GERALD TAFADZWA GWAZE
versus
ANDREW MAKAMBA

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE 6 January 2022 & 15 June 2023

Urgent chamber application

T Gatawa with Y Masvora, for applicant
N Masango, for respondent

MUTEVEDZI J: The applicant Gerald Tafadzwa Gwaze and the respondent Andrew Makamba were embroiled in a bitter turf war. Their hostilities emanated from a crudely crafted and possibly illegal lease agreement by which the respondent leased out twenty hectares of farm land to the applicant for agricultural activities. The farm described in the papers as *Vuna Impala* Farm is situated in the district of Hurungwe in Mashonaland Central Province. The respondent acquired that farm through the government of Zimbabwe's land redistribution programme set in motion over two decades ago. The respondent's acquisition of that land had stringent conditions attached to it. As will be illustrated later, he shamelessly accepted that he consciously violated some of those conditions. The breach however is not relevant to the determination of this matter.

The applicant alleged that in terms of his agreement with the respondent he acquired the right to lease the land in issue for a period of two years running from 2019 and terminating on 23 May 2022. On 28 December 2021and in breach of that agreement, so he continued, the respondent through the agency of his employees stormed *Vuna* Farm and deployed tillage units to that part of the farm which the applicant leased. Prior to that date on 25 November 2021, the applicant through his legal practitioners had written to the respondent imploring him to desist from dispossessing him of his land. The respondent ignored that letter. He was bent on unlawfully despoiling the applicant without following due process. The applicant added that he was at the height of land preparations for the current farming season. Those plans were

disrupted by the respondent's invasion of the farm. In addition, the applicant alleged that he had at the time of filing the application harvested ten tonnes of soya bean which were delivered to Olivine Industries a company with which he had entered into a contract for the supply of agro inputs required for the project. In return, the applicant was required to deliver more than forty tonnes of such beans to Olivine Industries. Another five tonnes were yet to be harvested. He further stated that the application, being one for spoliation was inherently urgent. He prayed for an order couched in the following terms:

IT IS ORDERED THAT:

1. The dispossession of the applicant by the respondent or any person acting under or through him of the leased 20 hectares of Center 2 of Vuna Impala Farm, Karoi District Mashonaland West Province without an order of court be and is hereby declared wrongful and unlawful
2. The respondent's taking of applicant's 20 hectares of leased farming land at Vuna Farm be and is hereby declared illegal and applicant's possession, use and occupation of 20 hectares of Vuna Impala farm, Karoi be and is hereby restored so that the status quo ante is achieved
3. That the respondent and all his employees be and are hereby barred and interdicted from harassing, ploughing Center 2 and disturbing any farming activities by the applicant at Vuna Impala Farm, Karoi District, Mashonaland West Province
4. That in the event of the respondent failing to vacate and give vacant possession of the property to the applicant, the sheriff of Zimbabwe or his lawful deputy, with the assistance of the Commissioner-General of Police and or each and every member of the Zimbabwe Republic Police in Karoi, be authorized and empowered and ordered to give effect to this order
5. The respondent pays costs of suit on a legal practitioner and client scale

The respondent opposed the application. In his opposing affidavit, he argued *in limine*, that the applicant was suing on the basis of an illegal agreement of lease. The agreement was illegal because it had been entered into without the written consent of the Minister of Lands and Rural Resettlement. That omission was in material breach of the conditions of the offer letter allocating the farm in question to him. Further, the respondent also alleged that the lease agreement contravened s 28 of the Lands Commission Act [*Chapter 20:29*] which prohibits the holder of an offer letter from leasing his rights on any portion of gazetted land. In addition, the respondent argued that the application raised material disputes of fact in that the applicant alleged that he still had to harvest his crop of beans yet in reality he had so harvested it in the month of November 2021. In rounding off, he couldn't resist throwing in the seemingly fashionable and irresistible trump card which many legal practitioners resort to even in circumstances where its inapplicability is undebatable- that the application was not urgent!

On the merits the respondent denied ploughing or threatening to plough down the crop of beans as alleged by the applicant. He contended that it would have been foolish of him to do

so because he was entitled to a percentage of the proceeds realized from the sale of the crop. As such he would not do anything that would disentitle him to his share of the profit. Further it was the respondent's contention that the applicant was never allocated a specific portion of *Vuna* Farm which is one hundred hectares in extent. Instead the agreement entitles him to plough any twenty hectares in the farm. To put this into context, in 2019, the applicant planted his maize crop on the northern part of the farm but during the 2020 season he worked the southern part. The applicant's application and insistence so said the respondent, was motivated by his realization that the Center 2 portion of the farm had more fertile soils than other parts. The farm's fields had always been used on a rotational basis. He concluded by alleging that in seeking this relief the applicant was seeking to obtain a declaratory order disguised as a spoliation. He had in no way despoiled the applicant.

In support of his argument, the respondent attached the affidavit of *Richard Madzviti*, his farm manager. The gist of the manager's evidence was that the applicant had harvested all of his bean crop sometime in November 2021. It was therefore untrue that he still had five tonnes of beans which were due for harvesting. He also vouched that the applicant was not allocated a specific portion of the farm because since he came on to the farm he had indeed been using different portions of the farm on a rotational basis.

At the hearing the parties persisted with the same arguments. It is needless to repeat them here. After hearing arguments, I dismissed all the preliminary objections. I also proceeded to dismiss the application on the grounds that the applicant had failed to establish one of the two essential requirements for the grant of a spoliation order. By letter dated 6 June 2023 it was brought to my attention that the applicant required my written reasons for that decision. I set them out below.

As indicated above the respondent raised objections *in limine.* I determined the objections and summarily dismissed them. The phrase objection *in limine* is Latin for *"objection at the beginning."* It entails a demur which is raised before the trial or consideration of the substantive issues. If it is upheld, a preliminary objection is dispositive of the application without the need for the court to hear the substantive arguments. A remonstrance which goes to the root of the dispute is not a preliminary objection but a substantive ground of opposition.

Illegality of the agreement

The first objection related to the illegality of the lease agreement. The argument was that the farm land lease agreement was steeped in illegality. I said I made a summary dismissal

of the objection. In my view, it could not have detained the court because it was an immaterial argument. It was inconsequential because it is neither a consideration nor a defence to a spoliation application. If there had been any debate about that proposition, the Supreme Court in the case of *Anjin Investments (Private) Limited* v *The Minister of Mines and Mining Development and 2 Others* SC 39/20 put that issue beyond doubt when it stated at p 7 of the cyclostyled decision that:

> "From the cited cases, the position of the law is quite clear in that an application for a spoliation order is not concerned with the legality or otherwise of the applicant's conduct. The court would be called upon to determine whether one was in a peaceful and undisturbed possession and whether he was dispossessed unlawfully." (Underlining is mine for prominence)

This application was therefore not concerned with whether or not the lease agreement between the parties was illegal. It was a hopeless objection. For that reason I dismissed it.

Material disputes of fact

The respondent timidly pleaded this point. It was a one sentence argument. All that was alleged was that there are material dispute of facts in that the applicant is alleging that his bean crop is in the field when in fact it was harvested in November 2021. In the case of *Supa Plant Investments (Pvt) Ltd* v *Chidavaenzi* 2009(2) ZLR 132 MAKARU JP (now JCC) succinctly described what a material dispute of fact is when she held at 136 F-G 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."

There is no such dispute in this application. Whether the applicant harvested all his bean crop or not is not material to the determination of this case. In any case, the respondent alleged that the entire crop had been harvested. He supported that contention by evidence of the letter of demand which he authored requiring the applicant to surrender to him 10% of the proceeds from the season's crop as per their agreement. Additionally, the respondent procured the affidavit of his farm manager who unequivocally deposed that the entire crop had been harvested months before the hearing of this application.

In the case of *Douglas Muzanenhamo* v *Officer in charge CID Law and Order and 7 others* CCZ 3/13 the Supreme Court admonished courts to take a robust common sense approach to resolving disputes of fact. At p. 4 of the cyclostyled judgment PATEL JA (now JCC) held that:

> "As a general rule in motion proceedings, the courts are enjoined to take a robust and common sense approach to disputes of fact and to resolve the issues at hand despite the apparent conflict. The prime consideration is the possibility of deciding the matter on the papers without causing injustice to either party."

The bald allegation of the existence of a dispute of fact in this case did not move me. It was not enough to persuade me to decline to resolve this issue on the papers. My view was that the alleged dispute of fact was lukewarm at best and non-existent at worst. If there was any dispute of fact I was of the firm view that I could resolve it on the papers without causing injustice to either of the parties. Once again, it was for that reason that the objection was dismissed.

Non-urgency

As indicated in the introductory paragraphs of this judgment, the objection regarding the non-urgency of the application appeared to have been raised as a matter of fashion. The courts have on times without number emphasised the point an application for spoliation is generally treated as urgent because of the need to stop unlawful conduct pending the determination of the parties' competing rights. See the case of *Chiwenga* v *Mubaiwa* SC 86/2020 for that proposition. This was an application for spoliatory relief and the court was enjoined to deal with it on an urgent basis.

With the preliminary objections out of the way, the application was ripe for consideration on the merits.

The issue

The only issue which was left for the determination of the court was whether or not the applicant had been despoiled. Put differently the court had to consider whether or not the applicant had successfully established the requirements for the grant of a spoliation order.

The law

In *Anjin Investments Ltd* (supra) BERE JA cited with approval the remarks of this court in the case of *Chesveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 240(H) where REYNOLDS J at 250 A-D held that:

> "It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing – that *spoliatus ante omnia restituendus est (Beukes* v *Crous & Another* 1975 (4) SA 215 (NC)). Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be

> restored until such time that a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all."

From the above the requirements which an applicant must successfully plead in order to obtain an order for spoliation become easy to discern. They are that:

a. The applicant was in peaceful and undisturbed possession of the thing; and
b. He was unlawfully deprived of such possession

Conversely, the defences available to a respondent in such applications are obviously that:

i. The applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and
ii. the dispossession was not unlawful and therefore did not constitute spoliation

I understand the phrase peaceful and undisturbed to mean quiet, calm and free from disturbance. It is diametrically opposed to a state of arguments, agitation and violence. An applicant for a spoliation order must therefore, in order to succeed, illustrate the existence of quietness, calmness and freedom in his/her possession of the thing in question. The requirement of unlawful deprivation or dispossession was dealt with and interpreted in the case of *Botha and Anor* v *Barrett* 1996 (2) ZLR 73 (S) to mean that the respondent must have divested the applicant of control of the thing violently and unjustifiably without his assent.

Application of the law to the facts

In this case, I have already indicated that the applicant's case is predicated on a contract of lease between him and the respondent for the lease of the farmland in question. The respondent denies dispossessing the applicant of any land as alleged or in any way. The applicant argues that the portion of the farm he is in possession of is called Center 2 of *Vuna Impala* Farm. On the other hand the respondent insists that in terms of the lease agreement, the applicant is simply entitled to twenty hectares within the farm. He has no right to a specific part of that farm. The applicant supported that averment with allegations which the applicant was not been able to controvert. It was shown for instance, that in the 2019 and 2020 farming seasons, the applicant planted his crop in the northern and southern parts of the farm respectively. Yet in this instance, he moved motion to convince the court that his portion was in the center of the farm. What defeats the applicant's argument is that the lease agreement itself does not specify which part of the hundred hectare farm he is entitled to work. Right at the beginning of their agreement, the issue is provided for in the following manner:

> "The lessor is the registered owner of Vuna Impala Farm, Tengwe, Mashonaland West and Hurungwe District which the lessor has agreed to let to the lessee 20 ha of land, pivot, sheds, accommodation, use of dam for irrigation, all other supporting infrastructure for the 2019 to 2021 winter season with an option for renewal for other two years." (*Sic*)

With above vague description of the land to be leased out and the land rotation which the applicant employed during the 2019 and 2020 seasons, the argument by the respondent that he did not despoil the applicant of any land became unassailable.

Further, as far back as November 2021 almost two months before the hearing of this application, the applicant's legal practitioners addressed a letter to the respondent whose contents put in doubt the applicant's claim of peaceful and undisturbed possession of the land in issue. It raised the applicant's complaints regarding strangers who the respondent was bringing to the farm. It disclosed that the applicant had shown those strangers around the farm including the portion which the applicant was working on. In paragraph 11 of that letter the applicant's lawyers concluded by urging the respondent to note that he was *"disturbing peaceful possession of the property being enjoyed by our client."* Instead of supporting the applicant's cause, the letter betrays a scenario in which the applicant was not in peaceful and undisturbed possession of the farm land in question. It is evident therefrom that there was and there always had been friction regarding whichever part of the farm the applicant was farming on. Once that happened the first requirement of being in peaceful and undisturbed possession was always going to be difficult to satisfy.

The applicant's woes were compounded by relief he sought. An examination of the draft order shows that he in more than one way, sought a declaratory order. It was incompetent to do so in the form he chose. In paragraphs 1 and 2 of the draft order he requested the court to declare his *"dispossession by the respondent of the leased 20 hectares of land wrongful and unlawful."* Such assertions vindicated the complaints raised by the respondent that the applicant desired to obtain a declaratory order under the guise of spoliatory relief.

The two requirements for a spoliation order discussed above both have to be satisfied before spoliation is granted. Once an applicant fails to satisfy one of them, it becomes unnecessary for a court to discuss the fulfilment or otherwise of the other. For that reason, it was futile for me to consider whether the dispossession had been unlawful. The applicant had lost. I therefore abandoned that leg of the exercise.

It was for the reasons explained above that I arrived at the conclusion that the application had no merit. I accordingly directed that the application be dismissed.

E Gijima Attorneys, applicant's legal practitioners
Antonio & Associates, respondent's legal practitioners