

TAKESURE MBANO
versus
AFARAS MTAUSI GWARADZIMBA
and
B.A.M.P.H (PVT) LTD
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 17 October 2018 & 30 May 2019

Court Application

T.T.G Musarurwa, for the applicant
T Magwalimba, for the 1st and 2nd respondents

MANZUNZU J: This judgment relates to two applications which were consolidated on 28 July 2017 by my sister CHATUKUTA J when she ordered that:

- “1. Application be and is hereby granted.
2. Matters HC 8473/16 and HC 9009/16 are hereby consolidated.
3. The Registrar of the High Court be and is hereby directed to do all is necessary to ensure the aforementioned matters are set down for hearing on the same date.
4. There is no order as to costs.”

In case number HC 8473/16 the parties are, Takesure Mbanu as the applicant versus Afaras Mtausi Gwaradzimba, BAMPH (Pvt) Ltd and Minister of Lands and Rural Resettlement.

In that case the applicant seeks an order in the following terms:

“IT IS HEREBY DECLARED THAT

1. The applicant being holder of valid offer letter from Minister of Lands and Rural Resettlement for use of state land known as the remaining extent of

subdivision A of Faraway of Mayfair, situate in the district of Salisbury measuring 24.9418 hectares hereby is entitled to peaceful and undisturbed possession and occupation of the property.

2. The First and Second respondent be and is hereby ordered to honour terms of third respondent's authority to administer state land , by not seeking to unilaterally alter any terms or conditions thereof, and by desisting from hindering the applicant from lawful possession and occupation of the property using under case number HC 2540/13.
3. First and Second Respondent be and is hereby ordered to pay costs of suit.”

In case number HC 9009/16 the parties are BAMPH (Pvt) Ltd as the applicant versus Takesure Mbanu and the Minister of Lands & Rural Resettlement. In this case the applicant seeks an order in the following terms;

“IT IS ORDERED THAT:

1. The purported acquisition of a certain piece of land known as the Remaining Extent of Subdivision A of Faraway of Mayfair, situate in the District of Salisbury, measuring 24.9418 hectares (hereinafter referred to as the property) be and is hereby declared invalid.
2. The offer letter by the 2nd respondent in favour of the 1st respondent dated 5 November 2015 be and is hereby cancelled.
3. Cost of suit.”

Background

This is a dispute arising from the land reform programme. This has caused the parties to be regular customers of the courts. The dispute is in respect to a piece of land known as the remaining extent of subsection A of Faraway of Mayfair Farm in Goromonzi measuring 24.9418 hectares (hereinafter referred to as “the property”).

In this judgment the parties shall be referred to by their names so as not to create confusion in the use of the words applicant or respondent. Takesure Mbanu (“Mbanu”)’s story is that following the acquisition of the property by the State as State land he was issued with an offer letter for the same on 11 November 2008 which he accepted and took up occupation. The offer

letter was withdrawn on 15 January 2013. The Minister then issued an offer letter for the same property to Afaras Mtausi Gwaradzimba (Gwaradzimba) on 22 January 2013. On 15 August 2013 Gwaradzimba obtained an eviction order of Mbano from the property in Case No. HC 2540/13. The order reads

“IT IS ORDERED THAT:

- a) The 1st respondent and all those claiming occupation through him be and are hereby evicted from the property, namely Subdivision 1 of the remaining extent of Subdivision A of Faraway Farm situate in the District of Goromonzi and measuring 24.94 hectares.
- b) The 1st respondent pays costs of suit on a legal practitioner and client scale.”

Gwaradzimba took up occupation of the property after eviction of Mbano before the Minister withdrew Gwaradzimba’s offer letter on 5 March 2014.

On 5 November 2015 Mbano was issued with yet another offer letter by the Minister for the same property. Before then, Mbano had taken occupation of the property and BAMPH (Pvt) Ltd (BAMPH) had taken Mbano to court seeking a spoliation order in case No. HC 10920/15 in which BAMPH lost. BAMPH successfully appealed the judgment of this court to the Supreme Court which granted the following order on 12 July 2016.

“IT IS ORDERED BY CONSENT THAT:

1. The appeal be and is allowed with costs.
 - a. The judgment of the High Court in case number HC 10920/15 be and is hereby set aside and substituted with the following-
 - (i) The 1st respondent be and is hereby directed to restore possession of the remaining extent of sub division A of Faraway Farm of Mayfair in the district of Goromonzi measuring 24.94 hectares.
 - (ii) The 1st respondent shall vacate the property referred to in para 1 above within 45 days of the date of this order.
 - (iii) The 1st and 2nd respondents be and are hereby barred from disturbing the applicant’s possession of the property referred to in para 1 above save in terms of a valid order of court.
 - (iv) The 1st respondent shall pay the costs of this suit.”

Mbano's application is based on the offer letter of 5 November 2015 which he still holds. BAMPH, a company in which Gwaradzimba is the director is the one claiming prior ownership of the property hence it seeks an order invalidating Mbano's offer letter.

Gwaradzimba and BAMPH say they acquired the property from the erstwhile owners in 2000. The question is which of the two parties, Mbano or BAMPH has rights over the property? This is what the Court is being called upon to determine in this dispute.

Advocate *Magwaliba* raised a number of points in *limine* which this court must consider first before the rights of the parties are decided. I will now deal with these in turn.

Whether or not Mbano has approached the Court with dirty hands

The dirty hands principle is something which is recognized in our law. Reference was made to case No. HC 2540/13 which ordered the eviction of Mbano on 15 August 2013. This was at the time Mbano's offer letter was withdrawn by the Minister on 15 January 2013. Mbano got an offer letter thereafter on 5 November 2015. However, the Supreme Court on 12 July 2016 ordered Mbano to restore possession of the property to BAMPH. The terms of the Supreme Court order are clear in that Mbano was to leave BAMPH with undisturbed possession of the property unless his intervention was in terms of a valid court order. BAMPH claims Mbano did not comply with the order and remains in occupation as he pursues his application which is a ploy to defeat the effects of the Supreme Court Order. Advocate *Musarurwa* argued that Mbano was not in occupation of the property. However, despite a clear allegation by Gwaradzimba in the notice of opposition in para 10.5 that Mbano was in defiance of the Supreme Court Order, all Mbano could say in his answering affidavit para 3 was that ".....I have a right to approach the Honourable Court to regularize my occupation of the land in question." In other words Mbano is saying "I will continue to be in occupation, contrary to the court order, while I try and regularise my stay". The Supreme Court did not say that, the order says he must vacate. He did not. He is in defiance. This is clearly a case of dirty hands. Despite my finding that Mbano has dirty hands I will proceed to deal with the other points *in limine*.

Whether there are material disputes of fact.

It was argued that Mbano's application was fraught with disputes of fact. I have already alluded to the fact that the issue surrounds as to who has the right over the property. Mbano waves an offer letter as his right over the property, and on the other hand BAMPH says it owns the

property and wields a title deed. Mbano challenged the propriety of acquisition of the property by BAMPH. On the other hand BAMPH challenges the validity of the offer letter. The parties are therefore miles apart with each other raising accusations and counter accusations against each other. Both parties rely on the application procedure which they adopted. The two applications are intertwined and this is why there was a consolidation. One cannot talk of existence of material dispute of facts in one application without the other. The parties' affidavits clearly show that this is not a matter capable of resolution on paper. I will demonstrate this by reference to only two conflict areas:

- (a) Mbano disputes that Gwaradzimba purchased shares in BAMPH and attacks all documents produced to prove that fact.
- (b) The validity of the offer letter held by Mbano has been put to question and rolls back to whether or not the alleged acquisition of the land by Government for agricultural purposes was valid.

There are certainly material disputes of fact in this matter which cannot be resolved on paper.

Having resolved that there are material disputes of fact, I do not think it necessary to deal with the other points *in limine* raised in this matter.

The two applications cannot be resolved on paper.

IT IS ORDERED THAT:

1. The two court applications are hereby referred to trial in their consolidated form.
2. The applicants in each case shall become the plaintiffs and respondents shall become the defendants.
3. The founding affidavits in each application shall take place and stead of plaintiffs' summons and declarations.
4. The notice of opposition and opposing affidavits shall take place and stead of the notice of appearance to defend and plea.
5. The applicants' answering affidavits shall take place and stead of plaintiffs' replication.
6. The parties shall proceed to comply with the normal rules of a trial procedure.
7. There shall be compliance with the order of the Supreme Court in case no. SC 708/15 by Takesure Mbano before he participates in the trial.

8. Costs shall be in the cause.

Mambosasa, applicant's legal practitioners
Mhishi Legal Practice, respondents' legal practitioners