PROSPER MUCHENJE
versus
TSITSI CHORUMA
and
THE MINISTER OF LANDS, AGRICULTURE, WATER,
CLIMATE AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 10 and 21 August 2022

Urgent Chamber Application

F Chimwawadzimba with *S Mukwekwezeke,* for applicant
E Jera with *P E Chivhenge,* for 1st respondent
C Chitekuteku with *B T Hungwe,* for 2nd respondent

TAGU J: The applicant is seeking an interdict against the first respondent pending an application for spoliation order mounted before the High Court under Case Number HC 3437/22. The application for a spoliation order under Case No. HC 3437/22 was set to be heard on 29 July 2022 before WAMAMBO J, to which it was postponed to 7th day of September 2022 after counsel for the first respondent had called in sick and that he was unable to attend to the hearing. The facts in the present application are materially the same with those in the founding affidavit of the application for a spoliation order against the first respondent in HC 3437/22 save for few variations.

The facts of this matter are that the applicant is a holder of an offer letter granted by the second respondent on 25June 2013 for Subdivision 3 of the Remainder of Amandas Estate of Mazowe District of Mashonaland Central Province for agricultural purposes. The Farm is approximately 50.00 hectares in extent. However, the map and the beacons on the ground in respect of the land offered to the applicant show that the area is actually 200.00 hectares. Faced with this anomaly the applicant continuously sought the assistance of the second respondent to rectify the hectares on the offer letter without success as the second respondent was taking time to do so. Later the first respondent came and alleged she had been offered plot 5 and in the process

attempted to take over part of lot 3 offered to applicant. Applicant and first respondent were at loggerheads and this led to applicant applying for a piece order against the first respondent which was granted by consent. Despite the order, the first respondent on 21 May 2022 invaded the applicant's farm and drilled a borehole without any lawful authority or applicant's consent. The applicant reacted by filling an urgent chamber application on 24 May 2022. This urgent chamber application was removed from the roll of urgent matters and is now enrolled as matter HC 3437/22 on the Roll of Opposed Matters and was to be heard on 29 July 2022 and subsequently postponed to 7 September 2022. Despite that matter HC 3437/22 was to be finalized, and was now set for 7 September 2022, on 31July the first respondent proceeded to send twelve builders to the applicant's farm to erect permanent structures, which conduct the applicant viewed as being uncalled for and is detrimental to his rights to due process. The applicant filed the present urgent chamber application on 2 August 2022 seeking the following provisional order:

"**TERMS OF FINAL ORDER SOUGHT**

That you show cause to this Honourable Court why a final order should not be made in the following terms-

a) That the first respondent is hereby interdicted from erecting structures or any developments on plot 3 and plot 5 pending the determination of the application for spoliation by the applicant under HC 3437/22.
b) The first respondent to pay costs of suit.

INTREIM RELIEF

Pending the determination of this matter, the applicant is granted the following relief-

a) The first respondent is hereby interdicted from interfering with the occupation of the applicant of plot 3 and plot 5 and from making any development of said plots until the final determination of the application for spoliation by the applicant under HC 3437/22.

SERVICE OF PROVISIONAL ORDER

That the Provisional order together with the accompanying urgent chamber application shall be served by the applicant's legal practitioners to the respondents."

The parties agreed that the court should make a ruling based on the papers filed by the parties. The first and second respondents filed their notices of opposition. The first respondent also filed her heads of argument.

Both respondents raised a point *in limine* that the matter is not urgent. The second respondent further raised two more points *in limine,* namely, that the matter is *lis pendens* and that the applicant has cited a non-existent respondent. The contention by the first respondent is that the

present application does not meet the requirements of urgency hence must be struck of the roll of urgent matters. Further he submitted that this application involving same parties, dealing with the same issues, was once brought as an urgent chamber application under HC 3437/22 was adjudged not urgent by MHURI J and struck off the roll of urgent matters. The submission by the second respondent is that the application does not meet the requirements of urgency such as *prima facie* right, apprehension of harm and balance of convenience. As to the fact that the matter is *lis pendens*, the second respondent submitted that this matter is being determined by another court of competent jurisdiction under case HC 3537/22.

IS THIS APPLICATION URGENT?

It has been said time without number, that for the court to determine whether or not the matter is urgent, the court must firstly be satisfied that the requirements of urgency have been satisfied or not. In so doing the court must be satisfied, from the founding affidavit and the certificate of urgency as well as the circumstances of the case that the requirements of urgency have been satisfied. These are-

a) The matter cannot wait when the need to act arises.
b) Irreparable prejudice will result if the matter is not dealt with straight away without delay.
c) There is *prima facie* evidence that the applicant treated the matter as urgent.
d) The applicant gives a sensible, rational and realistic explanation for any delay in taking action.
e) There is no satisfactory alternative remedy.

The leading case on the issue of whether a matter is urgent or not is *Kuvarega* v *Registrar –General & Anor* 1998 (1) ZLR 188 at 193 where CHATIKOBO J said-

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the dead-line draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

What is critical is for the court to determine, among other things, is what jolted the applicant to act? When did the need to act arise? When the need to act arise, what action did the applicant take? If the applicant did not act timeously, is there an explanation for the delay?

In the present case, the respondents are missing one important point. The point is that when the first respondent and applicant were at loggerheads over applicant's farm the Applicant filed

for a peace order against the first respondent and this was granted by consent. When despite the order being extant, the first respondent invaded the applicant's farm on 21May 2022 and drilled a borehole without any lawful authority or applicant's authority, applicant immediately reacted by filling an urgent chamber application under HC 3437/22 which was adjudged not urgent and removed from the roll of urgent matters and placed under the roll of Opposed matters under HC 3437/22. When HC 3437/22 was still to be determined, and a date had been set for hearing as 7th September 2022 which was known to all parties, the first respondent did not wait for the outcome of HC 3437/22, but on 31July 2022 sent twelve (12) builders to the farm under dispute to erect permanent structures. This is the conduct being complained of by the applicant in the present application. Applicant is not complaining about the events before 31 July 2022. The need to act in the present application therefore arose on 31July 2022. The current application was filed on 2 August 2022. There was no delay in filing this application. I found that the requirements of an urgent application was met. I dismiss the point *in limine* that the matter is not urgent.

IS THIS MATTER *LIS PENDENS*

Admittedly, the parties in HC 3437/22 and the present case are the same. The dispute in both cases a substantially, the same save for the fact that HC 3437/22 is an application for spoliation against the first respondent basing on the facts prior to 31st July 2022 while the relief being sought against the first respondent by the applicant is an interdict to stop the first respondent from putting up permanent structures on the applicant's farm until determination of HC 3437/22 basing on the facts from 31 July 2022. In my view the causes of action and the reliefs sought by applicant are different. The point *in limine* that the matter is *lis pendens* is without merit and I dismiss it.

DID APPLICANT CITE A NON-EXISTANT RESPONDENT?

The second respondent might have a valid point, but did not elucidate it. I say so because the second respondent merely said-

> "The applicant has cited a non-existent respondent
> The second respondent has been cited incorrectly."

That was all that the second respondent said. He did not specify who should have been cited as second respondent, or how the second respondent should have been cited. This point lacks clarity and I dismiss it.

The applicant is seeking a temporary order interdicting the first respondent from interfering with the occupation of the applicant of plot 3 and plot 5 and from making any developments of

said plots until the final determination of the application for spoliation by the applicant under HC 3437/22. Respondents on the other hand are opposing the application on the basis that the first respondent was offered lot 5 and therefore did not invade applicant's lot 3. The requisites for such an application are trite. These are *prima facies* right, though subject to doubt, apprehension of doubt, lack of alternative remedy and balance of convenience. In the present case it cannot be doubted that the applicant has at least shown that he has a *prima facie* right to be on lot 3 as shown by a copy of his offer letter. It can also not be doubted that the first respondent also have a *prima facie* right to be on the same farm as shown by the copy of her offer land to Lot 5. The problem is that the second respondent gave to the Applicant an offer for Lot 3 measuring 50.0 hectares yet the map and the beacons reflect the area as 200 hectares. Despite this anomaly being brought to the attention of the second respondent before the dispute arose between the parties the second respondent has been unhelpful to this extent. As to who owns which part of the farm can only be resolved after the determination of HC 3437/22. The first respondent cannot be allowed to continue with whatever activities she is doing at the farm before the determination of HC 3437/22.

To allow her to do so would result in irreparable harm to the applicant in the event HC 3437/22 is resolved in his favour. The first respondent would not suffer any harm as she will be allowed to proceed with her projects in the event she wins in HC3437/22. Currently, there is no alternative remedy to applicant as he has been to the second respondent's offices, to the Police, back to court and nothing has stopped. Finally, she is back to this court as a last resort. The balance of convenience favours the grant of an interim interdict against the respondents.

IT IS ORDERED THAT:

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms-

a) That the first respondent be and is hereby interdicted from erecting structures or any developments on plot 3 and plot 5 pending the determination of the application for spoliation by the applicant under HC 3437/22.
b) The first respondent to pay costs of suit.

INTERIM RELIEF GRANTED

Pending the determination of this matter, Applicant is granted the following relief-

a) The first respondent be and is hereby interdicted from interfering with the occupation of the applicant of plot 3 and plot 5 and from making any developments of said plots until the final determination of the application for spoliation by the applicant under HC 3437/22.

SERVICE OF PEROVISIONAL ORDER

That the provisional order together with the accompanying urgent chamber application shall be served by the applicant's legal practitioners to the respondents

TAGU J…….

Chimwamurombe Legal Practice, applicant's legal practitioners
Moyo & Jera, Legal Practitioners, first respondent's legal practitioners
Attorney-General's Office, second respondent's legal practitioners.