IGNATIUS MORGEN CHIMINYA CHOMBO
versus
MARIAN CHOMBO
and
MINISTER OF LANDS, AGRICULTURE, FISHERIES,
WATER AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
MANZUNZU J
HARARE, 20 June 2023 & 15 May 2024

Opposed Court Application

L Madhuku, for the applicant
G Gahadzikwa, for the 1st respondent
T S Dzvetero, for the 2nd respondent

MANZUNZU J:

INTRODUCTION:

The land question was at the heart of the liberation struggle for this country. A few white settlers had allocated to themselves all the fertile land to the exclusion of the black majority. The Government of Zimbabwe had a duty to address this obvious and oppressive inequities in the land allocation brought about by the white colonizers. The land reform program, like any other human interactions, is not without its own challenges.

The applicant, (Ignatius), is a beneficiary of the land reform process, having signed with the Government a 99 year lease agreement. Ignatius filed this court application, challenging the intention to cancel the lease by the second respondent, (the Minister). The application was initially filed without the second respondent, (Marian), who was joined to these proceedings as a party through the order of this court on 23 November 2022 under case number HC 6122/22.

Ignatius seeks the following declaratory orders against the Minister:

"IT IS ORDERED:

1. That it be and is hereby declared that clause 22.1 of the ninety-nine (99) year lease agreement between the applicant and the Government of Zimbabwe, (which lease agreement is attached to the application as annexure 1) provides the only circumstances in which the respondent may cancel the aforesaid 99 year lease.

2. That the reasons given by the respondent for the intended cancellation of applicant's 99 year lease in respect of subdivision 1 of Allan Grange farm in the district of Zvimba in Mashonaland West, are outside the scope of clause 22.1 of the lease agreement in annexure 1 and are hereby declared illegal and null and void.
3. That be and is hereby declared that the respondent has no powers whatsoever to cancel the 99 year lease in favour of the applicant in respect of subdivision 1 of Allan Grange farm in the district of Zvimba in Mashonaland West, (which lease agreement is attached to the application as annexure 1) outside the provisions of clause 22.1 of the lease agreement.
4. That it be and is hereby declared that, in any event, that by virtue of clause 5.1 and 6.1 of the tripartite agreement attached to this application as annexure 2, as read with section 17 of the Land Commission Act (Chapter 20:29), for a period of twenty years from 14 March 2018, the Government of Zimbabwe (represented by the respondent herein) irrevocably waived any right it might have had to cancel the 99 year lease in favour of applicant in respect of subdivision 1 of Allan Grange farm in the district of Zvimba in Mashonaland West.
5. For the avoidance of doubt, it be and is hereby declared that the order in paragraph 4 above means that for twenty year period beginning on 14 March 2018, the respondent can neither cancel the lease in respect of, nor in any way subdivide, the farm known as subdivision 1 of Allan Grange farm in the district of Zvimba in Mashonaland West.
6. The respondent, if he opposes, shall bear the costs of this application on a legal practitioner and client scale."

Both respondents have opposed the application and the relief being sought and have prayed for the dismissal of the application with costs on a punitive scale.

BACKGROUND

(a) **Common Cause Facts**

The factual background to this application is more or less common cause.

(1) On 14 November 2006, Ignatius, who at the time was married to Marian, signed a 99 year lease agreement with the Government of Zimbabwe as a lessee, in respect of Subdivision 1 of Allan Grange Farm in the district of Zvimba in Mashonaland West measuring 3098.8100 hectares (the farm). Primarily the farm was to be used for agricultural and pastoral purposes, although any other purpose was subject to consent by the Minister.

(2) In March 2018 Ignatius entered into a tripartite agreement with an investor called Pepary Investments (Private) Limited (Pepary) and the Government of Zimbabwe represented by the Minister.

(3) On 21 June 2021 the Minister wrote a letter to Ignatius informing him of his intention to cancel the 99 year lease agreement in respect of the farm. The letter gave reasons for the intended cancellation and invited Ignatius to make his representations, if any, to the Minister on the matter.

(4) On 13 August 2021, Ignatius responded to the Minister's letter and made representations persuading the Minister not to execute his intention to cancel the lease agreement.

(5) Despite the lengthy representations, the Minister proceeded to cancel the lease agreement on 21 September 2021 which letter only reached Ignatius on 17 January 2022 after the current application was lodged on 3 November 2021.

(6) Ignatius has persisted with the current application, which is premised on the intention to cancel the lease, despite the knowledge of the cancellation of the lease agreement. He however lodged another application on 2 February 2022 (pending before this court) for the review of the decision of the Minister under case number HC 674/22 in which the following order is being sought:

"IT IS ORDERED THAT:

1. The decision to withdraw and letter of withdrawal of applicant's 99 year lease by the respondent letter dated 21 September 2021 be and is hereby declared a nullity and set aside.
2. The decision of the respondent to replan the applicant's farm of subdivision 1 of Allan Grange farm in the district of Zvimba in Mashonaland West and all other pursuant actions and decisions pursuant to the same be and are hereby set aside.
3. In the result, it is declared that the applicant is lawfully authorized and entitled to be in occupation of Subdivision 1 of Allan Grange farm in the district of Zvimba in Mashonaland West measuring 3098.81 hectares in terms of the 99 year lease issued to him by the respondent on the 7th day of September 2006.
4. That the respondent shall pay costs of suit on attorney – client scale if this application is opposed."

(7) The Minister, through an order of this court was granted leave to file a supplementary opposing affidavit. He filed the affidavit on 16 November 2022 long after the parties, then, had filed their heads. Certain preliminary points were raised in the supplementary affidavit. No supplementary heads were filed in respect of the preliminary points which were orally argued at the hearing.

(8) On 23 November 2022 an order of this court joined Marian to these proceedings as the first respondent. She filed her opposition on 7 December 2022. She did not raise any preliminary points.

(b) **Applicant's Case**

Ignatius's application is in terms of s 14 of the High Court Act, [*Chapter 7:06*] (the Act). He says this is a proper case for the court to exercise its jurisdiction under that section.

Furthermore, Ignatius's contention is that the Minister acted outside clause 22.1 of the lease agreement hence his actions are illegal, null and void. He maintains that the declaratory orders sought are sound at law, real and practical.

(c) **Respondents' Case**

Marian and the Minister have taken an almost similar position in defending this application. The first stance taken is that this is not a proper case under section 14 of the Act as the same falls short of the requirements. Secondly, the respondents say the Minister's actions were lawfully taken in line with the clauses of the lease agreement. They both pray for the failure of the application.

(d) **Preliminary Points**

The Minister having abandoned the preliminary point on material non-joinder persisted with four others.

(i) Application is now moot

Mr *Dzvetero* argued that the application was overtaken by events in that the lease agreement was eventually cancelled yet the application was on the basis of an intention to cancel. This new development rendered the application moot and the court can no longer exercise its discretion because there is no longer a cause of action, so the argument was further advanced. The application was then said to be academic.

Mr *Madhuku* in response remained adamant that there was no mootness in this case. In his considered view, the cancellation of the lease agreement has made the application even more relevant. He said it was not academic for the court to hear the matter and exercise its discretion.

A matter becomes moot if the new developments terminate the controversy between the parties. See – *Zimbabwe School Examinations Council* v *Mukomeka & Anor*, SC 10/20. A court may decline to exercise its jurisdiction over a matter because of the occurrence of events outside the record which terminate the controversy. See *Khupe & Anor* v *Parliament of Zimbabwe & Ors* CCZ 20/19. The ZIMSEC case, (*supra*), cited with approval the two stage approach principle on mootness enunciated in the Supreme Court of Canada case of *Borowski* v *Canada (Attorney General)* [1989] 1 SCR 342, where the court said:

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it. The approach with respect to mootness involves a two- step analysis. It is first necessary to determine whether the requisite tangible and concrete

> dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case."

The simple question which the court must ask itself is whether the cancellation of the lease agreement has terminated the controversy between the parties. In my view it does not, more so if one looks at the nature of the declaratory orders being sought. The controversy remains live.

Even where the court finds that the matter is moot, the matter does not end there. The court should still decide whether to exercise its discretion to hear the case. See Khupe case supra. In that respect, courts are guided by the rationale and policy considerations underlying the doctrine of mootness. Some factors for consideration were laid out in *Independent Electoral Commission* v *Langeberg Municipality* 2001 (3) SA 925 (CC) where the court made the following remarks:

> "That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced."

In the final analysis, my finding is that the application has not been rendered moot by the cancellation of the lease agreement, even if it were, it is in the interests of justice that it be heard. In that event the preliminary point cannot succeed and must be dismissed as I hereby do.

(ii) Application is a disguised application for review

This preliminary point was raised by Mr *Dzvetero* while on his feet. No concrete argument was put to support it. In fact his argument shifted to the need to exhaust internal remedies. Since it was not pursued, it suffers a still birth and must be buried as such.

(iii) Application premature

The application, it was argued, was filed prematurely because the applicant should have exhausted internal remedies. The question is, *which remedies?* Mr *Dzvetero* argued that the application should have waited for the outcome of his representations to the Minister. But one should not overlook the inordinate delay by the Minister to respond. Ignatius had to write a follow up letter on 26 October 2021which was neither acknowledged nor responded to. He cannot be faulted for bringing in this application. The preliminary point has no merit and must be dismissed.

(iv) Lis Alibi Pendens

Renowned authors, Herbstein and van Winsen in *The Civil Practice of the Superior Courts in South Africa* 3 ed at pp 269 et seq, at pp 269-270 had occasion to comment on this defence thus:

> "If an action is already pending between parties and the plaintiff therein F brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis pendens*, that is, another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

The test is that, the parties must be the same, on the same cause of action and about the same subject matter. Mr *Dzvetero* said these requirements are present in the present matter. Although there are close similarities between this application and the review application, they are not on all fours. *In casu*, the relief is one of declarator and the other case seeks to set aside the decision of the Minister. The preliminary point must fail and is therefore dismissed.

(e) **Issues on the Merits**

Two main issues arise in this application which are:

(i) Whether the applicant have an interest in an existing, future or contingent right?

(ii) Is it appropriate to exercise the court's discretion in favour of making a declaratory order sought?

(f) **The Law**

Section 14 of the Act, under which this application has been brought reads:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The law governing applications for declaratory orders is well settled. The applicant must show that he/she is:

- an interested person
- that there is a right or obligation which becomes the object of inquiry
- that he/she is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter
- that there is an interested party upon which the declaration will be binding, and
- that consideration of public policy favours the issuance of the declarator.

See – *Movement for Democratic Change* v *The President of the Republic of Zimbabwe & Ors*, HH 28/07; *RK Footwear Manufacturers (Pvt) Ltd* v *Boka Book Sales (Pvt) Ltd* 1986

(2) ZLR 209; *Family Benefit Friendly Society* v *Commissioner of Inland Revenue & Anor* 1995 (4) SA 120 (T).

In considering whether the requirements of s 14 have been met, courts usually follow a two stage approach:

1. Does the applicant have an interest in an existing, future or contingent right?
2. If so, is it appropriate to exercise the court's discretion in favour of making the declaratory order sought?

In *Johnsen* v *AFC* 1995 (1) ZLR 65 (S) at p 72 E-F the court had this to say:

> "The condition precedent to the grant of a declaratory order under s 14 of the High Court of Zimbabwe Act 1981 is that the applicant must be an "interested person", in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. The interest must concern an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated thereto. But the presence of an actual dispute or controversy between the parties interested is not a prerequisite to the exercise of jurisdiction. See Ex p Chief Immigration Officer 1993 (1) ZLR 122 (S) at 129F-G; 1994 (1) SA 370 (ZS) at 376G-H; Munn Publishing (Pvt) Ltd v ZBC 1994 (1) ZLR 337 (S) and the cases cited."

The two stage approach is also followed in the South African courts. In *Cordiant Trading CC* v *Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) the court cited with approval the two stage approach adopted in *Durban City Council* v *Association of Building Societies* 1942 AD 27 at 32 para 18 where it was held that:

> "Put differently, the two stage approach under the subsection consists of the following. During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right of obligation'. At this stage, the focus is only upon establishing that the necessary conditions precedent for the existence of the court's discretion exist. If the court is satisfied that the existence of such conditions have been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

WHETHER THE APPLICANT IS AN INTERESTED PERSON

The court did not hear any serious challenge from the respondents that applicant is not an interested person. What I read from the respondents is that the applicant is not the only interested person.

On the part of the Minister, he said that there is non-joinder of a party to the tripartite agreement which renders the application defective. It cannot be disputed that the applicant is an interested person in this application. I do not think non-joinder vitiates the interest the applicant have in this application.

Marian on the other hand said that the applicant has no real and substantial interest. This is because the applicant is not a sole lessee as she is a co-lessee. That in my view does not exclude the applicant from being an interested person. In fact, it is common cause that the applicant was a lessee to the agreement upon which the cause of action is founded. Therefore, the application satisfies the first requirement under s 14 of the Act.

Having found that the applicant is an interested person, the court must now deal with the second requirement under s 14 of the Act.

IS IT APPROPRIATE TO EXERCISE THE COURT'S DISCRETION IN FAVOUR OF MAKING THE DECLARATORY ORDER SOUGHT?

The controversy of this case is centred on this requirement, the resolution of which will determine the outcome of this application. The letter by the Minister dated 21 June 2021 gave notice of his intention to cancel Ignatius's 99 lease agreement. The letter reads:

> "Notice is hereby given that the Ministry of Lands, Agriculture, Fisheries, Water and Rural Resettlement intends to cancel 99 year lease registered in your favour in respect of Subdivision 1of Allan Grange Farm measuring 3098.81 hectares in the district of Zvimba in Mashonaland West.
>
> Reasons for cancellation
> I. To retain Hon Marian Chombo's rights as a holder of an equal joint and undivided share in the leasehold following divorce.
> II. Re-plan to accommodate other settlers already settled on the farm.
> You are invited to make any representations you may have on this matter in writing within 3 months of receipt of this notification. All correspondence in this regard should be directed to the Minister."

This is the letter which sparked the dispute between the parties in which Ignatius now seeks a declaratory order to say clause 22.1 of the lease agreement provides the only circumstances in which the Minister can cancel the agreement. It is important to note that, despite the use of the words *"intention to cancel*" the Minister did not go further to say in terms of which clause of the agreement. The applicant says it is in terms of clause 22.1 because this is the only clause which deals with cancellation.

Clause 22.1 of the lease agreement reads:

> "22 CANCELLATION OF LEASE BY LESSOR
>
> 22.1 Subject to Clause 22.3, the Lessor reserves the right to cancel this lease and repossess the Leasehold subject to at least ninety (90) days' notice or a longer notice period as the Lessor may deem fit, in the event of:
> (a) the insolvency of the Lessee under the laws of Zimbabwe; or
> (b) the Lessee owning or leasing some other property for agricultural purposes; or
> (c) any breach of the terms and conditions of this Lease; or
> (d) the Lessee having permitted his or her agricultural or pastoral operations to decline to such an extent that the Leasehold is not being properly managed; or

(e) the Lessee failing to pay his /her rentals, levies and /or rates to the Lessor or to the relevant local authority, as the case may be, despite having received ninety (90) days' notice from the Lessor to honour his/her obligations in that regard."

In his notice of opposition the Minister explains his understanding *vis-a-vis* cancellation and repossession. I will reproduce para(s) 10 to 15 of his opposing affidavit hereunder:

"10. In the circumstances, I considered that the farm is large enough (3 098;8100 hectares) to be subdivided with each entity retaining its viability as agricultural land. It is important to note that the former spouse (Marian Chombo) is still resident at the farm, despite being deprived of her rights to practice any agricultural activities.
11. In order to allocate the former spouse her undivided share, the agreement of lease has to be cancelled.
12. Clause 20 of the agreement of lease provides for repossession of land by the lessor. One of the grounds for repossession is utilization of the property for a purpose beneficial to the public generally or any section of the public.
13. There are settlers who had been on the farm before the applicant was allocated this land. After applying my mind and cognizant of the fact that the farm is big, I made a conscious decision to allocate the portion already settled since the Government has no alternative land to allocate them at the moment.
14. For repossession to be effected, the lease must be cancelled first. This is what the Government is doing.
15. Provisions of clause 22.1 of the agreement of lease are permissive in that they only apply in situations where the lease is cancelled in totality. *In casu*, the intention is to partially repossess some portions of the land for the reasons outlined in my letter of intention to cancel the lease."

The stance taken by the Minister and supported by Marian is that clause 22. 1 does not apply *in casu*. Instead, it is clause 20 of the lease agreement which reads:

"The lessor may at any time and in such manner and under such conditions as it may deem fit, repossess the leasehold or any portion thereof if the repossession is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public."

The grounds stated by the Minister for his intention to cancel are not those found in clause 22.1. Mr *Madhuku*'s argument is that any purported cancellation in terms of this clause is null and void. The Minister does not dispute that he intended to cancel and indeed cancelled the agreement. But none of the letters revert to clause 22.1. The golden question is, does the Minister have power to cancel the lease agreement outside clause 22.1? Mr *Madhuku* said the Minister cannot. Mr *Dzvetero* and Mr *Gahadzikwa* for first respondent say the Minister can under clause 20.

This takes us to the issue of what was the intention of the Minister? Did he intent to cancel or he intended to repossess or cancel and repossess. Whatever course the Minister chose

to take, one needs to look at whether it was lawful or not. Did the Minister act within the confines of the agreement?

The letter of cancellation of the lease dated 21 September 2021 is instructive to determine whether this was an intended cancellation in terms of clause 22.1 or repossession under clause 20. The letter reads:

> "RE: CANCELLATION OF 99 YEAR LEASE NUMBER MAW/ZV10122 REGISTERED IN FAVOUR OF IGNATI0US CHOMBO M C ALLAN GRANGE FARM, ZVIMBA DISTRICT, MASHONALAND WEST PROVINCE
>
> Following the notice of intention to cancel your 99 year lease and my response to your representations, please be advised that the Minister of Lands, Agriculture, Fisheries, Water and Rural Resettlement is proceeding to cancel your 99 year lease number MAW/ZV10122 registered in your favour in respect of Allan Grange farm measuring 3 098.81 hectares in the district of Zvimba in Mashonaland West Province.
>
> You will be offered a new security of tenure document for 500 hectares in line with the reasons for cancellation of lease which were articulated in the notice of 21 June 2021."

It is clear from this letter as read with the letter of 21 June 2021 that the Minister never intended to cancel the lease agreement in terms of clause 22.1. This is more so because:

- he never said was cancelling in terms of clause 22.1;
- none of the grounds laid down in clause 22.1 were cited as the reasons for cancellation;
- the reasons for cancellation are consistent with those in clause 20;
- the Minister said he could not achieve repossession without cancelling the agreement first, and
- clause 23 anticipates cancellation to achieve repossession in the following words,

> "Upon termination or cancellation of this lease under clauses 20, 21 and 22 hereof the lessor reserves the right to resume possession of the leasehold…"

The relief sought by the applicant is premised on the violation of clause 22.1 by the Minister. The violation must be proved on a balance of probabilities which *in casu* it is not.

The law respects the principle of sanctity of contracts. See, *Book* v *Davidson* 1988 (1) ZLR 415 (S). The courts do not make contracts for the parties and cannot excuse any of the parties to a contract from the consequences of the contract that they have freely and voluntarily entered into. See – *Magodora & Ors* v *Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-D.

The parties knew at the time of signing the agreement that the Government of Zimbabwe through the Minister had unfettered rights to repossess the leasehold or part thereof in terms of clause 20 for the reasons stated therein.

An argument was raised about the rights flowing from the divorce matter between Ignatius and Marian. This court will not transgress into that area as if it were sitting as a family court to deal with ancillary issues to the divorce, neither is the court sitting as a review court. The challenge by the applicant is on clause 22.1 and not clause 20.

It was also argued that by virtue of the tripartite agreement and s 17 of the Land Commission Act, [*Chapter 20:29*] the Government of Zimbabwe waived any right to cancel the 99 year lease agreement in favour of the applicant or at least not before expiration of 20 years from 14 March 2018 in terms of clause 5.1 and 6.1 of the tripartite agreement. My reading of the tripartite agreement does not support the stance taken by the applicant. I agree with Mr *Gahadzikwa*'s submission that the tripartite agreement did not abrogate the powers of the Minister as the Administrative owner of the land in terms of the law. The role of the Minister in the tripartite agreement was to make sure that the joint venture was approved by Government and such an agreement could not have intended to oust the role of the Minister in managing the land reform programme.

COSTS

The parties, in the event of success, have asked for costs on a legal practitioner and client scale. This is one case where such punitive costs will not be justified. This is so because of the importance of this case, the outcome of which might not only benefit the parties to this case but others who are in similar situations. This case was earnestly and meaningfully argued by counsels.

CONCLUSION

For the reasons already stated in this judgment, this is not a proper case for the court to exercise its discretion in favour of granting the declaratory orders sought.

DISPOSITION

The application be and is hereby dismissed with costs on the ordinary scale.

Lovemore Madhuku Lawyers, applicant's legal practitioners
Madanhi, Mugadza & Co. Attorneys, first respondent's legal practitioners
Antonio & Dzvetero, second respondent's legal practitioners