

REPORTABLE (102)

MAKANDI ESTATE (PRIVATE) LIMITED

v

(1) TEMBA SITHOLE (2) TAKASIKWA SEVERE (3) JAMES FUMBO (4) ZANU PF PARTY PROJECTS (5) THE MINISTER OF LANDS, AGRICULTURE, WATER FISHERIES AND RURAL DEVELOPMENT (6) THE MINISTER OF STATE AND DEVOLUTION FOR MANICALAND (7) THE PROVINCIAL LANDS OFFICER MANICALAND (8) THE DISTRICT LANDS OFFICER CHIPINGE (9) THE OFFICER IN CHARGE OF THE ZIMBABWE REPUBLIC POLICE (10) THE OFFICER COMMANDING ZIMBABWE REPUBLIC POLICE (11) THE SHERIFF OF THE HIGH COURT

SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & CHATUKUTA JA
HARARE: 28 OCTOBER 2022 & 6 OCTOBER 2023

E. Mubaiwa, for the appellant

P. Garwe, for the fifth to tenth respondents

BHUNU JA: This is an appeal against the whole judgment of the High Court of Zimbabwe (the court *a quo*) handed down at Mutare on 9 May 2022 declining jurisdiction to hear and determine an application for a declaratory order of spoliation sought by the appellant.

THE PARTIES

1. The appellant is a company and former occupier of the Remaining Extent of Christina located in the district of Chipinge (the farm) whereas the fourth respondent is a political entity and beneficiary of the land reform program. It is the holder of an offer letter authorizing it to occupy the disputed farm. The first to third respondents are its

functionaries acting for and on its behalf. The fifth respondent is the Minister of Lands, Agriculture, Water, Fisheries and Rural Development responsible for allocating and distributing acquired land to beneficiaries of the Land Reform Program. His duties include issuing offer letters to deserving beneficiaries of the program. The remaining respondents are State functionaries aiding the State in the discharge of its governance function.

FACTUAL BACKGROUND

2. The dispute among the parties has to do with the occupation of a farm commonly known as the Remaining Extent of Christina located in the district of Chipinge.
3. It is common cause that the farm was compulsorily acquired long back and it became State property by operation of law. It is clear that despite the acquisition of the farm by the State, the appellant continued to occupy it without lawful authority in the form of a permit, offer letter or a lease in violation of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*].
4. On 3 December 2021 the first to third respondents pitched up at the farm armed with the offer letter issued to the fourth respondent in a bid to take occupation of 100 hectares of the land in terms of the offer letter.
5. The appellant took exception to the conduct of first to third respondents on the grounds that their conduct was unlawful as they did not have a court order authorizing them to occupy the farm. It therefore approached the court *a quo* seeking spoliation relief. In the interim it sought an urgent provisional order against the first to fourth respondents. The provisional order was granted on 16 December 2021 by consent in the following terms:

Interim order by consent of applicant and 5th to 10th respondents

“Pending the finalization of this matter, the applicant is granted the following relief:

1. The application is granted.
2. First to fourth respondents and all those claiming occupation through them be and are hereby directed to forthwith restore appellant to full exclusive peaceful and undisturbed possession of the Remaining Extent of Christina situate in Chipinge and to assets, plants, improvements, machinery, implements, utilities and amenities in the farm so as to restore the *status quo ante* prevailing thereon as at December 2021.
3. The Sheriff and tenth and eleventh respondents, collaboratively and jointly and severally, and with the full absolute and unconditional cooperation, assistance and involvement of each other, are directed to cause the immediate vacation of the first to fourth respondents and all those occupying through them from the Remaining Extent of Christina situate in Chipinge and simultaneously facilitate, ensure, cause or procure the release and surrender by them to the applicant of assets, plants, improvements, machinery, implements and utilities on the farm so as to restore the *status quo ante* prevailing thereon as at 2 December 2021.
4. First to fourth respondents and all those claiming occupation through them are ordered to not step foot within 2 000 meters of the precincts of or in any (way) disturb, disrupt, interfere with any of the activities on the farm of appellant in the Remaining Extent of Christina situate in Chipinge.
5. Fourth respondent and all those claiming through them shall not implement or act on the offer letter dated 19 May 2021 except in terms of a court order as executed upon by the eleventh respondent.”

SERVICE OF PROVISIONAL ORDER

6. The Sheriff is directed to serve this interim order on the respondent.

The final order sought was crafted in the following terms:

“TERMS OF THE FINAL ORDER SOUGHT

1. The offer letter dated 19 May 2021 issued in favour of fourth respondent in respect of 100 hectares of the Remaining Extent of Christina situate in Chipinge be and is hereby declared invalid and set aside
 2. It is ordered that fifth respondent shall not alienate to a third party any right of use and occupation of the Remaining Extent of Christina situate in Chipinge or of any part or portion thereof unless he had first given appellant adequate notice at least 21 working days of his intention to do so providing full facts and reasons for wanting to do so and according appellant the right to make representations before such decision is made.
 3. First to fourth respondents shall pay costs of suit on the legal practitioner and client scale.”
7. As is plain from the so called provisional order, it is a provisional order in name only as it does not contain a return date. Having obtained such an order the appellant parked it without bothering to apply for confirmation or a final order. This prompted the first to fourth respondents to set down the matter seeking a discharge of the purported provisional order.
8. At that hearing the appellant sought nullification of the fourth respondent’s offer letter on the basis that the fourth respondent does not exist as a legal persona. It further contended that the offer letter was invalid because it was issued in breach of the Administrative Justice Act [*Chapter 10:28*]. In developing its case, the appellant argued

that it had an agreement with the government to stop all proceedings relating to the acquired farm pending finalization of the dispute through international arbitration. Riding on that argument it contended that it should be allowed to continue using the disputed piece of land until it has been fully compensated. The appellant thus adopted the stance that no compensation no vacation of the disputed farm.

9. The first to fourth respondents opposed the confirmation of the purported provisional order raising preliminary objections *in limine* contending that there were material disputes of facts particularly relating to the size of the land they occupied. They further argued that there were fatal procedural irregularities. It was their argument that the appellant had adopted a wrong recourse by resorting to an urgent application for a spoliation order instead of applying for a review of the fifth respondent's conduct in allocating the disputed land to the fourth respondent. They further attacked the final order sought on the basis that the appellant could not seek nullification of fourth respondent's offer letter when the application before the court was for spoliation relief.

DETERMINATION OF THE COURT A QUO

10. Having heard the parties on the above preliminary points only and without hearing them on the merits, the court *a quo* riding on the dicta in *Commercial Farmers Union & 9 Ors v Minister of Lands & Rural Resettlement & 6 Ors* 2010 (2) ZLR P 576 (S) found that the appellant was in unlawful occupation of the farm. Consequently, it dismissed the appellant's prayer for the nullification of the 4th respondent's offer letter and discharged the consent order of 16 December 2021 with each party bearing its own costs. On that score the learned judge *a quo* proceeded to issue the following order:

“Consequently, the following order is granted.

1. Applicant is in unlawful occupation of the Remaining Extent of Christina situate in Chipinge.
2. The applicant's prayer to declare the offer letter issued in favour of fourth Respondent in respect of the Remaining Extent of Christina is dismissed.
3. The interim order granted by this court on the 16 December 2021 is discharged."

11. The appellant took umbrage with the judgment of the court *a quo* and appealed to this Court on the following 5 grounds of appeal:

- “1. The court *a quo* grossly misdirected itself in irregularly issuing a declaratur that appellant is in unlawful occupation, which relief had not been sought and could not at any rate have been sought absent a counterapplication or via the notice of opposition.
2. The court *a quo* grossly misdirected itself in irregularly discharging an executed spoliation order, itself a final order, and further erred in effectively rescinding an order granted in default of fourth respondent absent an application for rescission thereof. (*sic*)
4. The court *a quo* grossly misdirected itself in concluding that appellant was in unlawful occupation contrary to a formal admission made of record to the extent that fifth respondent against whom the allegation of the existence of lawful authority was made did not file opposing papers and *ipso facto* admitted the allegation.
5. The court *a quo* erred in coming to the conclusion that a declaratory order could be sought before the Administrative Court; and, having made such conclusion, further erred in then assuming and exercising jurisdiction over the matter by dismissing it and discharging the spoliation order instead of declining jurisdiction.

6. Having heard argument on points *in limine* only, the court *a quo* erred in making observations and findings bearing on the merits of the matter and so further erred in making such observations and findings without hearing the parties.”

RELIEF SOUGHT

12. On the basis of the above grounds of appeal the appellant sought the following relief:

- “(i) The appeal is upheld with costs
- (ii) The judgment of the court *a quo* is hereby set aside and in its place is substituted the following:
“The points in limine are dismissed with costs.”
- (iii) The matter is remitted to the High Court for hearing and determination on the merits before a different judge.”

DETERMINATION OF THE MATTER

13. It is plain and a matter of common cause that the only issue that was before the court *a quo* was the question of spoliation. None of the parties sought a declaratory regarding the legality or otherwise of the appellant’s occupation of the disputed farm. It is also clear from the record of proceedings that the proceedings did not go beyond the preliminary issues raised by the first to fourth respondents and that none of the parties addressed the court *a quo* on the merits.
14. On the basis of the above observations of material facts, the appeal falls to be determined on ground of appeal number 5 which is dispositive of the appeal. It appears that the learned judge *a quo* got carried away and excited by the lucid and sound judgment in the *Commercial Farmers* case (*supra*). It thus escaped him that he was only dealing with the preliminary points and not the merits of the case. Even on the merits it escaped him that in this matter he was only called upon to determine the question of spoliation. Whether

or not the appellant was in unlawful occupation of the farm was beyond his jurisdiction as none of the parties had placed that issue before him. To make matters worse the determination on the merits was premature as none of the parties had made any submissions on the merits.

15. At the point in time he pronounced judgment on the merits he was required to make a ruling on the preliminary points argued before him, this he did not do. He strayed into the wilderness of irregularity instead and determined issues which had nothing to do with the matter placed before him. The pertinent issue as to whether or not the first to fourth respondents could exercise self-help and dispossess the appellant of the disputed land without a court order was left undecided.
16. Undoubtedly the learned judge *a quo* fell into irretrievable procedural irregularity such that the proceedings cannot stand. In *Nzara & Ors v Kashumba & Ors* 2018 (1) ZLR 194 (S), this Court reiterated the need for a court to adhere to issues placed before it and not to go on a frolic of its own on issues not motivated by the parties. The court aptly stated that:

“The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence, and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court.”

The learned judge *a quo* erred in that regard, in not determining the issues placed before him and going on a frolic of his own

DISPOSITION

17. The court *a quo* having committed a fatal procedural error, the irregular proceedings cannot stand. They can only be set aside and the matter remitted to the court *a quo* for a proper hearing *de novo*. As the presiding judge *a quo*'s vision is already clouded with the

premature pronouncements he made on the merits, he is now non-suited to preside over the matter again. The rules of justice and fairness require that the matter be placed before a different judge.

18. As the fault in this case lay with the learned presiding judge the parties had no control, no party should be burdened with costs. Suffice it to say each party should bear its own costs.

19. It is accordingly ordered that:

1. The appeal is upheld with each party bearing its own costs
2. The judgment of the court *a quo* is hereby quashed and set aside in its entirety.
3. The matter is remitted to the High Court for hearing and determination *de novo* before a different judge.

CHIWESHE : I agree

CHATUKUTA : I agree

Wintertons Legal Practitioners, the appellant's legal practitioners

Civil Division of the Attorney General's Office, 5th to 11th respondents' legal practitioners