MAPFUMO GREGORY MUPFUMIRA
versus
HONOURABLE B. GEZA
and
PASTOR MLEYA
and
TASHINGA SIMONJE
and
ROBGERT MAZURU
and
STANLEY KAPATA
and
MINISTER OF LANDS AND RURAL SETTLEMENT
and
CHIEF LANDS OFFICER
(MASHONALAND CENTRAL PROVINCE)

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8, 15 19 December 2016 & 25 January, 2017

Urgent Chamber Application

V. Madzima, for the applicant
T. Hungwe, for the 1st – 5th respondents
K. Chimuti, for the 6th -7th respondents

CHITAPI J: In this application the applicant seeks the following relief as set out in his draft provisional order attached to his application:

> "TERMS OF FINAL ORDER SOUGHT
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> That you show cause to this Honourable Court why a final order should not be made in the following terms:
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> 1. That it be and is hereby declared that Applicant, his representatives, employees and invitees are entitled to remain in peaceful and undisturbed, possession, occupation and use of Subdivision 2 Barwick H Farm, Mazowe Districts of Mashonaland Central Province (Hereinafter called "Barwich H farm" until such time as Applicant – should it be necessary or expedient-is lawfully evicted from the property in accordance with the due process of law.
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> 2. That the First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondent and all other persons through them are interdicted from in any way interfering with the normal farming

and business operations by the Applicant, his invitees, employees or agents or in any way impairing or obstructing the free movement of such persons and their property including but without limitation to machinery, equipment and animals.

3. That the Respondents pay the costs of this Application jointly and severally the one paying the other to be absolved.

INTERIM RELIEF

THE Applicants are granted the following relief:

1. Pending the return date, the 1st, 2nd, 3rd, 4th 5th, 6th and 7th Respondents and all other persons claiming occupation or possession through the 1st Respondent or any other person occupying Barwick H Farm without the knowledge and consent of Applicant shall forthwith vacate Barwick H farm and shall forthwith remove all property introduced by them onto Barwick H Farm so that the status quo ante to possession of Barwick H Farm by Applicants as at 29th November, 2016 be and hereby restored.

   To the extent that it becomes necessary, the Deputy Sheriff is hereby authorised and empowered to attend to the eviction and removal of any person and their property so occupying Barwick H Farm without the knowledge and consent of Applicant. Pursuant thereto, the Deputy Sheriff be and is hereby authorized to enlist the assistance of any member of the Zimbabwean Republic Police Force who are directed to provide such assistance to the Deputy Sheriff so as to ensure that the provisions of this order are executed and implemented in full.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to the Applicant's Legal Practitioners or to them Deputy Sheriff to attend to the service of this order forthwith upon the Respondents in accordance with the rules of the High Court."

The first and through him the second – fifth respondents opposed the application and filed opposing affidavits. The first respondent filed the main opposing affidavit with the second-fifth filing verifying affidavits confirming and adopting the depositions made by the first respondent.

The application was initially set down for hearing on 8 December, 2016. I postponed the hearing by consent to 15 December 2016 to allow time to the respondents to file their opposing papers. I also directed that the sixth and seventh respondents should be served with notification of the next date of hearing as they were not in attendance. There was also no proof of service filed of record to indicate that the sixth and seventh respondents had been served with the notice of hearing.

I tasked Mr *Madzima* for the applicant as the applicant's legal practitioner to ensure that the sixth and seventh respondents had been served with the notice of hearing. I indicated

to the parties then that after reading through the application, it was clear to me that the sixth and seventh respondents would greatly assist me to resolve the matter because it involved rights of possession to land allocated by and under the auspices of the sixth respondent. The applicant had also attached to his papers, correspondence relating to the warring parties rights of occupation written by the seventh respondent. I should point out that a judge dealing with an urgent application placed before him pursuant to the provisions of rules 244 or 245 of the High Court Rules, 1971 has a discretion in terms of r 246 (1) to *inter-alia* require "any person" whom in the judge's opinion may assist in resolving the matter before judge to appear in chambers and provide such information as the judge may require. I had made up my mind that the presence of the sixth and seventh respondents would be invaluable in assisting me to dispose of the matter hence my directive to Mr *Madzima* as aforesaid. When I postponed the matter, I also directed Mr *Madzima* and Mr *Hungwe* to engage the sixth and seventh respondents because the nature of the dispute between the applicant and the first respondent appeared to be one wherein the sixth and seventh respondents should have been made the first point of call. I gave the legal practitioners an analogy of a father who had parcelled out a piece of land to his two sons and the two sons quarrel over their rights to the land. The father would be the best person to resolve the dispute. In this case, the applicant and the first respondent would be the sons and the sixth respondent or his proxy, the seventh respondent would be the father. The legal practitioners had apparently not approached the sixth and seventh respondents to mediate in the dispute prior to filing court papers.

As a matter of practice, it is advisable in land cases involving offer letters for counsel where parties are represented to jointly attempt a settlement of the land dispute before or ahead of presenting court arguments. The attempt at settlement should advisedly involve a joint approach to the first respondent's office. There should be officers available who can attend to the dispute and give advice to the parties and their legal practitioners on how the dispute may be resolved. The soundness of this approach arises from the fact that it is the first respondent who issues offer letters for land designated by government for resettlement to the beneficiaries. It is therefore the sixth respondent or his or her officers who can authoritatively speak to the offer letters including the extent of the land allocated to a beneficiary and the validity or authenticity of the offer letters. The sixth respondent or his office can also explain any duplication of offer letters. An offer letter can be likened to a contract between the first respondent and the beneficiary. The sixth respondent therefore has a definitive role to play in dispute resolution over rights pertaining to offer letters. If parties were to be advised to first

seek resolution of land disputes by the sixth respondent or his designated officials, the courts would not be flooded with such cases at first instance and the parties would also most probably not engage in costly litigation by coming to this court at first instance. I do not however purport to shut the doors of the court to be approached at first instance in land disputes and the remarks I make are *obiter* and I make them as an observation which I have made over time. The court will invariably call for the sixth respondent's position in relation to a land dispute involving competing claims by beneficiaries purporting to have superior rights over each other. It therefore makes sense then for the acquiring and distributing authority to be made the first point of call when disputes over land offers and related problems arise. If legal practitioners were to follow this route, they would be better informed to advise their clients on their rights and the prospects of success in pursuing the litigation route.

On 15 December, 2016, I reconvened the hearing. The sixth and seventh respondents were represented by Mr *Chimuti* from the Civil Division of the Attorney General's Office. He did not file any papers but orally submitted that the sixth and seventh respondents did not oppose the application. Mr *Madzima* for the applicant submitted that the parties had embraced the judge's sentiments on the need to involve the sixth and seventh respondents in any proposed settlement deliberations and attended on the offices of the sixth respondent. Mr *Madzima* further submitted that the applicant stood by the depositions he made in his founding and answering affidavits and the heads of argument also filed of record. Despite the concession by the sixth and seventh respondents, Mr *Hungwe* submitted that his instructions even after engaging the officials from the sixth respondent's office were to persist in opposing the relief sought. The first respondent and his co-respondents were of course entitled to persist in their opposition despite the consent to the application indicated by the sixth and seventh respondents.

Mr *Hungwe* submitted that an applicant applying for a spoliation order should show that he was in peaceful and undisturbed possession of the property prior to the alleged act of spoliation. He submitted that the applicant was in fact seeking an order of eviction through the backdoor by using the spoliation application route. The basis for his submission was that the first respondent was already settled on land complained of prior to 30 November, 2016. He referred to the first respondent's opposing affidavit in which the first respondent deposed that he had occupied the disputed farm since 2000 and that the applicant knew of his presence since 2004. The first respondent further stated that he had built three structures with one at

roof level in the "last three months" and that the applicant had not protested. The first respondent also deposed that he had moved his 120 cattle onto the farm in question in August, 2016 without protest from the applicant.

It was submitted in the first respondent's papers that not only had the applicant created his own urgency by inaction when the first respondent allegedly despoiled him but that the relief sought was not enforceable for the reason that the first respondent had been referred to by his "*non deplum*" (*sic*) since his correct name was Blessing Runesu and not Honourable B Geza. Mr *Hungwe* also submitted that when the parties legal practitioners visited the sixth respondent's offices, they were told that the issue of boundaries which appeared to be at the centre of the dispute had been referred to the Mashonaland Central lands officials to sort out.

Since the applicant in his founding affidavit was arguing that the applicant had been despoiled of his allocated land on 30 November, 2016 through invasion of the same by the respondents who commenced to build structures thereon, and the first respondent was arguing in his affidavit that the structures had been put up as early as June, 2016, I asked both parties legal practitioners to address me on how a court could be expected to resolve such a dispute. I asked the legal practitioners as to whether any of them had been to the disputed farm to ascertain for themselves the facts alleged by their clients. It turned out that none of the counsels had been to the disputed piece of land. All that counsel had done was to just sit behind their desks, take verbal instructions from their clients and never bothered to acquaint themselves with the actual evidence on the ground. I call this a perfunctory approach to the discharge of work and a disservice to both one's client and more importantly to the court for counsel to simply fail to engage in the basic duty to investigate evidence within their reach.

I then asked counsel whether it would be an onerous task if they were simply to team up and establish the true facts on the ground and submit an agreed statement of their observations so as to assist the judge who had been left to imagine what the true facts were short of conducting an inspection in loco. The three counsels conferred amongst themselves and resolved that I postpone further argument to enable them time to investigate and report to the judge their observations on whether there was evidence of recent structural constructions on the land in dispute or the structures which the applicant was complaining of were old as alleged by the first respondent. I should record that Mr *Chimuti* also offered to be part of the investigative team in his capacity as counsel for the sixth and seventh respondents albeit their

non-opposition to the order sought by the applicant. I postponed the application to 19 December, 2016 by consent.

On 19 December 2016, the three counsels reported that they had visited the disputed farm, that is, subdivision 2 of Barwick H in Mazowe. Through Mr *Chimuti*, it was reported inter-alia that counsel had observed two structures under construction at window and roof levels respectively. The structures were recent though it could not ascertained as to how recent they were. There were also two recently ploughed fields which had not been planted the previous season. People at the site were housed in tents. There was an old boundary fence and some cows grazing. The legal practitioners also observed old brick moulding ovens and a foundation which was dug long back. There was no brick making activity at the ovens or construction going on where the old foundation was dug.

Mr *Madzima* submitted that the recent structures were put up following the invasion complained of by the applicant on 30 November, 2016. He submitted further that the recently ploughed field was ploughed following the invasion or spoliation of the applicant's land. It was also submitted on the applicant's behalf that he pays levies charged on the land to Mazowe District Council. Mr *Hungwe* persisted in his argument that the applicant should seek an eviction order as opposed to a spoliation order and that there was no urgency in the matter. He further argued that the applicant based his claim on ownership of the farm and was describing the first respondent as a squatter who should be evicted as opposed to an invader or despoliator who should be removed through the remedy of spoliation.

It does not appear to me that the first respondent has been able to successfully proffer a persuasive defence to the grant of a provisional order. The approach to urgent applications is that where the applicant seeks a provisional order and he or she has satisfied the judge on the papers filed and such other information as the judge may elicit that he or she has a *prima facie* case entitling the grant of the relief sought, the judge is required in terms of r 246 (2) of the High Court Rules 1971 to grant the provisional order sought or with such variations as the judge considers appropriate in the interests of justice.

What constitutes a *prima facie* in any given case is a circumstantial consideration which is dependent on the facts of the particular case. It denotes an evidential flexible standard in terms of which a party making a claim or a defence as the case may be should establish to meet the burden of proof or defence in the party's favour if not rebutted by the opposing party. The words *prima facie* is a latin term which is translated in English as 'at first sight'. The consideration is circumstantial as it depends on the subject matter before the

court. In *casu*, this is an application for a spoliation order. A '*prima facie'* case is established by the applicant if the applicant adduces facts which are sufficient to establish the requirements for spoliatory relief unless disproved by the opposing party or the alleged spoliator.

Against the first respondent and his co-respondents is firstly that the sixth and seventh respondents do not oppose the relief sought. As already pointed out the role of sixth and seventh respondents is two fold. They confirm the applicant's rights to the land which he occupies and secondly that the applicant should not be disturbed in his possession and use of the land. The first respondent's allegations in the opposing affidavit that the applicant's offer letter is not genuine and that the sixth respondent's officials disowned it is accordingly untrue. The first respondent does not dispute that he has occupied subdivision 2 of Barwick but avers that his occupation is lawful. This is not really the issue for my determination. I am required to determine whether the applicant has *prima facie* established that he was despoiled of land or part thereof which was in his possession and use. I take cognisance of the fact that the dispute over the piece of land in question has been deliberated upon by the sixth respondent's officials and that as far back as 21 June 2016, the first respondent was ordered to vacate the land in issue by the seventh respondent. Whilst ownership rights are not central to spoliation proceedings, the court cannot completely disregard the fact that of the warring parties, it is the applicant who has produced evidence of an offer letter to subdivision 2 of Barwick, Mazowe. The offer letter is attached to his answering affidavit as Annexure 'A'. It is dated 24 November, 2006 and it backs Annexure 'A' to the applicant's founding affidavit, being an acceptance of the offer of the land. The probabilities of the applicant despoiling the first respondent of the land as purported to be the case by the first respondent in his opposing affidavit are remote.

The legal practitioners visited the subdivision in question. They were agreed that the applicant was in possession of the subdivision or part of it. The first respondent had freshly ploughed and also recently built structures on the subdivision which according to official records was allocated to the applicant. This was without the consent of the applicant. The first respondent does not allege consent but entitlement on the basis what he has occupied the land since 2000. Mr *Hungwe*'s distinction between spoliation and eviction is a distinction without a difference. The remedies dove tail with each other. The applicant seeks that the first respondent should return possession of the piece of land he has occupied and ceases construction works and tillage of land. The applicant is entitled to this relief not only because

he is according to the sixth and seventh respondents, the rightful occupant of the subdivision but also because the respondent has put up structures or is in the process of doing so, without the blessings or consent of the applicant.

A reading of the papers, and consideration of the parties submissions show that the first respondent is simply bullying his way and the applicant. Even after the sixth and seventh respondent have clearly declared him to be without title or rights to the land and asked him to vacate, he has continued to defy their authority. *Prima facie*, the first respondent is intent on taking the law into his own hands and no court should countenance such conduct or attitude.

It was not disputed that the applicant has previously sought the intervention of the sixth respondent to resolve previous acts of spoliation by the first respondent. The decision of this court holds good in *Karoh (Pvt) Ltd and Anor* v *Mijaji* HH 23/07 that the fact that a despoiled party seeks other avenues of dispute resolution where there has been a spoliation rather than come to court in the first instance does not defeat the urgent nature of the remedy of spoliation.

I need to comment on the objection by the first respondent regarding his citation using what he calls his *nom deplum* name. In his opposing affidavit he stated that he is the person referred to as Honourable B. Geza. He says that he "is referred to", and therefore he is known by that name. Although he states that the name is his *non deplum* (*sic*), the correct Latin term is in fact *nom deplume* meaning a 'pen name' or a pseudonym, the objection is without substance. Once the first respondent identified himself with the pseudonym, it means that he is the within mentioned defendant. One is reminded of the expression 'what is in a name?' The first respondent has not been prejudiced. He has defended the application in his capacity as the person whose actions have been complained against. The applicant has also stated in his affidavit that he only knows the first respondent as Honourable B. Geza and does not have his further particulars. Neither the applicant nor his legal practitioner has submitted that the use of the first respondent's '*nom duplume*' has a prejudicial effect on the application.

With respect to the relief sought, I accept that there is an ongoing dispute between the applicant and the first respondent. The sixth and seventh respondents or their officials have interceded in the dispute. There is correspondence to the effect that the first respondent has been ordered out of the subdivision and has no offer letter which he has presented to the court. There are mechanisms under the Gazetted Land Consequential Provisions Act [*Chapter 20:28*] for dealing with persons who remain in unlawful occupation of gazetted land. A person who remains in occupation of such land commits a criminal offence. No

submissions have been made on this point. The applicant in its draft interim relief seeks that the status *quo ante* 29 November, 2016 should be restored. Mr *Hungwe* took issue with the interim order in that it seeks to bar the respondents from the whole of Barwick H Farm. The observation by Mr *Hungwe* is valid. The applicant is the beneficiary of a subdivision of Barwick H Farm. His offer letter relates to subdivision 2 Barwick H. Farm. He is not entitled to possession of the whole farm but the subdivision allocated to him. The applicant did not contend that he was in peaceful and undisturbed possession of the whole of Barwick Farm. He deposed in his founding affidavit that he has been in peaceful and undisturbed possession of subdivision 2 of Barwick in Mazowe measuring 565.25 hectares in extent since 2004. The acts of spoliation complained of as having taken place on 30 November, 2016 at 9:00 am consisted in the first respondent and/or on his instruction, the second, third, fourth and fifth respondents invading the applicant's allocated subdivision, putting up structures and disturbing farming operations in the process. The interim order will therefore be amended to limit its operation to the applicants' allocated farm.

In the premises, there will be an order in terms of the draft provisional order as amended or varied.

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:

4. That it be and is hereby declared that Applicant, his representatives, employees and invitees are entitled to remain in peaceful and undisturbed, possession, occupation and use of Subdivision 2 Barwick H Farm, Mazowe Districts of Mashonaland Central Province (Hereinafter called "Barwick H Farm" until such time as Applicant – should it be necessary or expedient-is lawfully evicted from the property in accordance with the due process of law.

5. That the First, Second, Third, Fourth, Fifth, Sixth and Seventh Respondent and all other persons through them are interdicted from in any way interfering with the normal farming and business operations by the Applicant, his invitees, employees or agents or in any way impairing or obstructing the free movement of such persons and their property including but without limitation to machinery, equipment and animals.

6. That the Respondents pay the costs of this Application jointly and severally the one paying the other to be absolved.

INTERIM RELIEF

THE Applicants are granted the following relief:

2. Pending the return date, the 1st, 2nd, 3rd, 4th and 5th, Respondents and all other persons claiming occupation or possession through the 1st Respondent or any other person occupying Subdivision 2 of Barwick H Farm Mazowe measuring 565.25 in extent without the knowledge and consent of the Applicant or 6th and 7th Respondents shall forthwith vacate the said farm and shall further forthwith remove all property introduced by them thereon so that the status *quo ante* the dispossession of the subdivision by the Respondents on 30 November, 2016 is restored to the applicant.

   To the extent that it becomes necessary, the Deputy Sheriff is hereby authorised and empowered to attend to the eviction and removal of the 1st – 5th respondents or any person and their property so occupying Subdivision 2 of Barwick H Farm Mazowe without the knowledge and consent of Applicant. Pursuant thereto, the Deputy Sheriff be and is hereby authorized to enlist the assistance of any member of the Zimbabwean Republic Police Force who are directed to provide such assistance to the Deputy Sheriff so as to ensure that the provisions of this order are executed and implemented in full.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to the Applicants Legal Practitioners or to the Deputy Sheriff to attend to the service of this order forthwith upon the Respondents in accordance with the rules of the High Court.

G.N. Mlotshwa & Company, applicant's legal practitioners
Venturas & Samukange, 1st -5th respondents' legal practitioners