

MAXWELL MUNONDO
and
STANLEY CHAGAKA
and
ROLAND REMUNYANGA
and
MAKOBO MACHEKA
and
KNIFE MUYAMBO
and
PARDON MATARE
versus

NEW CENTURY PRODUCTIONS (Pvt) Ltd
and
MANYAME RURAL DISTRICT COUNCIL
and
MINISTER OF LANDS, AGRICULTURE, FISHERIES WATER, CLIMATE & RURAL
DEVELOPMENT

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE, 24 November 2023 & 19 January 2024

Urgent Chamber Application

Mr *J Gwapedza*, for applicants
Mr *Z Chidyausiku*, for 1st respondent
Ms *S Mbauya*, for 2nd respondent
No appearance for 3rd respondent

MUCHAWA J: This is an urgent chamber application in which the following order is sought:

“ IT IS HEREBY ORDERED THAT:

1. The first respondent his agents proxies and assignees be and are hereby ordered to restore forthwith to the applicants possession of Garth farm.
2. The first respondent, his agents and assignees be and are hereby ordered to forthwith vacate Garth farm upon being served with this court order.
3. Costs of suit shall be borne by such party or parties who oppose thus application jointly and severally the one paying the others being absolved.”

The background to this matter is that on 25 October 2023, heavy vehicle machines invaded Garth Farm which is currently occupied by the applicants. Their mandate was to clear an area

to clear an area to pave way for roads. Those operating the machines explained that they were clearing link roads for Chiedza Park a residential development owned or being developed by first respondent.

It is the applicant's contention that the intended link road is going to pass through their fields, pastures and residences. The link roads so far cleared are said to have already destroyed such fields and pastures and some will pass through homesteads.

In an effort to resist the developments the applicants say that they placed twitches on the cleared roads and protested by sitting in front of the machines. This resulted in the arrest of some of the applicants on 2 October 2013 over assault as defined under s 89 of the Criminal Law (Codification and Reform) Act [*Chapter 9 :23*]. On 27 October the arrested applicants were granted free bail.

According to the applicants the first respondent has no legal authority to invade Garth Farm as it has done and they believe this is resorting to self-help for financial profiteering. They allege that they are aware that Boronia Farm on which Chiedza Park is being developed already has a link road which passes through Garth farm and there is no need for these current developments and invasion. Attempts to have sight of the alleged approved plans for such link roads are alleged to have been unsuccessful as both first and second respondents were uncooperative.

The applicants further allege that they have been in peaceful and undisturbed possession of Garth Farm since around 2003 to 2004 a time of the land resettlement farm invasions. Some of the applicants are said to have been farm workers at the farm whilst others invaded at the stated time. The applicants state that they made applications for regularization of their stay through the third respondent and this is pending.

In short, they want to have possession restored over Garth Farm on the basis of wrongful and forceful deprivation. The first respondent is opposed to the granting of the spoliation order. Points *in limine* were raised I heard the parties on these and reserved my ruling. This is it and I deal with each point, in turn below.

WHETHER THE SECOND, THIRD, FOURTH FIFTH AND SIXTH APPLICANTS ARE PROPERLY BEFORE THE COURT

Mr Chidyausiku submitted that the affidavits by the second to sixth applicants merely confirm the first applicant's averments and do not set out how each of them has been despoiled. One is left guessing whether they occupy the same portion of land or different homesteads and whether each of them has had their homestead demolished. It was argued

that without setting out their own facts they have not set out a cause of action. Relying on the learned authors Herbstein and Van Winsen, 5th edition at p 439, it was contended that the deponents have not set out the grounds upon which they seek relief and their claims cannot be sustained.

It was prayed that their claims be dismissed.

Mr Gwapedza conceded that there is no cause of action set out for the second, fourth and sixth applicants. He however argued that the first, third and fifth applicants are properly before the court as the first applicant's founding affidavit states that the fifth applicant's field was destroyed as they are related and share the same field.

Mr Chidyausiku insisted that there is no cause of action laid out in the third and fifth applicants supporting affidavits and first applicant's affidavit is at best hearsay. All the third applicant and fifth applicant's supporting affidavits say is that they have read the first applicant's founding affidavit and confirm same as true and correct. They then associate themselves wholly with the said contents and incorporate them as deposed by them.

The first applicant explains that the link road intends to pass through his homestead and he will be rendered homeless. He even attaches pictures. He does not say that he shares his homestead with third and fifth respondents. It is only counsel who tried to lead evidence from the bar and said they are related and share a field. It is my finding that no cause of action has been laid out by the second, third, fourth, fifth and sixth respondents. I have no choice but to dismiss their claims. This leaves only the first applicant as a party.

WHETHER THE FORM USED BY THE APPLICANTS IS FATALLY DEFECTIVE

Mr Chidyausiku submitted the point *in limine* that the applicants had used a wrong form which is non-compliant with the rules as it does not advise the respondents that they have a right to file a notice of opposition and the *dies induciae* within which such opposition may be filed nor does it provide where the notice of opposition may be filed, and the consequences of not filing. The absence of such procedural rights are alleged to render the application fatally defective.

Mr Gwapedza conceded that they had indeed used the wrong form and quickly sought condonation in terms of R 7(A) of the High Court Rules 2021 which allows for condonation in the interests of justice. It was contended that the court has a discretion to condone.

The mistake was said to have arisen as a result of the challenges encountered in initially attempting to file an application with eighty six applicants which was rejected by the

system. It was alleged that it was the downsizing which led to the omission in the form of the application.

Mr Gwapedza also pointed out that no prejudice had been suffered by the respondents as they had been able to file their notices of opposition. The matter was said to be of importance to the parties, especially the first and second respondents.

Mr Chidyausiku countered that the applicant has not disclosed in detail the reasons for non-compliance not has this been confirmed by counsel who prepared the application. What was submitted by Mr Gwapedza was said to be possible hearsay or evidence led from the bar.

On the lack of prejudice, Mr Chidyausiku pointed out that we can never know whether the third respondent's failure to file a notice of opposition was as a result of the lack of procedural rights.

It was prayed that the application for condonation is incomplete and should be dismissed. I quizzed the parties as to whether the court can condone a fatal defect. Mr Chidyausiku relied on the *Macfoy v United Africa Company Ltd* [1961] 3 ALLER 1169 to argue that you cannot put something on nothing and expect it to stand. It will fall.

On the other hand, Mr Gwapedza pointed the court to r60 (1) and argued that the form can have appropriate amendments. He argued that there had been substantial compliance with the prescribed form. Relying on the case of *Marick Trading Pvt Ltd v Old Mutual Life Assurance Co. OF Zimbabwe (Pvt) Ltd*.

HH 667/15 he stated that urgent chamber applications have hybrid form. Furthermore, Mr Gwapedza submitted that this is not a fatal defect as it does not go to the cause of action as they set thus out in summary form. This was said to be unlike the *Veritas v ZEC & 2 Ors* case SC 103/20 where the cause of action and procedural rights were missing. I was also referred to the case of *Dabengwa & Anor v ZEC & 3 Ors* SC 32/16

Rule 60 (1) provides that a chamber application shall be accompanied by form No 25 duly completed provided that where such chamber application is to be served on an interested party it shall be in Form No 23 with appropriate modifications.

The rule is peremptory in stating the need to use Form No 23 where the application is to be served on another party. In *Veritas v ZEC & 2 Ors* supra the rationale for the different forms was laid out.

“A notice in an application serves many purposes. The notice informs the respondent of the steps he is required to take if he intends to oppose the application. It also places upon a respondent the onus to file and serve his or her papers within a given period and most importantly gives the address for service of the applicant. The court and the registrar are also

informed by the notice of the requirements placed upon the respondent to such suit. This, is why the rule is peremptory.”

See also *Zimbabwe Open University v Madzombwe* 2009 (1) ZLR 101 (H).

I do accept that in the *Veritas v ZEC & 2 Ors Supra* case the matter was a court application as opposed to a chamber application and the form did not contain the plethora of procedural rights the respondent should be alerted to. Additionally there was no summary of the grounds of the application as required in Form 29 B. *In casu* a summary of the grounds of the application is available.

I do take note that the first and second respondents did file notices of opposition. There is no prejudice therefore. I take the approach taken in *Moyo v Sibanda & 4 Ors* HB 81/17 where it was held as follows;

“ In my view, despite the wrong format, the substance of the application has not been affected in any way , the application was served on 2nd respondent who filed her opposing papers.”

In *Rabeka v Stockil & Ors* HB 1/15 it was held that the irregularity complained of did not go to the root of the substance and form of the application. I proceed to condone the applicant’s failure to use Form No 23.

WHETHER THE APPLICANT HAS APPROACHED THE COURT WITH DIRTY HANDS

Mr Chidyausiku relied on the cases of *Commercial Farmers Union & Ors v Minister Lands & Rural Resettlement & Ors* SC 31/10 and *Mtewa & 2 Ors v Dzakakuyambe & 4 Ors* HH 310/16 to argue that the applicant had approached the court with dirty hands as they are acting in open defiance of the law.

CHIDYAUSIKU CJ in *Commercial Farmers Union Supra* had this to say

“It was submitted that the orders were issued in spoliation proceedings. Spoliation proceedings cannot confer jurisdiction where none exists. A court of law has no jurisdiction to authorize the commission of a criminal offence. In any event spoliation is a common law remedy which cannot override the will of Parliament. A common law remedy cannot render nugatory an Act of Parliament.

Apart from this, there is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State for Information & Publicity and Ors* 2005(1) ZLR 222 (s) . Indeed if the point had been raised as a preliminary point the probabilities area that this application would have been dismissed on that point alone.”

The provisions of s 3 (1) of the *Gazetted Lands (Consequential Provisions) Act* [Chapter 20:28] criminalise the occupation of land without lawful authority. Lawful authority

is defined to mean an offer letter or a permit or a land resettlement lease. In this, the applicant in his averments does not have any of these. He clearly says he invaded the land and is still awaiting regularization from 2004 or 2005. He has failed to prove any lawful authority. Mr Gwapedza's submissions relying on these being spoliation proceedings show that he had no occasion to peruse the *Commercial Farmers Union supra* judgment which as quoted above, distinctly notes that even in spoliation proceedings the common law cannot override statute law.

This court cannot be invited to protect someone who is in open defiance of the law. As this was raised as a preliminary point, the applicant is non suited as he has dirty hands. The application for a spoliation order is consequently dismissed with costs.

Disposition

1. The application for an urgent spoliation order be and is hereby dismissed with costs.

Chitsa and Masvaya Law Chambers, applicant's legal practitioners
Madziwa Chidyausika Museta, first respondent's legal practitioners
Coghlan Welsen & Guest, second respondent's legal practitioners