VODAGE INVESTMENTS (PRIVATE) LIMITED
versus
LIFORT TORO
and
MANYAME RURAL DISTRICT COUNCIL
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 4 March 2015 & 25 March 2015

Opposed Application

T Tandi, for the applicant
J Koto, for the 1st respondent

CHIGUMBA J: Section 72(2) of the Constitution[1] enshrines the right to compulsory acquisition of agricultural land by the State, where the land is required for public purposes, such as settlement for agricultural or other purposes, land reorganization or relocation of dispossessed persons, through a notice published in the government gazette identifying the land. With effect from the date of publication, the land becomes fully vested in the State. Agricultural land means land used or suitable for agriculture, but does not include communal land or land within the boundaries of an urban local authority or within a township. The applicant has approached this court seeking an order for the eviction of the first respondent and all those claiming occupation through him from Subdivision C and D of Beatrice, Central Beatrice, as well as costs of suit. The basis of the application is a proclamation[2] handed down by the President for the benefit of the second respondent, a Rural District Council, which designated the land in question to be urban land whereas the land had previously been gazetted as agricultural land. The issue that falls for determination is whether Proclamation 3 of 2012 trumps an offer letter issued to the first

[1] Amendment (No 20) Act of 2013

[2] Proclamation number 3 of 2012 SI 157-2012

respondent in respect to the same piece of land. Put differently, what is the effect of a proclamation that agricultural land be subsequently designated to be urban land, on the rights of the holder of an offer letter to the agricultural land?

The applicant is a company which is duly registered in accordance with the law of Zimbabwe. The first respondent is the current occupier of the piece of land known as Subdivision C and D Beatrice central, Beatrice. The second respondent is a Rural District Council. The third respondent is the Minister who is mandated to administer all agricultural land in Zimbabwe, and who was cited in his official capacity. Mr Leornard Matiza, who deposed to the founding affidavit, averred that the basis of the application for eviction is that on 30 July 2013, the applicant entered into an agreement of sale/lease with the second respondent as the seller/lessor. It was a lease agreement with an option to purchase. The lease number is A639/2013. The full purchase price of the property is listed as US$176 000-00. It was acknowledged that the applicant had paid a deposit to the second respondent of ZW$150 000-00 in 2003. The applicant exercised its option in terms of clause 18 of the lease agreement and purchased the property from the second respondent.

It was averred on behalf of the applicant, that the presence of the first respondent on the property had hindered it and prevented it from taking occupation despite having bought the property from the second respondent. The applicant averred that the first respondent had an offer letter which was withdrawn on 11 January 2012. The offer letter was cancelled in terms of the ***Gazetted Land (Consequential Provisions) Act [Chapter 20: 28]***. It was submitted that the first respondent no longer had any lawful authority to hold or use the land, and lost his rights over the piece of land, on the date that the offer letter was cancelled. It was submitted that if the first respondent has another valid offer letter, it is invalidated because the third respondent's authority over the property was ousted by Proclamation 3 of 2012 SI 157/2012 (the proclamation), which handed over the property to the second respondent.

The first respondent filed a notice of opposition on 30 September 2014. He raised a preliminary point that the matter was *res judicata*. On the merits, he averred that he was in occupation when the parties entered into their lease agreement solely to defeat his rights in the piece of land. The authenticity of the lease agreement was challenged, and the applicant was challenged to substantiate the claim that it had bought the piece of land from the second

respondent. The applicant was challenged to produce proof of payment, and to provide an explanation as to why he paid a deposit for the piece of land in 2003 before he signed the agreement in 2013. The first respondent attached an offer letter dated 16 July 2012 as proof that he was allocated the piece of land under the A2 model. He averred that he has a current offer letter. The third respondent filed an opposing affidavit on the first of October 2014. The Director of resettlement in the Ministry of Lands and Rural Resettlement, Mr Elias Ziro deposed to the affidavit on behalf of the third respondent. It was averred that the land in question is now designated as urban land by the proclamation. It was averred further, that, as from the date of the proclamation the offer letter holder, the first respondent, no longer had title, because the land ceased to be agricultural land, and title to urban land does not fall under the same regime as title to agricultural land.

The applicant's answering affidavit was filed on 10 November 2014. It was denied that these proceedings are *res judicata*. The applicant averred that the proceedings before the magistrates court dismissed an application for summary judgment, which is an interlocutory order, and did not dispose of the matter on the merits. In any event the proceedings before the magistrate's court were withdrawn in terms of a notice of withdrawal dated 10 October 2014. The applicant reiterated that the proclamation, as read with s 139 of the ***Rural District Councils Act*** *[Chapter 29: 13]*, effectively bestows ownership of the piece of land to the applicant. It was submitted that the offer letter was invalidated by operation of law. It fell away, and ceased to be valid. The offer letter ceased to operate when the land was designated as urban land, because offer letters are issued in terms of the provisions of the ***Agricultural Settlement Act*** *[Chapter 20: 01]*, which do not apply to urban land.

At the hearing of the matter the first respondent insisted on being heard on the merits of the preliminary point that these proceedings are *res judicata*. The court was referred to the case of *Chimpondah & Anor* v *Muvami* [3] , where the court stated that:

> "…our law recognizes that once a dispute between the same parties has been exhausted by a competent court, it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and

[3] HH81-2007

> will bring the administration of justice into disrepute…for the plea to be upheld, the matter must have been finally and definitively dealt with in prior proceedings…in other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties by making a finding in law and or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings…***a judgment founded purely on adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter, does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved."*** (my emphasis)

The applicant submitted that the issue of *res judicata* does not arise in these circumstances, and set out the constituent elements of the defence as follows:

(a) An earlier judicial decision

(b) Which is final and definitive on the merits of the matter

(c) Involving the same parties

(d) Where the cause of action in both cases is the same

(e) Seeking the same relief.

I agree with the applicant's contention that dismissal of an application for summary judgment is not a decision which is final and definitive of the merits of the matter. It is a judgment 'founded purely on adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter', *Chimpondah & Anor* v *Muvhamu (supra).* A dismissal of an application for summary judgment is merely an indication that the requirements of summary judgment were not established to the satisfaction of the court. The court will have made a finding that the applicant is not entitled to use the procedure of summary judgment to obtain relief. Such an applicant is at liberty to proceed in terms of the normal court rules to obtain relief. Summary judgment is a procedure whose purpose is to curtail proceedings and provide quick relief to a litigant who has a clear-cut case, who is faced with a defendant who enters appearance to defend merely to delay the inevitable. Summary judgment is 'merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved'. The preliminary point raised is entirely devoid of merit. The proceedings before the magistrate's court have been withdrawn. This matter is not *res judicata*.

The first respondent took a second *point in limine,* that the applicant had no *locus standi* to bring these proceedings, and relied on the case of *Pedzisa* v *Chikonyora*[4], as authority for this proposition. The facts of this case are that the respondent had entered into an agreement to "purchase" on a lease-to-buy basis from the owner-lessor a plot of land with an incomplete dwelling house. Under the agreement, title to this property would only pass to the respondent after certain conditions had been met. These conditions had not yet been fulfilled. One of the terms of the agreement was that the lessee-to-buy was prohibited from sub-leasing or assigning the property to a third party without the written consent of the owner-lessor. After the agreement had been entered into, the respondent did not move into the house, as he had somewhere else to live. Thereafter he either sub-let this property to the appellant or assigned the property to him by selling to him his right of occupation together with the eventual right to take title. The respondent did this without first obtaining the consent of the owner-lessor to this sub-letting or assignment.

Sometime later, the respondent brought an action for the eviction of the appellant from the premises. The main issue on appeal was whether the lessee-to-buy had locus standi to sue to evict the appellant without having obtained a cession of action from the owner-lessor. It was held, that the terms of the lease-to-buy agreement were such that the lessee initially acquired only a personal right exercisable against the owner-lessor and not against third parties without recourse to the owner-lessor. This personal right entitled him to delivery of vacant possession of the property from the owner-lessor. But once the lessee had been given vacant possession of the property and had assumed physical control over it, he then acquired a real right entitling him to evict anyone who wrongfully occupied the property such as a trespasser. Although the respondent had not actually moved into the house, he had acquired control over the unoccupied property. He had thus acquired a real right over the property. It was held therefore, that the respondent had *locus standi* to sue for the eviction of the appellant, even though he had not obtained a cession of action from the registered owner-lessor. It is my view that this case does

[4] 1992 (2) ZLR 445 (SC)

not assist the first respondent to make a good case that the applicant does not have the requisite *locus standi* in the circumstances of this case. The applicant is a lease holder and purchaser of the piece of land, in terms of the Proclamation, which vested the land in the second respondent which subsequently sold it to him. The *Pedzisa* case regrettably has no application to the circumstances of this case. This case does not turn on the distinction between real rights and personal rights. It turns on the issue of the effect of the proclamation on the offer letter issued to the first respondent by the third respondent. It turns on the legal implications of title to urban land versus agricultural land, and whether the classification of land as urban or agricultural is interchangeable, and if so what the implications are.

I find myself in agreement with the submissions made on behalf of the applicant, that the legal position with regards to *locus standi* was summarized in the case of Zimbabwe *Teachers Association & Ors* v *Minister of Education*[5] at 57B, as follows:

> "It is well settled that, in order to justify its participation in a suit such as the present, a party such as second applicant has to show that it has a ***direct and substantial interest*** in the subject-matter and outcome of the application. In regard to the concept of such a "direct and substantial interest", CORBETT J in United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another 1972 (4) SA 409 (C) quoted with approval the view expressed in Henri Viljoen (Pty) Ltd v Awerbuch Brothers 1953 (2) SA 151(O) that it connoted -
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> '. . . an interest in the right which is the subject-matter of the litigation and . . . not thereby a financial interest which is only an indirect interest in such litigation.' and then went on to say:
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> 'This view of what constitutes a direct and substantial interest has been referred to and adopted in a number of subsequent decisions, including two in this Division . . . and it is generally accepted that what is required is a legal interest in the subject-matter of the action which could be prejudicially affected by the judgment of the Court This requirement of a legal interest as opposed to a financial or commercial interest also received judicial endorsement in Anderson v Gordik Organisation 1962 (2) SA 68 (D) at 72B-E."

From these authorities it is apparent what the legal approach to the issue of *locus standi* should be. The petitioners must show that they have a direct and substantial interest in the subject matter and what is required is a legal interest in the subject matter of the action. I proceed now to consider the application of these principles to the facts of the matter before me. Clearly

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[5] 1990 (2) ZLR 48

the applicant has a direct and substantial interest in this matter; whether it be derived from a lease agreement or from an agreement of sale will be determined when the merits of the matter are determined. The preliminary point taken is entirely devoid of merits and is dismissed. I will now turn to the merits of the matter. It was submitted on behalf of the applicant, that the issue that falls for determination by this court is whether the first respondent can continue to rely on an offer letter that has been terminated by operation of law. It is common cause that the piece of land is no longer agricultural land, or gazetted land. The third respondent has refused to revoke the offer letter, despite no longer having any interest or title in the piece of land. It was alleged that the first respondent has remained in occupation without the lawful authority of the second respondent, who now hold the land as urban land, in terms of the proclamation 3/2012- SI 157-2012 which declared that:

"…AND WHEREAS I consider it desirable to alter the boundary of the Manyame Rural District Council by ***excising*** Subdivision C [Beatrice Showground] and Subdivision D of Beatrice Central from Ward 14 and incorporate them in ward 13 of Manyame Rural District council therefrom…"The word excise means 'to delete part of something…to remove something by cutting…". So the effect of the proclamation was to alter the boundaries.

It was further submitted that the effect of the Proclamation, when read with s 139 and s 10(4) (c) of the ***Rural Distrcict Councils Act*** *[Chapter 29: 13]* is to immediately vest the land in the second respondent. Section 10 provides that:

> "(2) Notwithstanding anything contained in the Urban Councils Act [*Chapter 29:15*], the establishment of a council for a district in which there are one or more areas under the jurisdiction of a local authority ***shall have the effect of incorporating those areas within the council area and of vesting in the council the administration, control or management of any local government area within that district, unless the proclamation establishing the council expressly provides the contrary.***
> (3) …
> *(a)*…
> (*b*)…
> (4) …Where the whole or part of a council area is a former local authority area, the following provisions shall apply in addition to any apportionment, direction, authority, declaration or requirement made or given in terms of subsection (3)—
> (*a*)…
> *(b*)…
> *(c*) ***all property, movable or immovable, and all moneys of or vested in the former local authority shall be vested in and belong to the council, without formal conveyance or assignment*** of the estate and interest of the former local authority, and, in the case of immovable

property so vested, a Registrar of Deeds shall, without payment of any fee or duty, at the request of the council and on being satisfied with the title of the council to such property, register the council as owner of such property in lieu of the former local authority and shall make the appropriate amendments in his registers and on the title deeds relating to such property" (my emphasis)

Section 139 provides as follows:

"**139 Alteration of councils and wards and abolition of councils**
(1) Subject to this Part, whenever the President considers it desirable he may, by proclamation in the *Gazette*, exercise all or any of the following powers—
(*a*) alter the name of a council;
(*b*) alter a council area by adding any area thereto and additionally, or alternatively, subtracting any area
therefrom, and redefine the council area;
(*c*) alter the wards of a council area by adding any area thereto and additionally, or alternatively, subtracting any area therefrom;
(*d*) re-divide the council area into any number of wards;
(*e*) abolish a council;
(*f*) determine any question arising from any exercise of powers in terms of this subsection, and give directions relating to such determination.

Regrettably the court did not find any of the first respondent's submissions on the merits instructive. In terms of the ***Gazetted Land (Consequential Provisions) Act,*** no person may hold use or occupy gazette land without lawful authority. Section 1 of this act provides that:

"lawful authority" means—
(*a*) an offer letter; or
(*b*) a permit; or
(*c*) a land settlement lease;
and "lawfully authorised" shall be construed accordingly;
"offer letter" means a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;

It is common cause that the first respondent had an offer letter which lawfully authorized him to occupy and utilize the piece of land for agricultural purposes. The Supreme Court has given guidance in respect of the holding of title to agricultural land in the leading case of ***Commercial Farmers Union & 9 Ors*** **v** ***Minister of Lands and Rural Resettlement & 6 Ors***[6] *(CFU)* The Supreme Court made the following observation in the CFU case:

[6] SC 31-2000 @p19: 'lawful authority' means –(a)an offer letter; or(b) a permit; or(c) land settlement lease; and 'lawfully authorised' shall be construed accordingly; "'offer letter' means a letter issued by the acquiring authority to

> "The Legislature in enacting the above provision clearly intended to confer on the acquiring authority the power to issue to individuals offer letters which would entitle the individuals to occupy and use the land described in those offer letters…"
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> "The Minister has unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to choose… Having concluded that the Minister has the legal power or authority to issue an offer letter, permit or land settlement lease, it follows that the holders of those document have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease. An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the rights of possession and occupation on it. The holders of offer letters or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights as may be applicable in each particular case. See *Alan McGregor* v *Nehemiah Saburi & Ors*[7].

My reading of s 139, as read with ss 10(2) and 10(4) (c) of the Rural District Council Act is that the proclamation had the effect of incorporating those areas it identified within the council area and of vesting in the council the administration, control or management of the piece of land in question. The effect of the proclamation was to vest in the council, without formal conveyance, the piece of land in question. In terms of the ***Gazetted Land (Consequential Provisions) Act,*** no person may hold use or occupy gazette land without lawful authority. Once the proclamation was gazetted, the first respondent no longer had lawful authority to remain on the piece of land. I am fortified in this view by the opposing affidavit filed on behalf of the third respondent which contains an admission that the land is now urban by virtue of Proclamation 2 of 2012. The sentiments expressed in that affidavit, that the offer letter holder needs to be relocated before anything can take place on the property in question have no basis at law. There is no offer letter holder to speak of. Urban land does not fall under the Minister of Lands & Rural

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any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;

[7] HH 33-11

Resettlement. Title to urban land cannot be the same as title to agricultural land. Once the piece of land ceased to be agricultural land, on the date of the Proclamation, the offer letter fell away by operation of the law. There is no need for the offer letter to be cancelled. It became invalid at law, on the day of the gazetting of the proclamation.

It is this court's considered view that officials of the third respondent, who have shown a frequent tendency to confuse issues with regards to the allocation of agricultural land and the issue, revocation and alteration of offer letters and other title to agricultural land, should desist from this dishonourable practice forthwith. Clearly after admitting that the piece of land in question was now urban, the legal position is that only agricultural land can be held via the auspices of an offer letter, so there was no longer any offer letter to speak of. The need of the third respondent to find suitable land for the first respondent is one of the issues that ought to have been brought to the attention of the President, before the Proclamation was gazetted. It does not constitute a valid legal shield, to the first respondent, that he can use to resist eviction, by the applicant, which has validly been allocated the piece of land, by the second respondent, in whom the piece of land vested as at the date on which the Proclamation was gazetted.

It follows that the applicant is a genuine and legitimate title holder to the piece of urban land, and entitled to the relief that it seeks. Accordingly IT IS HEREBY ORDERED THAT;

1. The first respondent and all those claiming occupation through him be and are evicted from Subdivision C & D Beatrice Central, Beatrice.
2. The first respondent to pay costs of suit on a party and party scale.

Messrs Kantor & Immerman, applicant's legal practitioners
Messrs Koto & Company, 1st Respondent's legal practitioners