfully deprived of such possession. He averred to the facts that the respondents' action has the potential of causing violence. In this case the event that jolted the Applicant into action is the event of 5 May 2022 when the first respondent dispatched his workers who started to dig trenches and building onto the Applicant's piece of land. This application was filed timeously on 10 May 2022. When the Applicant noted the activities of the first respondent he did not sit on his laurels. Firstly, he had to find out who sent the workers, and secondly, he engaged the first respondent. When he noted that the first respondent was not forthcoming he engaged his legal practitioners. There is a plethora of authorities to the effect that a legal practitioner in the same law firm can depose to an affidavit of urgency more so because he or she is better placed to assess the urgency of the matter as he or she knows the facts of the matter. As I indicated above the events in the cases referred to by the counsel for the second respondent have nothing to do with the cancellation of the Applicant's offer letter which is still extant. I am satisfied that the Applicant acted when the need to act arose as stated in the case of Kuvarega v Registrar General and Anor supra. The matter is therefore very urgent and the Applicant acted urgently. In any case spoliation applications are urgent by their very nature. Had the cases cited by the counsel for the second respondent been found to have any substance, then one might say the Applicant was aware of the cancellation of his offer letter as far back as 2015. None of the respondents have been able to produce proof of such cancellation. The counsels for the respondents were content

in saying they can bring the proof later. I therefore dismiss the points *in limine* raised by the respondents that the matter is not urgent.

RELIEF SOUGHT IS INCOMPETENT

This preliminary point had been raised by the second respondent. There is no need to labour on it because the second respondent indicated that it was abandoning it.

THERE IS NON-JOINDER

This point was taken by the third respondent wherein it said the Minister of Local Government, Public Works and National Housing through the powers that are vested him at law promulgated S.I. 211 of 2021. Through the promulgation of the said Statutory Instrument the Manyame-Chitungwiza joint committee was created which gave the said committee the authority to jointly manage Braemar, Longlands, Cawdor, Edinburg, Tantallon and Dunnotar, and given the that the dispute is in Braemar, the Applicant ought to have cited the body corporate that has the authority to oversee affairs of in the area and the body corporate whose rights are affected.

This point was dismissed by the Applicant who submitted that there was no need to join the Minister of Local Government, Public Works and National Housing.

While it may have been prudent to join the Minster in these proceedings, the Rules of this Honourable Court are quite clear that non-joinder is not fatal to the application as the court can resolve the dispute among the parties before it. It is in exceptional circumstances that the non-joinder of a party is material that the court may decide otherwise. In this case the non-joinder of the Minister is not material. The point *in limine* is dismissed.

Having dismissed the preliminary objections raised by the respondents I will proceed to deal with the merits of the application. The Applicant approached this court on an urgent basis claiming spoliation. The Applicant submitted that he was in peaceful and undisturbed possession of his farm land by virtue of an offer letter which is extant. On the other hand the respondents are alleging that the Applicant was not in peaceful and undisturbed possession of the piece of land by virtue of the fact that the Applicant's offer letter was withdrawn and that the 1st respondent is occupying Stand Number 7727 Manyame in terms of a lease which is not a farm but a planned

urban settlement which falls under the jurisdiction of the Manyame –Chitungwiza Joint Committee established in terms of Statutory Instrument 211 of 2021.

The Applicant filed detailed heads of argument which I found to be informative and persuasive. *In casu* the respondents seem to have invaded the Applicant's farm land without following due process thereby despoiling the Applicant of his Farm Land if one considers the heads of argument submitted by the Applicant as I will briefly demonstrate below.

If the Applicant's heads of argument are correct the second respondent could not have issued a lease agreement under Nyatsime Township because no such township exists. The President of the Republic of Zimbabwe never declared it to be so. This is just unbridled corruption. The law is as follows.

In terms of section 3 of the Urban Development Corporation Act [*Chapter 29.16*] (The Act) which provides as follows:

"DECLARATION OF DEVELOPMENT AREAS:

(1) Subject to subsection (2), after consultation with the Board, the Minister may by statutory instrument declare any area of rural or urban land within Zimbabwe to be development area.
(2) The Minister shall not make a declaration in terms of subsection (1) in respect of-(c) any area of land, other than communal land, held in trust by the President or a Minister except with the consent of the President or the Minister, as the case may be, in his capacity as trustee, or…."

In casu the land occupied by the Applicant is a commercial farm held by the Minister of Lands outside the jurisdiction of the Ministry of Local Government and the respondents. The Minister of Local Government has no mandate over the farms and it follows that the second respondent cannot issue a lease agreement to the first respondent whatsoever. The Minister of local Government has no power nor authority to establish or expand an urban settlement. In any event the duty of the Minister or Ministry is only to identify land and declare it as a development area. State land has its categories in terms of section 3 (2) (c) of the Act which is Land under the Minister of Local Government, Public Works and National Housing, Land under the President and Land under another Minister (Minister of Lands).

The Applicant was given farm land through an offer letter which is a commercial farm not an area under the jurisdiction of the second respondent. Thus the second and third respondents cannot come on the Applicant's land and impose conditions on that land including issuing leases without cause or consent of the owners. Therefore the second respondent has no legal basis to take the land from the Applicant except it be done by the President himself, respecting the Constitution of Zimbabwe. See Florence Sigudu v Minister of Lands and Rural Resettlement N.O. and Pheneas Chihota HH 11-2013, Lowveld Sugar Cane Growers Association v Minister of Lands and Rural Resettlement AC9/17 (Administrative Court) and Margaret Zinyemba v The Minister of Lands and Yakub Mohamed CCZ 2016-03. If the second and third respondents were to take commercial farms even if Statutory Instrument 211 of 2021 were to be interpreted as giving such power to them such action would constitute a usurpation of the power and authority of a sitting President which is criminal, if not treasonous.

Again in terms of s 4, 5 and 6 of the Urban Councils Act [*Chapter 29.15*] which deal with establishment, alteration, abolition of Municipalities, Towns, Councils and Council areas, it would seem the prerogative to decide what happens in the new areas rests with the President of the Republic. The problem is that by issuing a lease agreement second respondent has exercised the authority of the President without any legal basis. I say so because the President has not exercised the powers vested in him by the Urban Councils Act to allow the first and second respondents to act as they did as no proclamation in the Gazette has been made in the area occupied by the Applicant. Thus, the activities of the first, second and third respondents in the Applicant's farm are illegal and criminal. In terms of sections 71, 72 and 68 of the Constitution every person has the right in any part of Zimbabwe to acquire, hold, occupy, use, transfer, hypothecate, lease, or dispose of all forms of property, have right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and substantially and procedurally fair. By taking the portion of the Applicant's farm the actions of the first and second respondents have been arbitrary without any attempt or pretence to implement the due process of the law. Hence the unauthorized and illegal conduct of the first, second and third respondents is *contra boni mores* and contrary to public policy and cannot be condoned by the court because the Applicant's offer letter is extant. It is very clear from the procedural processes

above that the issuance of a lease agreement by the second respondent to the first respondent is a nullity. I say so because there is no where were the farm was declared to be for urban development or where the President withdrew the offer letter.

In my view S.I. 211 OF 2021 is only about cooperation between the municipality and rural district council that does not mean the joint committee is to swallow the role of the former.

In an application for spoliation only two requirements must be satisfied, namely, the applicant was in peaceful and undisturbed possession of the thing and he/she was unlawfully deprived of such possession. Having said this the respondents actions have no legal basis and the Applicant was despoiled as he did not know what the second respondent and first respondent conspired to do. The application for spoliation ought to be granted in terms of the draft order above.

IT IS ORDERED THAT

1. The first Respondent and those claiming occupation through him are hereby ordered to vacate subdivision 6 of Braemar Farm belonging to the applicant and give full possession of the same to the applicant within 48 hours of being served with this order failure which the Sheriff of the High Court of Zimbabwe is hereby authorized to assist in effecting their removal.
2. The first respondent is hereby ordered to remove any structure(s) he might have built on the farm and refill any trenches made with soil failure which the applicant is authorized to do the same.
3. The first respondent is hereby ordered to pay costs of suit on a client legal practitioner scale.

Mufunda and partners law firm, applicant's legal practitioners
Tabana & Marwa, 1st respondent's legal practitioners
Global Investments/Commercial/Labour Attorneys, 2nd respondent's legal practitioners
Coghlan, Welsh & Guest, 3rd respondent's legal practitioners
Civil Division of the Attorney General's Office, 4th respondent's legal practitioners