CLAY CHAKONA
and
CLEVER KAFERO
and
AUBREY PRICE
and
ERIKA MILANZI
and
KEAVEN NYIKA KAHONDO
and
THANDI MASIGU
and
ACTION BONDE
and
TENDAI KADZUNGE
and
NHAMO CHIWAZA
and
BELIEVE MUPFAVI
and
PETRONELLA MACHINGAUTA
and
STELLA BOKA
and
EDITH MUDARA
and
PAIDAMOYO KADZUNGE
and
INNOCENT MAKERE
and
TRYMORE BARWA
and
MAXWELL MATAVA
and
TAKESURE CHIBI
and
CLAUDIOUS MOYO
and
TENDAI MARIVO
versus
HALLMARK CHICKS (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 25 October 2022 and 10 May 2023

Opposed Application

Mr *J Koto*, for the applicants
Mr *SM Hashiti*, for the respondent

MUNANGATI-MANONGWA J: The twenty applicants have approached this court seeking a spoliation order. They are entreating the court to order the respondent to "restore access, possession and occupation of certain piece of land called Athena of Longford measuring one hundred and twelve comma two hectares to the applicants forthwith by removing the fence it erected around the land" and grant costs against the respondent.

Only the first applicant filed a founding affidavit with averments upon which the application is based with the other 19 applicants filing what has been headed "applicant's supporting affidavit." Suffice to state from the onset that these affidavits are bereft of any averments save to state that the deponent has read the first applicant's affidavit and confirms the averments stated therein and the wish to incorporate the averments made by the first applicant as if they were specifically pleaded in the deponent's affidavit. The facts of the matter as related in the first applicant's affidavit are that, he together with the rest of the applicants are potential beneficiaries of the land redistribution programme. They occupied the above mentioned land which had been gazzetted for acquisition by the Zimbabwean government. The occupation is said to have taken place in July 2002. The first applicant avers that he together with the rest of the applicants were in peaceful and undisturbed possession and occupation of the land when in June 2021 the respondent brought bull dozers which "brought down their structures". A further averment is made that the respondent chased most of the members away except a few and then fenced off the area to bar the applicants from coming back to reoccupy the land. The remaining applicants cannot access their homes as usual and no vehicle can enter the premises. It is the applicants' case that their homes were destroyed without their consent and they were driven out

using force with some members being assaulted. It is alleged that all this was done without a court order. The first respondent specifically alleges in para(s) 20 and 21 of his founding affidavit that:

> "I wish to be given access to land;" and, "I want to occupy the land as before." He states that the land remains vacant.

The application is opposed. The respondent raised a number of points *in limine*: That there is only one applicant as the rest of the applicants having filed supporting affidavits, hence they are not applicants and are not before the court. The respondent submitted that the applicants lack *locus standi* given that they claim to be **potential** beneficiaries of land resettlement. The respondents submitted letters emanating from the Ministries of Local Government, Public Works and National Housing and the Ministry of Lands, Agriculture, Water Fisheries and Rural Development written on 2 and 3 May 2019 and 9 August 2019 confirming that the land purportedly occupied by the applicants is private land. The respondent in his affidavit submitted that the applicants "admittedly unlawfully occupied land belonging to the respondent. They have no valid offer letter or consent from the respondent to occupy its land. They are illegal occupants". (See para 15 of the opposing affidavit.)

The respondent contends that the applicants have never been in peaceful possession of the land in issue. That the applicants had been included in the application of *Joseph Chinotimba Housing Co-operative Society Limited* v *Hallmark Chicks (Private) Limited & Another* HC 675/21 which was dismissed. In that regard the matter is *res judicata*. Mr *Hashiti* further submitted that there are no particulars of how the applicants were despoiled. He submitted that the applicant simply said his home was destroyed and there is no specific mention of the piece off land. Further that the affidavit is not specific as to when the alleged despoliation took place. The respondent further stated that there are **material disputes of fact**. This it is contended, arises from the fact that the applicants state that they were in possession of the land when the respondent claims the applicants were not in possession thereof. Mr *Hashiti* also referred to the respondent's affidavit that the applicants could not claim to have been in occupation when Chinotimba Housing Co-operative had been before the court claiming occupation of the same land. The respondents also raised issue that the orders sought **are incompetent** as the applicant seek a mandatory interdict which is not available in a spoliatory relief claim. Mr *Hashiti* further submitted that applicants seek the removal of a perimeter fence which is around the Remaining Extend of Longford which

engulfs Athena of Longford yet the cause of action arises over Athena of Longford. He submitted that the court cannot assist the applicants to commit an offence by granting them the incompetent relief as the applicants are trespassers on private land.

In response to the raised points *in limine* Mr *Koto* submitted that there is more than one applicant as the other applicants' state that they are applicants and their affidavits are sufficient in raising the cause of action. That the applicants contend that they were in occupation of the land since 2000 and were only evicted in 2022. He submitted that the applicants have *locus standi* to institute the application as they were the possessors of the land and were in peaceful and undisturbed occupation and had built their homes there. They contend that they were unlawfully and forcibly removed. That would suffice and they needed not establish ownership. On failure to give particulars of despoliation and the place or area occupied the applicants submitted that the area's measurement or hectarage had been stated and particular stand numbers could not be given as they do not exist.

Mr *Koto* submitted that the matter was not *res judicata* as the applicants were never parties to the concluded matter of Chinotimba Housing Co-operative case cited above.

Pertaining to the **dispute of facts**, the applicant's counsel submitted that these were illusory. He submitted that the respondent had acknowledged the applicants' occupation when in its affidavit the respondent stated that the applicants were in illegal occupation of the land and they were trespassers and could not possibly benefit from their wrongful actions. He thus argued that there cannot be illegal occupants or trespassers who are not in occupation. Mr *Koto* also accuse the respondent of approbating and reprobating given that despite a seemingly acknowledgment of occupation the respondent then indicated in para 16 of its opposing affidavit that the land has always been possessed by the respondent and applicants could not have been despoiled by the respondent and hence the allegation that the applicants were in peaceful occupation is false.

Mr *Koto* submitted on behalf of the applicants that the draft order cannot be said to be incompetent given that the respondent had erected the barrier fence in order to perpetuate the spoliation. That being so he argued that it was necessary to seek such relief which he stated was justified in the circumstances.

Determination on the points *in limine:*

The court finds the argument that there is only one applicant before the court to be without merit. Whilst the affidavits of the nineteen applicants are headed "Applicant's supporting affidavit" each affidavit starts with identification by the applicant that he or she is an applicant. Each applicant confirms the averments made in the first applicant's affidavit and states that the deponent wishes to "incorporate each and every averment made therein into my affidavit as if specifically pleaded herein." Whilst it is careless and improper to refer to an applicant's affidavit as a supporting affidavit the contents of the affidavit leaves the court with no doubt that the applicant has placed himself/herself before the court as the litigant seeking the relief in the draft order. The request to throw out the rest of the applicants' application on that basis is thus denied.

The point raised that the applicants have no *locus standi* to bring the application lacks merit in that the applicants purport to have been occupying the described piece of land and claim to have been forcibly removed and their homes destroyed. They have a material interest in the case, it is them that were affected by the alleged respondent's actions and hence have a legal platform to institute this application as the aggrieved parties. Thus the point cannot be upheld.

The court equally finds the allegation that the matter is *res judicata* to be without basis. I have had occasion to look at Case No HC 675/21. It is clear that the parties that were litigants therein are different. Chinotimba Co-operative Limited did not provide a list of its members and to assume that there are the applicants would be improper. In any case that matter was not disposed off on merits. The court found that there were material disputes of fact which could not be resolved on paper. The disposal of a matter on that basis does not make a matter *res judicata*. In any case the requirements of *res judicata* were not met. Accordingly the point *in limine* is dismissed.

Pertaining to the material disputes of fact, it must be noted that not all disputes are material. It is those disputes which arise 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. The dispute is one which cannot be resolved without viva voce evidence. See *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009(2) ZLR 132(H) at 136F-G.I agree with the counsel for the applicant that the alleged disputes of facts are illusory. The applicants have alleged that they were in occupation and the respondent has adopted different stances: that the applicants have never been in occupation as the respondent has always been in occupation, that the applicants are illegal occupiers and trespassers on private

property, that the applicants had been included in the application by Chinotimba Housing Co-operative and had their case thrown out. Weighing the submissions with the respondent's averments being contradictory, the court cannot say that there are disputes of fact which it cannot resolve when adopting a robust approach. Accordingly the point *in limine* cannot be upheld.

The point raised by the respondent that the applicant seeks an incompetent order is an issue that falls under merits. It is about whether the applicant has averred or pleaded facts which entitle them at law to the relief sought hence same cannot be considered under points *in limine.* In any case what is before me is a draft order and it is for the court to determine whether a case has been made out for the court to grant what the applicant prays for. Equally the argument that the applicants did not indicate when the unlawful eviction took place is a case to be dealt with under merits. In any case there is an indication that the events took place in June 2021 as per the first applicant's affidavit.

On Merits

The applicants maintain that they were despoiled as the respondent resorted to self-help and evicted them without a court order at the same time destroying some of their homes. They rightfully argue that the relief they seek has nothing to do with ownership rights but peaceful possession. Despite these submissions Mr *Hashiti* for the respondent hammered and emphasized the point that the applicants are trespassers who are acting in open defiance of the law and cannot be assisted by the courts. He argued that the applicants have no lawful authority to be on the land either by way of an offer letter, a lease or some other document granting them the right to occupy the described land. However what is required to get the relief sought by the applicants is simply that they were in peaceful and undisturbed possession of the thing in question and were wrongful and against their consent forcibly dispossessed of their property. See *Gondo N.O.* v *Gondo* 2001(1) ZLR 376 at 378E-F. Thus it is the respondent's act of not seeking lawful means to remove the applicants which has given rise to the cause of action.

Further the respondent submitted that the applicants do not identify the location and extent of the land they want restored in their founding affidavit which averment is disputed by the applicant. The respondent further states that the applicants do not explain how they were despoiled. This argument is without merit as the founding affidavit identifies the place as a piece of land called Athena of Longford measuring One Hundred and Twelve comma two hectares. Equally the

first applicant indicates that the applicants' homes were destroyed by bull dozers although ***some*** of the homes remained but the occupiers cannot access their homes due to being fenced off. A further explanation was rendered that there are no stand numbers as such as the applicants are just settled on the land presumably as a community. However the court takes note of the fact that none of the applicants identify as the ones whose homes still remain intact but have difficult in accessing their homes as no car can enter the premises as alleged. These seem to have access to their homes but cannot drive into the premises as stated by the first applicant. Where there are several applicants, it is imperative for each applicant to state their predicament as relief may well turn on the prevailing circumstances and conduct complained of.

It is common cause that the events complained of transpired in June 2021 yet the first applicant's affidavit was only deposed to on 22 February 2022. The respondent contended that the applicants displayed a high level of acquiescence to the alleged spoliation given that the events complained of took place in June 2021 and the founding affidavit was deposed to on 22 February 2022. I note that the application was then filed on 24 February 2022.

Spoliatory relief by its nature is relief sought on an urgent basis. It is a possessory remedy that is aimed at restoring possession where a person is disposed of their property. It is aimed at the preservation of public order by stopping or preventing self-help in cases where the errant party takes the law into its/ their hands. An affected litigant thus has to act with haste to safeguard their interest. *In casu,* the applicants were purportedly forcibly evicted from the land occupied and had their homes destroyed and subsequently barricaded from their homes by the respondent who erected a fence. The events as per the applicants' affidavit happened in June 2021. An application for spoliation and a mandatory interdict was only filed in February 2022. Thus a period of approximately 8 months had elapsed. There is no explanation why it took that long for the applicants to seek relief. If the court where to take it that the applicants had been unlawfully evicted and their homes destroyed urgent action was therefore necessary. Failure to take action for over half a year and then go to court seeking restoration is inconsistent with the actions of an aggrieved party who relies on spoliatory relief. This is a display of acquiescence as submitted by the respondent.

Where a litigant seeks spoliatory relief timeous action has to be taken lest the harm becomes irreversible. This is to allow the court to timeously provide for the protection and

preservation of an applicant's rights. The urgency that characterizes the relief was reiterated in *Karori (Pvt) Ltd & Anor* v *Mujaji* 2007 (1) ZLR 105 at 110 D-E wherein the court held that:

> "I also find that an application for spoliation is urgent by its very nature. It exists to preserve law and order and to stop and reverse self-help in the resolution of disputes between parties. Its purpose is to restore the status *qou ante*."

Any unexplained and unreasonable delay in springing to action by a litigant points to the fact that the applicant himself did not treat the matter with the urgency consistent with spoliatory relief. Mr *Koto* referred to the fact that the applicants had reported the issue to the Zimbabwe Republic Police. Reporting to the police as alleged by the applicants cannot count towards necessary action required in terms of seeking restoration. The failure to act timeously militates against the applicants. This is because the respondent had for 8 months taken over possession and cannot be blamed for assuming that the applicants had accepted their predicament. This is because the applicants seem to have accepted their predicament which they have lived with for some time. In that regard, it can be held that the applicants had acquiesced to their position. It is imperative that there be order in the country with the courts cautiously approaching matters with a sense of balance and responsibly dispensing justice within the confines of the rule of law. A litigant who seems to have abandoned their right to protection and then seek to enforce it especially after considerable lapse of time particularly in spoliatory proceedings will not receive the empathy of the court where acquiescence is clearly present.

Due to the aforegoing, the court will uphold the contention raised by the respondent that the conduct of the applicants is such that they acquiesced to the situation. That being so, the application cannot succeed. However the court will not grant the successful party an order of costs for the main reason that there is evidence pointing to having taken the law into their hands as deciphered from the defence proffered in the opposition as enunciated in the aforegoing paragraphs. Had it not been for the unexplained lengthy delays by the applicants which created a situation of acquiescence, the chances of the respondent succeeding in defending the application would have been remote. **Accordingly, it is ordered as follows**:

1. The application is dismissed.
2. There is no order as to costs.

Koto and Company, applicants' legal practitioners
Nyawo Ruzive Attorneys, respondent's legal practitioners