WONDER MAZORODZE
versus
GIDEON DZITIRO
and
NICHOLUS MUTUME
and
MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9 May 2018; 16 May 2018; 18 May 2018 and 6 February, 2019

Urgent Chamber Application

W. P Mandinde, for the applicant
R. Mafunda, for the 1st and 2nd respondent
R. M Mutandwa, for the 3rd respondent

CHITAPI J: This application became protracted and quite unnecessarily so but for the unmeritorious arguments raised by the respondents through their counsel. It is important to point out for the benefit of counsel who appeared for the respondents and for other litigants in general that urgent applications for a provisional order are intended invariably for the judge to grant provisional, interim or temporary relief to the applicant pending parties coming back to court to ventilate their arguments further in open court when the court will either discharge or confirm the provisional order which will have been granted by the judge hearing the urgent application in chambers. Counsel must be further reminded of the provisions of rule 246 (2) of the High Court Rules, 1971. That rule is clear in its wording that the judge is obligated to grant the provisional order applied for as prayed for or as varied depending on the facts and circumstances of each case. The obligation to grant the order as aforesaid is subject to the applicant's papers establishing a *prima facie* case. The judge granting the provisional may require that the applicant in whose favour the provisional order is granted provides such security as may to the judge appear adequate to cover for any losses or damages which may arise as a result of the grant of

the order. The return date of any interim relief granted may be anticipated by the respondent by arrangement with the applicant's counsel and registrar who arranges for a hearing date. If parties are not agreed or there is urgency which the respondent demonstrates or establishes, the respondent may by chamber application on notice to the applicant seek directions from a judge.

In addition to the judge having a discretion to order that the applicant should provide security as aforesaid, the judge may order that additional information or evidence be placed before him or her before granting the order to assist in the determination of whether or not to grant the order and if so; its content. Rule 246 (1) gives the judge power to call upon any person who may in the judge's opinion be able to assist in resolving the matter to appear before the judge in chambers or court as the judge may determine and for that person to provide on oath or otherwise such information as necessary to assist in the just resolution of the case. It was in terms of this rule that on the initial set down date on 9 May, 2018, I insisted on receiving the input of the third respondent in his capacity as the relevant Minister seized with land dispute issues. The third respondent's legal practitioner had not filed any papers for the reason that he had only seen the application papers on the set down date. He undertook to file the third respondent's papers by 11 May, 2018 and the application was postponed by consent to 16 May, 2018.

On 16 May, 2018, the 3rd respondent's counsel was not in attendance. For his part, first and second respondent's counsel had not been served with the third respondent's opposing papers. I directed that the first and second respondent's counsel should arrange with the third respondent's counsel to get copies of the third respondent's response. I postponed the hearing to 18 May, 2018. On 18 May, 2018, third respondent's counsel was in attendance. He apologized that he diarized a wrong time for the hearing on 16 May, 2018 and attended after the hearing had been postponed. He confirmed that he had since served the third respondent's response on both the applicant and the first and second respondent's counsel. He also apologized for filing the third respondent's response on 14 May, 2018 and not 11 May, 2018 as undertaken. He gave the excuse that the third respondent's affidavit had only been signed on 11 May, 2018 and could only be filed on the next court day which was 14 May, 2018. I condoned the third respondent's failures as the explanations given were reasonable.

There was also a further development in that by letter dated 16 May, 2018 addressed to the Honourable Judge Resident, a copy whereof was filed of record through the registry. The

first and second respondents complained that I was biased and acting in "cahoots" with the applicant. On sight of the letter, I directed that the hearing should be held in open court on resumption on 18 May, 2018. I also directed that the hearing be recorded on tapes for record purposes. I determined that since there was a complaint of impartiality and bias made against me, it was only proper that the hearing be moved from chambers where the doors are shut out to the general public to open court where the proceedings can be witnessed by any interested party. The fact that an application is brought or filed as a chamber application is a matter of procedure in that the application is made to a judge and not to the court. The incidences which arise from filing an application as a chamber application or as a court application are set out in the relevant rules of court. Suffice however that chamber applications are dealt with in accordance with rules 241 – 247 *mutatis mutandis* depending on the nature of the chamber application whilst court applications are dealt with in terms of rules 230 – 240. The point l make here is that there is no rule which obliges that chamber applications are heard in a judge's chambers as opposed to an open court. It is up to the judge presiding over a chamber application in which parties appear before such judge to determine the place of hearing which can either be in chambers or in court. The place of hearing of a chamber application does not change the character of the application.

Before dealing with the application proper it became necessary to deal with the preliminary issues raised by the first and second respondent's letter. I asked their counsel to address me on the letter. He expressed ignorance over the letter which he said he was not aware of. He asked to peruse it and proceeded to do so whereafter he asked for an indulgence to discuss the same with the first and second respondent. I gave him the indulgence. I asked counsel as to what the letter was intended to achieve and whether it was a request for my recusal. Counsel confirmed that indeed the first and second respondent's instructions to him were to move for my recusal and for the application to be placed before another judge for determination. Counsel submitted that he did not have any submissions to make in furtherance of the prayer for recusal other than what the first and second respondents had set out in their letter. I will reproduce their letter. It read as follows:-

"The Judge President
High Court of Zimbabwe
Harare

RE: COMPLAINT AGAINST JUDGE CHITAPI PRESIDING OVER CASE NUMBER

HC 3802/18

APPLICANT: WONDER MAZORODZE

RESPONDENT: GIDION DZITIRO, NICHOLAS MATUME AND 3RD RESPONDENT

MINISTRY OF LOCAL GOVT

We stand to complain to how our matter presided over by Judge Chitapi we as the 1st and 2nd respondents.

As we were before the afore mentioned judge on this date 16 May 2018 at 9 am where we expected our matter to be heard against the applicant, the 3rd respondent (Local Government legal practitioner) did not appear. We suspect the judge is working in cahoots with the applicant as the notice of opposition was not served to our lawyer.

NB Judge Chitapi openly predetermined the issue as he went on to allude that our issue was not a legal issue but rather a social matter which is determined by the position of the 3rd respondent's notice of opposition. He further went on to say to our lawyer that "I am giving you the last chance to talk to your clients or you may choose to challenge it as your clients do not have a *locus standi* on the matter before he postponed the matter to Friday 18/05/18.

Several complaints were raised in past years with letters copied to the former minister Kasukuwere and the permanent secretary with regards to corrupt activities by some local government officials namely Chikotera, Nyamowa, Shawatu, Nyamadzawu whose evidence of fraudulent shenanigans in cahoots with the menacing land barons in Harare South with documents misleading the court of law, Judge Chitapi failed to handle the matter in a professional manner as he openly said "mombe dzachimuti ndedza chimuti" thus referring to applicant as the owner before the matter was even heard.

We pray for justice to prevail over this matter to curb the corrupt behaviour of ministry officials and the legal system.

Yours faithfully

Gidion Dzitiro
Nicholas Mutume
cc Secretary of the judicial service commission
cc Minister of justice and legal parliamentary affairs"

In response to the recusal application both the applicant and third respondents counsels opposed the application on the grounds that no valid and cognizable grounds to seek the judge's recusal had been established by the first and second respondents. Mr *Mandinde* submitted that the first and second respondents did not enjoy the right to cherry pick a judge and that whilst they were entitled to apply for a judicial officer's recusal, they had to satisfy the judge that he had conducted himself in a manner that created an impression or perception that the judge would not be impartial in determining the matter. He cited the case *E R Donoghue* v *Country* CORK JJ

1910 (2) IR 271 where it was held that "mere flimsy, morbid suspicion should not be used as a ground for recusal. He submitted further that the application must be *bona fide*. He argued that the application should be dismissed with costs on the attorney and client scale.

Mr *Mutandwa* for the third respondent submitted that the application was frivolous and that the first and second respondent's allegations made in the letter were false. He submitted that contrary to what the first and second respondents alleged that the judge had said that they had no *locus standi*, the judge had not mentioned anything of the sort. He submitted that the case had not been dealt and that the judge had when postponing the hearing to enable the third respondent's papers to be filed only encouraged the parties to try and settle the matter. He took serious issue with allegations made in the letter against the third respondent and submitted that they were defamatory of the Minister. He likewise prayed for the dismissal of the application with costs on the legal practitioner and client scale.

In reply, first and second respondent's counsel submitted that his clients were just ordinary people and had taken a position on the matter. He submitted that there was no justification for an award of punitive costs. I did not hear him to submit that the application had merit. It was not surprising that counsel did not seek to advance the application other than submit that the first and second respondents stood by their letter. Indeed counsel was constrained not to admit that there were no grounds for recusal established as he was not instructed to concede so.

I dismissed the application for my recusal on the turn after submissions and indicated that I would furnish my reasons in the main judgment. I give the reasons as promised herein. It is trite that a judicial officer should apply the law in any case that is placed before him or her, "impartially, expeditiously, without fear, favour or judgment" as provided for in s 164 (1) of the constitution. The judicial officer before assuming duty takes the oath of office as detailed in the Third Schedule to the Constitution. The judicial officer's oath is that he or she "will uphold the constitution and administer justice to all persons alike, without fear, favour or prejudice in accordance with the constitution and the law." An application for the judicial officer's recusal is therefore a safeguard open to a litigant to invoke where the litigant can demonstrate or establish grounds to fear or hold that the judicial officer will not subject, afford or accord such litigant a fair hearing.

In *Standard Chartered Finance Zimbabwe Ltd* v *Geogias & Anor* 1998 (2) ZLR 547 (H), it was held that recusal applications involve the judicial officer whose recusal is sought being the judge in his or her own cause. This is so because the judicial officer has to assess the proceedings and decide whether there is something he said or did which can reasonably be perceived as being unjustifiably favouring one party at the expanse of the other. In *S* v *Nhire & Anor* HH 619/15 it was held by HUNGWE J that invariably judicial officers are faced with allegations of bias "some justified but most not borne by the facts." The judge reasoned that judicial officers should handle criticisms against them with sensitivity because if they fail to show sensitivity their reactions may unfortunately crystallize the criticisms into fact. I agree. I must note that in civil disputes, the claimant and respondent come to court because they have opposing views of how the dispute must be settled. In such a case, the loser is likely to and invariably concludes that the winner was favoured by the court. Thus, where a party raises an issue of recusal, the application must be handled dispartionately and without emotion lest unjustified allegations for seeking recusal become justified because the judicial officer has considered and determined the application rashly . A litigant has a right to express his or her dissatisfaction with the conduct of the judicial officer and where issues of recusal are raised, the judicial officer should not consider such challenges as an affront to their authority. I was minded to be alive to the above principles or pronouncements.

I reminded myself that whilst the litigant applying for recusal of the judicial officer bore the onus on a balance of probabilities to establish cognizable grounds at law to justify the recusal, the test to be applied was an objective one. The question to consider is whether right minded people would, given the proven circumstances giving rise to seeking the judicial officer's recusal hold that there is a likelihood of bias by the judicial officer. Mere surmise or conjecture is insufficient to justify recusal HUNGWE J in *Nhire & Anor (supra*) stated that the authorities enshrined the principle that "no reasonable man should, by reason of the situation or action of a judicial officer, have grounds for suspecting that justice will not be administered in an impartial and unbiased manner." Again I am in agreement with the *dicta* aforesaid. I remained mindful that notwithstanding the litigants' right to apply for the recusal of the judicial officer, such application should be made *bona fide* lest the integrity and independence of the judiciary be unjustifiably undermined leading to the justice dispensation being rendered *moribund.* Frivolous

and vexations applications not based on substantive grounds should be dismissed and the justice system allowed to flow its course. The system is in any effect protective of the litigant in that subject to the rules of court, a quality control mechanism of appeal ensures that the judge's decision is scrutinized and corrected where it is shown to be wrong.

In *casu*, the first and second respondents' legal practitioner could not motivate the recusal application. The allegations made in the letter are patently false. It is not correct that on 16 May 2018, the application was heard nor that there was a hearing conducted before their legal practitioner had been served with the third respondent's opposing papers. The hearing was postponed to 18 May 2018 and on that date first and second respondents' legal practitioner confirmed having been served with the third respondent's opposing papers. As regards the allegation that a ruling that the first and second respondents had no *locus standi* was made is concerned, clearly this issue did not arise for determination in as much as the hearing did not commence prior to 18 May 2018 as on 9 and 16 May, the hearing was postponement. The reference to Chimuti's cattle belonging to Chimuti as alleged is again not susceptible to sensible interpretation as a ground for bias and even from a literal translation, it would be a point of fact that if property is proved to belong to a particular person ("Chimuti"), them it is that person's property. As indicated, one is not clear as to how such a comment even if made would lead a reasonable person to perceive bias on the part of the judicial officer. The submissions made in the letter on illegal practices in the third respondent Ministry have no bearing on my recusal. It was therefore eminently clear that the application for recusal had no substance and was dismissed.

Regarding costs of the dismissed application. I was not minded to grant an order for costs as prayed for by the applicant and the third respondent's counsel. I considered that the letter which was used to support the application was penned by the first and second respondents in person. They are laymen. They ought however to have consulted their counsel. Their counsel advisedly and wisely did not motivate the application himself meaning that he did not find it supportable or meritorious. He simply carried out his instruction that its contents be taken as the basis for the application. I was of the view that I should not take a hardline stance and be insensitive to the first and second respondent's fears though not properly grounded. In my judgment, the costs should be in the cause.

Having dealt with the preliminary issues which arose, the hearing proper commenced and I deal with the case. The applicant claimed the following relief as set out in the provisional order:

"TERMS OF FINAL ORDER SOUGHT

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

(i) The applicant be and is hereby declared the rightful and lawful occupant and or possessor of property known as Stand No. 6044, Retreat, Harare.
(ii) The 1st and 2nd Respondents be and are hereby interdicted from carrying out any development or activities and coming to the applicant's property known as Stand No. 6044 Retreat, Harare.
(iii) The 1st and 2nd Respondents pays costs on an attorney-client scale.

INTERRIM RELIEF GRANTED

Pending argument and finalization of this application the applicants are granted the following interim relief:

(i) The Respondents, their agents, employees, proxies or any person(s) acting on their instruction and any other person claiming authority or title be and are hereby forthwith interdicted from erecting any structure or introduce any developments to certain piece of land situate in the District of Salisbury called Stand No. 6044 Retreat, Harare

1. SERVICE OF THE PROSISIONAL ORDER

A copy of this application together with the provisional Order shall be served upon the respondents by the Applicant's legal Practitioners or an officer in their employment.

At the onset of argument the applicant's counsel withdrew the prayer for costs in the interim relief. He was advised to because costs are not ordinarily granted in a provisional order but are determined on the return date.

The applicant averred that he is a member of a co-operative called Hatidzokereshure Housing Co-operative. The co-operative was allocated land to parcel out to its members by the third respondent. With the third respondent's blessing, the co-operative allocated the applicant a piece of land called stand 6044 Retreat, Harare. He attached to his application, as annexure E a lease agreement executed between him and the third respondent dated 28 March, 2018. In terms of the lease agreement, the applicant in terms of clause 2, the applicant leased stand 6044 retreat, Harare for a period deemed to have commenced on 1 October 2017 for a period of 6 years extendable at a rental of $474 per month. The applicant as lessee was obliged to erect outbuildings of not less than $30 000 in value and to comply with building by law of the City of

Harare. The applicant averred that he took possession and occupation of the property from the time of execution of the lease agreement. He alleged that he has enjoyed peaceful and undisturbed possession of the stand until 15 April, 2018 when he was alerted that there were developments taking place at the leased property. On visitation of the stand, he found people erecting a structure on the stand. The people working on the stand were the first and second respondents. On questioning them as to why they were interfering with his occupational rights, the applicant averred that he did not receive from them any satisfactory explanation. The applicant averred that the first and second respondents boasted of their political connections and that he became afraid to lose his stand. He reported the matter at Waterfalls Police Station but the report was not taken as the police considered the matter a civil dispute, so the applicant averred in his founding affidavit.

In filing the application, the applicant averred that he did so as this was the only option he had to protect his right. He averred that the first and second respondents had no rights over the property and were acting without the applicant's consent in interfering with the applicant's occupational rights. The applicant deposed that the first and second respondents had taken the law into their own hands and that their conduct be censured by the court.

The first and second respondent in their opposing affidavit filed on 8 May 2018 averred that they are residents of Retreat Farm 315. They purported that they were overseers of developments which the owner of stand 6044 retreat who was in South Africa, had permitted that they be done by a South African Investor. The investor was supposed to build a house on the Stand. They averred that the third respondent had made double allocations of stands in the area hence causing confusion. They attached as annexure 2 to their opposing affidavit, a copy of a partnership agreement purportedly executed between the Ministry of Local Government, Rural and Urban Development and Harare South Housing Union (Apex Board) dated 2 August 2012. A perusal of the main provisions of the agreement shows that the Ministry as a partner to a project to develop "Subdivision A of retreat and Remainder of Retreat and portion of Remainder of Eyerslone 'which land it owned would contribute to the partnership the land valued at its intrinsic value. The Ministry would facilitate survey of the land and issue title deeds. Harare South Housing Union (Apex Board) "would design, engineer, procure finance and develop the requisite infrastructure". Members of the Housing Union would be beneficiaries and would be

obliged to make payments upon allocation for construction of infrastructure and for the land itself. They would get title deeds to any allocated property after making full payment for the land and infrastructure development. Significantly, clause 5.1 of the agreement provided that the land would remain state land until transferred to beneficiaries.

The first and second respondents attached as annexure I a letter addressed to one Edith Chibhamu dated 8 October 2016. The letter was written by Harare South Housing Apex Co-operative Society Limited and purported to allocate stand 6044 Retreat to the said Edith Chibhamu. It also authorized Edith Chibhamu to carry our developments in the nature of a "temporary structure awaiting the certificate of compliance after completion of onsite infrastructure. This has been necessitated due to parallel developments of housing co-operatives empowerment" However clause 3.6 of annexure 2 clearly provided that the Ministry was the one which would upon submission by the Housing Co-operative of a list of paid up beneficiaries "process lease agreements in favour of the beneficiaries. Annexure I therefore could not constitute a valid document of allocation because an allocated beneficiary had to have a lease agreement issued by the Ministry.

The third respondent in its opposing affidavit averred that the stand 315 Retreat had not been allocated to the Harare South Housing Union. The Secretary for Local Government Public Works and National Housing confirmed in a letter dated 4 February 2016 that a meeting had been held with the co-operative on 29 January 2016 at which the allocation had been withdrawn. As regards the partnership agreement Annexure 2 to the first and second respondent's papers, the third respondent averred that the document was invalid because the entity referred to as Harare South Housing Union (Apex Board) was a non-existent entity. The third respondent averred that as owner of the land, it only recognized the applicant as lessee in terms of annexure E to the applicant's founding affidavit.

Despite the third respondent clarifying the position in relation to rights of occupation of the disputed property, the first and second respondents counsel to my utter disbelief raised the issue that the third respondent was not entitled at law to issue lease agreements or allocate Urban Land. For whatever it was worth and at his instance counsel offered to file heads of argument to support his argument in this regard. I acceded to the request. The applicant and the third respondents' counsel filed heads of argument to address this point. I do not find it necessary to

interrogate the point argued or to comment on its relevance in any greater detail. What I however find absurd is that the first and second respondents through their counsel approbate and reprobate at the same time. In their opposing affidavits, they rely on a partnership agreement whose provisions provide that the Minister or Ministry concerned will issue lease agreements to paid up beneficiaries yet in the same vein they argue that the Minister or Ministry does not have such powers when the lease agreement in favour of the applicant was issued. It is a recognisable and accepted principle of our law that a party cannot approbate and reprobate a course or position in the same proceedings. See MATHONSI J in *Wanganayi* v *Mudukuti* HC 155/17 and the cited cases of *S* v *Marutse* 1990 (2) ZLR 370; *Archipelago (Pvt) Ltd* v *Local Authorities Pension Fund and Anor* SC 30/13; *Fulner* v *Freeman* 1985 (3) SA 555 C. In considering whether the applicants papers establish a *prima facie* case, I proceed to determine the application on the understanding that the role of the third respondent in granting rights to the disputed land was *prima facie* established. In the case of the applicant he produced a lease agreement issued in his favour by the third respondent whilst the first and second respondent did not produce such a one in their favour or in favour of their alleged principal.

At the end of argument, I must record that the connection between the first and second respondent to the disputed property was not established. Their authority to represent their alleged principal Edith Chibhamu was not established. They did not produce any evidence documentary or otherwise to show that they had a right to interfere in the applicants' possession and enjoyment of rights over the disputed stand other than to make a bold assertion that there were overseers for Edith Chibhamu. They went on to allege corruption and other misdeeds on the part of the third respondent without laying evidence for their conclusions. Other than to state that they are residents of Retreat Farm 315, nothing of substance placed before me shows that they are entitled to interfere with the goings on at stand 6044 *in casu*. It was wholly insufficient to prove their *locus standi* for the first and second applicant to merely state as they did in para 3 of the supporting affidavit they had been asked by the owner of the stand to oversee foreign investors who were supposed to build a house.

In para 7 of the opposing affidavits, the first and second respondents deposed that the applicant had been allocated the stand by "people who were invading the land which they did not

own". In para 8, they aver that the allocation of the stand to the applicant was fraudulent, an assertion denied by the third respondent.

In paragraph 9, they aver that the applicant "is only acting to prevent the project while all along he had been in slumber." Implicit in this averment is the tacit acceptance that there is activity not authorized by the applicant which the applicant seeks to prevent from continuance. They allege that the applicant has an alternative remedy of damages in para 11 of the opposing affidavit. This of course is a strange submission because a reasonable person is not expected to look by whilst his or her rights are being violated simply because he can claim damages later. A reasonable person whose rights are being violated is expected to act immediately to protect or safeguard them.

Lastly and in para 12 of the opposing affidavit the first and second respondents aver that they are not the correct respondents and have been wrongly brought before the court. Their deposition is inconsistent with the stance which they have taken. If they have nothing to do with the matter, then why take all the trouble to challenge the applicant's claims to the property. Why challenge the third respondent's rights or entitlements to deal in the land. Why not simply aver that they have not interfered in the affairs concerning the stand in question. The first and second respondents again approbate and reprobate at the same time. They do not deny that they have a presence on the stand. They on the contrary seek to protect the developments which the applicant wishes to have stopped. They aver that the developments should be allowed to go on. The first and second respondents were in my view coy about who exactly they are in this dispute and what their interest in the property in question is.

I commented earlier in the reasons for judgment that the first and second respondents through their counsel presented spurious arguments which unnecessarily prolonged the hearing. They did not seem to appreciate the purport of a *prima facie* case and the fact that once a *prima facie* case is established, the judge must grant the order sought or as varied.

In *Zimbabwe Open University* v *Magaramombe & Another* SC 20/12, CHIDYAUSIKU CJ set out the factors to be taken into account in considering the grant of interim relief as

(i) Whether or not the party seeking the relief has a *prima facie* right.

(ii) Whether or not the applicant will suffer irreparable harm.

(iii) The balance of convenience.

In casu, the applicant has established a *prima facie* right to protect the property in question from being interfered with to the detriment of or in violation of his rights of possession and use. The construction of any developments on the stand done without his consent will result in his suffering irreparable harm. Irreparable harm is not an absolute or abstract statement. It must be understood in context and considered together with the balance of convenience. A property owner cannot stand by whilst his property is being decimated or be denied relief because he or she can reverse the damage done and claim damages. Were such a construction to be adopted, it would mean that every harm is in fact reparable by reversal or a damages award. It would make a mockery of the justice and court system were courts to be seen not stopping violations of rights on the basis that the harm caused by the violation is reparable. Where a law has been broken the principle of irreparable harm having to be established before interim can be granted to arrest the wrong does not apply as to do so would be to perpetuate a wrong and hold that the wrong could always be redressed in due course. *In casu* the applicant by virtue of the lease agreement granted by the third respondent has established a *prima facie* right and will suffer a constitutional violation of the right not to have his property entered without permission as given under s 57 (a) of the Constitution. The balance of convenience clearly favours that an order sought by the applicant should issue in the interim to protect the property rights of the applicant. I was not persuaded by the feeble argument that the application is not urgent. The first and second respondent did not deny that the right of the applicant were being interfered with. They challenged the validity of the applicant's rights of possession and use of the property. For as long there was a proven or established continued violation of the applicant's rights, urgent relief would be appropriate to seek.

Consequently, the provisional order is granted in terms of the draft as amended by the deletion of para (i) in the interim relief.

Sibanda & Partners, applicant's legal practitioners
Chengetai Law Chambers, 1st and 2nd respondent's legal practitioners
Civil Division, Attorney General Office, 3rd respondent's practitioners