NYAFARU SECONDARY SCHOOL SDC
versus
NYAFARU DEVELOPMENT COMPANY (PVT) LTD
and
MINISTER OF LANDS, AGRICULTURE, WATER & RURAL RESETTLEMENT
and
MINISTER OF STATE FOR MANICALAND PROVINCE & DEVOLUTION N.O.
and
COMMISSIONER GENERAL OF POLICE N.O.

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE, 10 May 2021 & 27 October 2021

Urgent chamber application

Mr T Dzvetero, for the applicant
Adv *E Mubaiwa*, for the first respondent
No appearance for the 2nd and 3rd respondents

CHINAMORA J

Introduction

The applicant filed an urgent chamber application on 10 January 2021. In para (s) 8 (i) to 8 (iv), the applicant describes the nature of the application before the court and relief sought as follows:

(i) This is a two-pronged chamber application brought on an urgent basis for a spoliation order and a temporary interdict against the first respondent and all those claiming the right to timber and interfering through them who unlawfully invaded and dispossessed applicant of a piece of land called Lot 1 of Inyanga Downs, Inyanga Block, measuring 717 hectares.

(ii) The first respondent and its agents and assignees further trespassed and took occupation of the aforesaid land which is occupied by the applicant and began to unlawfully harvest timber without a court order or lawful authority on that land occupied by applicant and the school.

(iii) This application is made in terms of Order 32, rr 241, 244 and 247 of the High Court Rules, 1971. It is also made in terms of common law principles on interdicts and predicated on the fact that the requirements for a spoliation order and temporary interdict are met.

(iv) Application seeks a *mandament van spolie* and temporary interdict.

From the papers on record, it is evident that the applicant desired the relief of a spoliation order and temporary interdict. After hearing submissions from the parties, on 10 May 2021, I granted the following order:

"Pending the determination of the dispute between the parties by the Lands Commission, the following interim order is hereby granted:

1. Applicant and those claiming possession through them, are hereby declared to be entitled to peaceful and undisturbed possession of a piece of land called Lot 1 of Inyanga Downs, Inyanga Block, measuring 717 hectares.
2. The 1st respondent and any of its agents, employees, functionaries, assignees and all those claiming any rights to harvest timber through them, be and are hereby forthwith interdicted from harvesting and carrying timber from the applicant's occupied land, being Lot 1 of Inyanga Downs, Inyanga Block, measuring 717 hectares.
3. The 1st respondent and any of its agents, employees, functionaries, assignees and all those claiming any rights to harvest timber through them, be and are hereby ordered forthwith to remove makeshift camps, motor vehicles and equipment from Lot 1 of Inyanga Downs, Inyanga Block, measuring 717 hectares from the date of this order.
4. Failing compliance with paragraphs (2) and (3) of this order within 24 hours of its service, the Sheriff of the High Court or his lawful deputy is hereby authorized to

remove the makeshift camps, motor vehicles and equipment put by the 1st respondent on Lot 1 Inyanga Downs, Inyanga Block, measuring 717 hectares with the assistance of members of the Zimbabwe Republic Police.

On the return date, the applicant asked the first respondent to show cause why final relief should not be granted as follows:

1. Confirmation of the interim order granted on 10 May 2021.
2. The 1st respondent and any of its agents, employees, functionaries, assignees and all those claiming any rights to harvest timber from the applicant's occupied land, Lot 1 Inyanga Downs, Inyanga Block, measuring 717 hectares, be and are hereby interdicted from accessing land called Lot 1 Inyanga Downs, Inyanga Block, measuring 717 hectares.
3. The 1st respondent shall bear the costs of this application.

Having reserved judgment, my reasons for the order I granted on 10 May 2021, have since been requested. I now give my full judgment with reasons.

Background facts

The applicant is the school development committee of Nyafaru Secondary School. From the papers before me, there is a lease agreement between the school and the second respondent. (See Annexure "B" to the application, on page 37 of the record). The leased land is described as Lot 1 of Inyanga Downs of Inyanga Block. It is 717 hectares in extent. According to the lease, the school leases the whole piece of land. The land was acquired by the Government through the 2nd respondent in 2002. Since then, the first respondent has been fervently contesting the acquisition, including litigating in both the Magistrates Court (under Case No. 7571/02) and High Court (under Case No. HC 3004/20, HH 324/20). The other dimension to the dispute is who between the applicant and the first respondent has the right to harvest timber. That issue is not before me.

By operation of the law following the acquisition, the Government is the owner of the said piece of land. Currently, there is a dispute before the Zimbabwe Land Commission between the

applicant and the first respondent. On 8 July 2019, the said Commission wrote a letter to Nyafaru School which, *inter alia*, reads:

> "**Re: Notification to abide by resolution made at the investigation hearing of ownership dispute between Nyafaru Development Company and Nyafaru High School**
>
> The above subject matter refers.
>
> The Zimbabwe Land Commission is mandated in terms of section 297 of the Constitution of Zimbawe Amendment No. 20, Act of 2013 and Land Commission Act (Chapter 20:29) to resolve disputes on all agricultural land in Zimbabwe.
>
> According to our procedures, as part of our investigations, a hearing was convened and the following resolutions were made pending finalization of the dispute:
>
> 1. The school to continue utilizing timber within the school boundary only.
> 2. The timber for use under the Rural Electrification Agency Programme for the Chief's homestead was to be extracted in the presence of the complainant, disputant and contractor (Border Timbers).
>
> The validity of the lease offered to the school is being disputed by Nyafaru Development Company directors. The school was then ordered by the Zimbabwe Land Commission and the Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement to stop extracting timber pending finalization of the dispute …"

In *casu*, the applicant avers that the first respondent had invaded the land it leases from the second respondent and is harvesting the timber from the land. The applicant says that the lease gives the school the right of occupation of the entire piece of land, and that the letter from the Lands Commission entitles it to harvest timber within the school boundary. It further submits that it previously approached this court for an interdict on an urgent basis (under HC 3004/20), but the application was dismissed. However, on appeal to the Supreme Court, the appeal was allowed and the judgment of the High Court was set aside and substituted by an order striking of the matter with costs.

On its part, the respondent denied acting unlawfully and based its right to harvest timber on a letter from the third respondent written on 9 March 2020, in the following terms:

> "**Permission to harvest timber from Lot 1 of Nyanga Down of Nyanga Block owned by Nyafaru Development Company**
>
> Your letter dated 7 January 2020 pertaining to the above referred to subject matter is hereby acknowledged with thanks.

> As the Minister of State for Provincial Affairs and Devolution responsible for Manicaland Province, as well as being the Chairperson of the Provincial Lands Committee, Nyafaru Development is the bona fide beneficiary of Lot 1 of Nyanga Down of Nyanga Block. As a result, Nyafaru Development Company has the sole right to harvest the timber in this piece of property without undue hindrance or interference.
>
> Dr E Gwaradzimba (Senator)
> **Minister of State for Provincial Affairs & Devolution**
> OFFICE OF THE PRESIDENT AND CABINET

It is the above letter that the applicant contends gave the first respondent a basis to come on the disputed property. The applicant disputes the authority of the third respondent to give such authority to the first respondent in respect of land owned by the second respondent and leased to the applicant. It argues that the first respondent and its agents or assignees were cutting down timber and ferrying it from the land leased to it. In addition, the applicant avers that the first respondent's employees or agents have erected makeshift camps on the property in dispute. The applicant says that in one incident on 15 June 2020, a parent was cut by a chain saw being used by the first respondent's agent. The applicant further submits that the first respondent in doing so commits acts of violence and destroyed water pipes, the school fence and other infrastructure, and disrupted school activities. Despite reporting the matter to Nyanga Police under CR 4806/20 and RRB 4442697/11/20, the applicant asserts that the 1st respondent has not stopped its offending conduct. As a result of these unlawful activities, the applicant argues that it has had to file the present application.

In the application, the applicant contends that it was in peaceful and undisturbed possession of the property prior to the first respondent's conduct. In addition, it states that the first respondent deprived of such possession forcibly and unlawfully without its consent. The applicant's additional argument was that the letter from the third respondent does not constitute lawful authority which entitles the first respondent to occupy and harvest timber on the land occupied by the applicant in terms of the lease with the second respondent. Thus, it was seeking an order restoring the *status quo ante*, since the first respondent and its agents and functionaries or those claiming rights through it did not follow due process, besides not having lawful authority for their actions. Additionally, the applicant sought an interdict to stop the first respondent or persons acting through it from occupying and harvesting timber on the land it leased from the second respondent. The applicant avers that it is entitled at law to occupy the land in question in terms of the lease, and that it had a

right to use and enjoy the land it occupies. It also contended that s 5 of the Education (School Development Committees) (Non-Governmental Schools) Regulations, 1992, (SI 87 of 1992) places an obligation on it to preserve and protect the facilities at the school. On the contrary, the applicant submits that the first respondent has no legal basis to occupy and harvest timber on the land it occupies.

With regards to harm actually committed or reasonably apprehended, the applicant avers that the first respondents and its agents have damaged the school fence, water pipes and other property previously mentioned. It proceeds to argue that the letter dated 9 March 2020 from the third respondent does not give the first respondent any authority to act in the manner it did. The applicant makes this point in para 40 of its founding affidavit *[at page 34 of the record]*, which states that "the letter is unlawful as it is not lawful authority in terms of the Gazetted Lands (Consequential Provisions) Act". According to the applicant: *"the letter is a nullity"* and the first respondent took the law into their own hands.

The applicant further contended that it had no alternative effective remedy. This is how it expressed its exasperation:

> "Applicant and its members have been reporting the matter to the police on numerous occasions. The police have been ignoring applicants in preference of the letter dated 9 March 2020 from the 3rd respondent. The 3rd respondent's letter was cited as instruction from higher authority by the police. There is no other alternative remedy than to approach this honourable court on an urgent basis, Order has to be restored as the 1st respondent has created anarchy and chaos on land occupied by the applicant".

Finally, it submitted that the balance of convenience and the interests of justice favoured the grant of the interim interdict it was seeking. In respect of urgency, the applicant asserts that the need to act arose on 6 January 2021when Mr Bernard Mawoko, the Headmaster of Nyafaru Secondary School, observed the first respondent and its agents unlawfully cutting and ferrying timber from the land the applicant occupies. According to the deponent, the first respondent and its agents had engaged and hired more manpower to ferry the timber and its agents had started to disrupt learning activities at the school by hurling obscenities at the applicant's members and students. In addition, the first respondent's agents had destroyed water pipes, resulting in the school not receiving water during a time of the Covid-19 pandemic.

Preliminary points

Whether or not this matter is urgent was a burning issue before me. I looked at the circumstances of this case, particularly, the issue of when the need to act arose, and am satisfied that the matter is urgent and justifies consideration as such. It is also pertinent to note that a spoliation application is by its very nature urgent, given that peaceful and undisturbed possession would have been disturbed without due process. The position of the law was aptly put by KUDYA J (as he then was) in *Gifford* v *Muzire & Ors* 2007 (2) ZLR 131 (H) in the following words:

> "It seems to me that the preservation of law and order and the prevention of self-help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it." **[My own emphasis].**

In *casu*, the applicant's complaint was that the 1st respondent had not followed due process and acted without a court order or lawful authority. I therefore considered this matter to be urgent and will dismiss the point *in limine* for lack of merit. I now proceed to consider the merits of the case.

The issues for determination on merits

While the dispute regarding ownership and/or validity of the lease still has to be determined, the issue I am seized with concerns the act of spoliation alleged by the applicant. I have also been asked to issue an interdict against the first respondent and persons acting under it from invading the land the applicant leases and harvesting timber from it. If the act of spoliation which has given rise to this application is established, whether or not the applicant owns the disputed land need not concern me. The applicant must also establish a *prima facie* right for interdictory relief.

Analysis of the case

The applicant contends that it has been despoiled of the property known as Lot 1 of Inyanga Downs of Inyanga Block by the first respondent. For the relief it seeks to succeed, the applicant must show that it was in peaceful or undisturbed possession of the said property, and that it was

forcibly or wrongfully dispossessed without its consent. (See *Botha & Anor v Barret* 1996 (2) ZLR 73 (SC). It is imperative to state that I have not been presented with any evidence which controverts the applicant's allegations. These are that, the first respondent and its agents unlawfully came onto the leased property to cut and ferry timber, damaged pipes and other infrastructure and, additionally, set up illegal structures on the property. Nothing has rebutted the evidence of acts of violence and reports being made to the police. In fact, reports were made to Nyanga Police under CR 4806/20 and RRB 4442697/11/20. They have not been proved to be fictitious reports. Crucially, the first respondent did not show that it was acting in terms of an order of court or other lawful authority which permitted it to occupy the property or enter it to fell and ferry away timber.

The first respondent sought to rely on the letter dated 9 March 2020 authored by the third respondent. I have had read the letter by the third respondent which purports to grant the first respondent authority to harvest the timber on the basis that the plantation and the timber on it belong to the first respondent. In my view, the third respondent cannot give such authority for a three principal reasons. Firstly, the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] provides the basis upon which land acquired by the Government may be occupied. In terms of s 3 (1) of that statute, no person may hold, use or occupy Gazetted land without lawful authority. The definition section defines "lawful authority" to mean an offer letter, a permit or land settlement lease. Quite clearly, the letter written by the THIRD respondent does not constitute lawful authority within the contemplation of the Gazetted Lands (Consequential Provisions) Act.

Secondly, the dispute between the applicant and the first respondent is pending determination by the Zimbabwe Land Commission. As such, the letter by the third respondent acts to undermine the process that the Zimbabwe Land Commission has put in motion, yet the third respondent describes herself as the Chairperson of the Provincial Lands Committee. It seems inconceivable to me that the Zimbabwe Land Commission would allow the third respondent to declare that the first respondent has the sole right to harvest the timber on the disputed land before it has determined the competing interests of the parties.

Finally, I have not seen anything that gives the third respondent the power to confer rights on anyone in respect of land owned by the Government. Even, if such power existed, I do not see it being exercised in a manner that conflicts with another constitutionally established entity is doing regarding the dispute between the same parties. My conclusion is that the said letter does

not give the authority that the third respondent purports to give to the first respondent. I therefore find that the first respondent acted without a court order or lawful authority. It therefore despoiled the applicant in the manner alleged. Accordingly, the applicant is entitled to spoliatory relief. In this respect, the law makes it clear that once an applicant demonstrates that he was in peaceful or undisturbed possession, and that the respondent disposed him forcibly and wrongfully without his agreement, then spoliation is established. It is because of this trite position of the law that in *Chisveto* v *Minister of Local Government* 1984 (1) ZLR 248 (H) this court appositely stated:

> "The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party … lawfulness or otherwise of the applicant's possession of the property does not fall for consideration".

With regard to the interdict, my view is that once it is shown that the first respondent acted without a court order or lawful authority, and cut trees and ferried timber away from the leased property, then a *prima facie* for an interdict would have been demonstrated. I say this in light of the fact that the applicant holds a lease to the disputed property, and a letter from the Zimbabwe Land Commission allowing it to use timber within the school boundary. Accordingly, I was satisfied that the applicant established a case for both a spoliation order and an interdict.

Disposition

In the result, I granted the order which appears on pages 2 to 3 of this judgment.

Antonio & Dzvetero, applicant's legal practitioners
Bruce Tokwe Commercial Law Chambers, 1st respondent's legal practitioners
Civil Division of the Attorney-General's Office, 2nd respondent's legal practitioners