

TILTRAC INVESTMENTS (PVT) LTD
versus
MAHSEER INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 28 November & 11 December 2023

Urgent Chamber Application

J Marange and T Tagwirei, for the applicant
T Mubhemi and S Mukwekwezeki, for the respondent

MANYANGADZE J: INTRODUCTION

This is an urgent chamber application for a spoliation order. The applicant seeks restoration of what it claims has been its peaceful and undisturbed occupation and use of a certain piece of land, being 40 hectares of Buckland Estate, which is a subdivision of 280 hectares of Buckland Estate, situated in the District of Goromonzi.

BACKGROUND FACTS

The facts giving rise to this application can be gleaned from the papers filed of record and are as follows:

The applicant and the respondent are both companies which are duly registered under the laws of Zimbabwe. The applicant avers that it took occupation of 40 hectares as a subdivision of 280 hectares of Buckland Estate. It is the applicant's contention that it has been enjoying peaceful occupation of the said 40 hectares since 2002. The problem then arose sometime in August 2023 when a convoy of vehicles with the respondent's agents and some Chinese persons approached the applicant's farm manager and workers, accompanied by a police officer, and advised applicant's workers to vacate the piece of land citing that the land was owned by the respondent. The applicant went on to write a letter dated 1 September 2023 notifying the respondent that it was the owner of a 40-hectare portion of Buckland Estate.

Regardless of the notification, on or about 8 September 2023, the respondent proceeded by way of erecting and building a perimeter durawall on the land, which durawall encompassed

a portion of the land occupied by the applicant. It is the applicant's case that the durawall erected was also accompanied by various and unending threats to the applicant's employees to vacate the said property, failing which they would face undesirable action. Further, the applicant asserts that ever since 2011 it has always been in full and undisturbed occupation of its 40-hectare portion. The respondent, through its agents, has occupied neighbouring portions of Buckland Estate, excluding the applicant's 40-hectare portion. It is said that on the 13th of September 2023, the respondent proceeded to come and place its bricks on the applicant's land which was followed by the events of the 14th and 15th of September 2023.

PRELIMINARY POINTS

The respondent has opposed the application and raised 5 points *in limine*. These are that:

1. There are material disputes of fact.
2. The applicant has approached the court with dirty hands.
3. The non-joinder of the Ministry of Lands, Agriculture, Water and Fisheries constitutes a fatal defect.
4. There is impossibility of restoration.
5. The matter is not urgent

Having gone through the submissions by the parties, both written and oral, I am of the considered view that save for the last preliminary point, all the points raised touch on the merits of the application. They have therefore been improperly raised as points *in limine*. I shall proceed to show, in respect of each point, why I hold such a view.

1. Material disputes of fact

In the case of *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) the court held that a material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence. MANGOTA J in the case of *Tanganda Tea Company Limited v Darlington Matsitukwa* HH 365-23 had this to say:

“The net effect of the views of the learned authors as read with the case authority of *Supa Plant* (supra) is that the dispute of fact which exercises the mind of the court at any given point in time that it is hearing a matter must be a real, and not an imaginary or illusory, dispute. It is for the mentioned reason, if for no other, that the court discourages judicial officers who have reason to entertain the view that the matter which is before them contains material disputes of fact from taking an over-fastidious approach but a robust and common-sense one subject to the conviction on their part that there is no real possibility of any resolution doing an injustice to the other party.”

MALABA CJ in the case of *Riozim (Pvt) Ltd v Falcon Resources (Pvt) Ltd and Anor* SC28-22 at p 7 of the cyclostyled judgment stated as follows;

“The mere allegation of a possible dispute of fact is not conclusive of its existence. From decided cases, it is evident that a dispute of fact arises where the court is left in a state of reasonable doubt as to which course to take in resolving the dispute matter without further evidence being led.”

Although the applicant raised several issues which touch on the ownership of the land in question, the court should be restricted to the relief sought and the nature of the application before it. By its very nature, a spoliation order touches on the question of possession and not ownership. What the applicant seeks is a restoration of the *status quo ante* pending a determination of the main dispute of ownership. The respondent is conceding that the applicant has been occupying the said portion of land but challenges the legality of such occupation. In my view, there is no material dispute which cannot be resolved on the papers in this instance, especially if one considers the nature of the relief sought. This preliminary point clearly encroaches on the merits of the main application. The main matter is disposed of on a resolution of the issue whether or not the applicant was in possession of the property in question and was unlawfully dispossessed of the same.

2. Dirty hands

In the case of *Bongani Mhlanga v Busisiwe Mhlanga* HB 132/22 the court held that:

“The jurisprudence in this jurisdiction is that people are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called, in time-honored legal parlance, the need to have clean hands. It is a basic principle that litigants should come to court without dirty hands. If a litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions.”

The same position was stated in the following cases;

Nhapata v Maswi & Another SC 38-16, *Econet Wireless (Private) Limited v The Minister of Public Service Labour and Social Welfare and Others* SC 31-2016.

In this regard, it is important to note that a court of law cannot connive with or condone the open defiance of the law. In the case of *Bongani Mhlanga, supra*, the court went on to state that a court cannot come to the rescue of a litigant whose hands are dripping dirt. One cannot defy the court, undermine the orders of the court and when it suits him still approach the same court for assistance and relief. In *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of*

State for Information and Publicity & Ors SC 20/2003 the court held that a court would withhold its jurisdiction against an errant litigant who is in defiance of a court order.

Turning to the facts of the instant case, the respondent contends that the applicant has approached the court with dirty hands since its claim is based on an illegality. Its basis is on the ownership of the land in question. It alleges that the applicant has already been in unlawful occupation of the said land. I have already indicated that the question of ownership cannot be resolved in this application. If this preliminary point finds favour with the court, this would be tantamount to a determination of rights in ownership of the disputed land. This is not the essence of spoliatory relief.

3. **Non-joinder**

The Supreme Court in *Wakatama & Ors v Madamombe* SC 10/2012 made reference to Rule 87 of the then High Court Rules, 1971 in stating that;

“The question whether the non-joinder of the Minister is fatal need not detain this Court and can easily be disposed by reference to r87 of the Rules of the High Court which provides:

- (1) No cause of action shall be defeated by reason of the misjoinder or non-joinder of any and the court may in any cause or matter determine issues or question in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter
- (2) At any stage of the proceedings in any case or matter the court may on such terms as it thinks just and either of its motion or application –
 - (a)
 - (b) order any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon to be added as a party: but no person...

The above provision is clear and allows for no ambiguity. The non-citation of the Minister is not, in the circumstances, fatal.”

It is however important to note that each case can be decided basing on its own merits. A different conclusion was reached in the case of *Chimutanda v Buwu and Another* HH 122/23 in which KATIYO J was of the view that the non-joinder of a party involving the freedom of another rendered the application fatally defective. In the present case, there is no question as to the freedom of another person and the conclusion reached in the case of *Wakatama & Ors v Madamombe, supra*, is the one applicable. It therefore follows that the non-joinder of the Ministry of Lands, Agriculture, Water, Fisheries should not be taken as rendering the application before the court defective.

In the instant case, it is significant to note that the Ministry of Lands, Agriculture, Water, Fisheries’ main role, as stated by the respondent, would be to confirm issues to do with

ownership of the said portion of Buckland Estate. What has been stated under the above preliminary points regarding ownership *vis a vis* possession equally applies under this point.

4. **Impossibility of restoration**

The respondent avers that the order sought by the applicant cannot be effected due to impossibility of restoration. This emanates from the fact that the applicant did not show any mark or provide the exact extent of the said 40-hectare portion of the 280 hectares of Buckland Estate.

In the substantive application, the court is going to determine whether or not the applicant has been despoiled. That issue obviously will be determined after it is established that the applicant was in peaceful occupation of the land in respect of which it would have been despoiled.

Under this preliminary point, the respondent is in essence alleging that the applicant has failed to establish what land it has been in occupation of, for which it has been despoiled. Put differently, the applicant has failed to jump the first hurdle in its quest for spoliatory relief. To delve into such an inquiry would be to prematurely traverse the merits of this matter. Again, like the preceding points *in limine*, the respondent is dragging the court into the merits of the main matter.

5 **Urgency**

This is the only point, as already mentioned, that properly fits the description of a preliminary point, unlike the rest of the points looked at. What, however, needs to be determined is whether the point has merit in this matter.

In the case of *Econet Wireless (Pvt) Ltd v Trustco Mobile (Proprietary) Ltd & Anor* 2013 (2) ZLR 309 (S) at 320D-E it was stated that,

“It is clear that in terms of Rule 244 and 246 of the High Court Rules the decision whether to hear an application on the basis of urgency is that of a judge. The decision is one therefore that involves the exercise of a discretion.”

In *Rephio Chirumbwa and 8 Ors v Bethlehem Apostolic Church and Another SC* 9/2020 it was also held that, in order to satisfactorily challenge the decision to hear an Application as urgent, the appellants must show that the court *a quo* did not properly exercise its discretion.

In light of the foregoing, the court has the discretion to determine whether a matter placed before it is urgent or not. However, this discretion must be exercised judiciously, taking into account the applicable principles. The leading cases on these principles are those of

Kuvarega v Registrar General & Another 1998 (1) ZLR 188, *Document Support Centre Ltd v Mapuvire* 2006 (2) ZLR 240 and *Bonface Denenga & Another v Ecobank Zimbabwe (Pvt) Ltd & 2 Others* HH 177/14. In *Kuvarega v Registrar General, supra*, CHATIKOBO J stated, at p 193 F-G:

“What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay.”

In casu, the respondent avers that the applicant failed to show the actual period when the need to act arose. It is referring to too many dates spanning the period August to September 2023. In response, the applicant makes reference to paragraph 2(e) of the certificate of urgency and paragraphs 12 to 16 of its founding affidavit. It avers that the acts of spoliation complained of occurred between the period 8 to 14 September 2023. This the period the respondent started constructing a durawall and offloading bricks, indicating that further construction was about to commence. This is allegedly taking place at the applicant’s portion of the Buckland Estate. They were also allegedly threatening the applicant’s employees with unspecified action if they did not leave the land in question.

It has been held that spoliation is an inherently urgent remedy. In *Exmin Syndicate v Luke Dube & Ors* HB 102/22, MAKONESE J stated, at p11 of the cyclostyled judgment;

“Spoliation proceedings are by their very nature urgent. An order for a *mandamante van spolie* seeks the restoration of property that has been despoiled and the restoration of the *status quo ante*.”

The facts alleged in the instant matter do not take it out of the inherently urgent category. There are allegations of occupation of land and encroachment thereon without a court order. These are the elements that constitute spoliation, calling for urgent redress. Whether the applicant succeeds in the substantive application is another matter. For the purpose of determining the preliminary point whether the application is urgent, it has placed reasonably sufficient material before the court to enable it to decide the point. It is the court’s considered view, in the circumstances, that the preliminary point that the matter is not urgent lacks merit and cannot be upheld.

DISPOSITION

For the reasons indicated, none of the respondent’s points *in limine* is upheld.

In the result, **it is ordered that;**

1. The points *in limine* raised by the respondent be and are hereby dismissed.
2. The application proceeds to a hearing on the merits.
3. Costs shall be in the cause.

Mberi Tagwirei and Associates, applicant's legal practitioners
Chimwamurombe Legal Practice, respondent's legal practitioners