NYAMANHINDI INVESTMENTS
(PRIVATE) LIMITED
and
MINISTER OF AGRICULTURE
RURAL RESETTLEMENT
and
THE REGISTRAR OF DEEDS N.O
and
THE SURVEYOR GENERAL N.O
and
MINISTER OF LOCAL GOVERNMENT
PUBLIC WORKS AND NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE, 14 & 21 January, & 11 February 2022

Opposed Application

Mr.D.Basopo for the applicant
Ms. A.Magunde for 1st and 3rd Respondent
No appearance for 2nd and 4th Respondent.

THE PRAYER BEFORE THE COURT

1. The applicant seeks a declaratory order to confirm its title to a certain piece of land situate in the District of Umtali known as Credo of Lot 1 of Dora Estate. Additional to this primary prayer, the applicant also sought certain consequential relief in the form of declarations of invalidity.
2. The title deeds to the piece of land in question having been misplaced, the applicant added the prayer that the Registrar of Deeds or second respondent be direct to issue a replacement thereof. The competence of the relief sought by applicant was contested by the first and third respondents.

THE DISPUTE

3. The application was opposed by the first and third respondents represented by the permanent secretary of the Ministry Mr. John Bhasera. Essentially, the opposition went as follows:-The applicant`s prayer for a declaratory order could not succeed because it had not title to the piece of land in question. Credo Farm had, according to Bhasera, been acquired by the government as far back as 1986.In that regard, it was argued that the applicant had failed to demonstrate that it had past, present of future rights or interest in the farm in question.
4. Bhasera argued that the acquisition of Credo Farm an exercise of the rights and authority possessed by the state. In that regard, any legitimate rights and interest the applicant may have had in the property had been extinguished by that act of state.
5. Mr.Bhasera`s view of the present application were expressed with some vehemence. He was dismissive of the applicant`s claims to ownership of Credo Farm .He challenged the applicants to produce proof of title to the land in the form title deeds. The applicants failed to do so.It was therefore argued that the applicant`s quest to obtain a declaratory order could not succeed given this failure to demonstrate the existence of its right to the farm.
6. The applicant was represented by Boniface Nyamanhindi, in his capacity as director of that entity.Mr.Nyamanhindi stated that the piece of land was purchased in 1978 from a company known as Credo Tobacco Estates (Private) Limite.The farm was purchased with proceeds from applicant`s "…*well known business ventures in hospitality, crop farming and animal husbandry [which] it conducted in the city of Mutare*".
7. In his founding affidavit, Mr. Nyamanhindi summarised the applicant`s case as follows;-

    - *29.Applicant`s case is simple. Applicant has lost its documents and information in relation to its ownership of Credo 1 of Dora Estates also known as Credo Farm. Applicant has approached the second respondent for copies of title deeds but the second respondent has also lost the documents. Second respondent has a statutory duty to safe-keep title documents but in breach of the duty second respondent has lost the documents.*

- *30. First respondent has in its records documents that are being sought by the applicant but has not produced the documents despite several demands and enquiries.*
- *31.Therefore,the first,second,third and fourth respondents must produce documents or information relating to ownership of the property in question as the land has now been invaded by illegal land barons who are creating chaos and illegally parcelling out Applicant`s land.*
- *There is a procedure provided by second respondent`s governing staute (sic) to apply for replacement of a lost or destroyed title deed but this cannot be done without the deed number and the proper description of the land as denoted on the lost title deed. Thus Applicant seeks that the Respondents produce the documents or information relating to its title to the property in question.*

8. The applicant also argued with some intensity, that the farm was never, at any stage subject of acquisition processes by authority. The applicant argued further, that the purported acquisition of the farm being relied upon by Mr Bhasera was suspect, fraught with irregularity and strongly contested. Applicant recriminated by challenging first respondents to also produce evidence of the alleged lawful acquisition of the farm (in 1986).The first respondent only managed to produce a purported cancellation of the survey diagram by the third respondent. A request for other evidence of the acquisition such as notices in the gazette were not successful.
9. The applicant produced two letters between communication issued by the first and fourth respondent`s officers in support of his claim that firstly he held title to the land and secondly, that the farm had not been acquired by government'. A third letter, written by Mutare Rural District Council was also attached to applicant`s papers. The import of this letter was to confirm that applicant was the registered ratepayer for the property in question. These letters are considered in greater detail later in this judgment.

THE APPLICABLE LEGAL PRINCIPLES

10. Section 14 of the High Court Act [*Chapter 7:06*] provides that:

> "The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

11. The first issue to note from section 14 of the High Court Act is that the granting of a declaratory order is dependent on the exercise of a court`s discretion. The court`s discretion in granting a declarateur is in turn, circumscribed by a number of considerations. Such considerations have been articulated in numerous authorities over the years and can be reduced to a two stage approach.

12. In the oft cited passage from *Munn Publishing (Pvt) Ltd* v *ZBC* 1994 (1) ZLR 337 (S) at 343-344, where GUBBAY CJ held as follows:

> "The condition precedent to the grant of a declaratory order is that the applicant must be an interested person, in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd &Ors* v *Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C) at 415 *in fine*; *Milani & Anor* v *South African Medical & Dental Council & Anor* 1990 (1) SA 899 (T) at 902G–H. The interest must relate to an existing, future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest
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> This, then, is the first stage in the determination by the court.
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> At the second stage of the enquiry, it is incumbent upon the court to decide whether or not the case in question is a proper one for the exercise of its discretion under s 14".

13. The two stage approach propounded in *Munn Publishing* v *ZBC and Another* (supra) was further elaborated in In *Movement for Democratic Change v President of Zimbabwe and 4 Others HH 28-2007*.MAKARAU JP as she then was, followed the enunciation by South African courts` approach and stated as follows;-

> "The considerations that a court has to take into account before issuing a declarator were in my view further expanded and explained in Family Benefit Friendly Society v Commissioner for Inland Revenue and Another 1995 (4) SA 120 (T) where in six comprehensive paragraphs, VAN DIJKHORST J sets out the legal principles applicable when a declarator is sought and the mental steps that a court must follow in determining whether to issue the declarator. The applicant or plaintiff must show that:
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> 1. it is an interested person;
> 2. there is a right or obligation which becomes the object of the inquiry;
> 3. it is not approaching the court for what amounts to a legal opinion upon an abstract or academic matter;
> 4. there must be interested parties upon which the declaration will be binding; and
> 5. considerations of public policy favour the issuance of the declaratory".

15 The same principles were laid differently by the Gauteng Division of the High Court of South Africa in *Minister of Finance* v *Oakbay Investments(Pty) Ltd & 21 Others 2017 4 All SA 150* at [59] where the court stated ;-

> *[59] Herbstein and van Winsen extrapolate from decided cases factors Courts have taken into account to determine whether judicial discretion should be exercised positively or negatively in an application for declaratory relief. These include:*
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> *[59.1] the existence or absence of a dispute;*
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> *[59.2] the utility of the declaratory relief and whether if granted, it will settle the question in issue between the parties;*
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> *[59.3] whether a tangible and justifiable advantage in relation to the applicant's position appears to flow from the grant of the order sought;*
>
> *[59.4] considerations of public policy, justice and convenience;*
>
> *[59.5] the practical significance of the order and,*
>
> *[59.6] the availability of other remedies.*

THE FIRST HURDLE: - IS THERE AN EXISTENCE OF PAST, PRESENT, FUTURE OR CONTIGENT RIGHTS OR DISPUTES?

16 Without a doubt the applicant has a substantial interest in Credo Farm. This interest sustains despite the absence of title deeds as well as the spirited objections of Mr.

John Bhasera. Mr. Nyamanhindi's affidavit related a credible and coherent account of the purchase, occupation and usage of the farm. In addition the applicant produced correspondence confirming his interest from non-other than the first respondents own officers. These letters confirm that the farm was never acquired by the state.

17 In this respect, I am satisfied that the applicant has demonstrable interest deriving from a claim of rights attached to the piece of land. I am therefore satisfied that the applicant passes the first hurdle in establishing the existence of a past, present and future interest in the piece of land in question.

18 In the same vein, I found the contestations by first and third respondent of applicant`s interest more on the argumentative than sustainable side.

SECOND HURDLE; - DOES THIS MATTER WARRANT A PROPER EXERCISE OF THE COURT`S DISCRETION?

19 Given that proven interest in the piece of land, does this matter therefore demand the exercise of discretion in favour of applicant? Before such question is answered, it is necessary to revisit the substantive part of the relief claimed which was set out as follows;-

1. The applicant be and is hereby declared the owner of certain piece of land situate in the District of Umtali called Credo of Lot 1 of Dora Estate measuring +/-1000 hectares.
2. The acquisition of Applicant`s property being certain piece of land situate in the District of Umtali called Credo of Lot 1 of Dora Estate measuring +/-1000 Hectares in terms of the endorsement on Map in custody of the third respondent be and is hereby declared void ab initio.
3. The first and fourth respondents be and are hereby compelled to provide from their records, the title documents and or information on ownership of Credo of Lot 1 of Dora Estate measuring +/- 1000 Hectares to the applicant, the second respondent and the third respondent within 7 days of this Order.
4. The second and third respondents be and are hereby ordered to recreate title documents of certain piece of land situate in the District of Umtali called Credo of Lot 1 of Dora Estate measuring +/- 1000 Hectares upon application and request by Applicant upon first and fourth respondents

20 Herbstein and van Winsen in the 5th edition of The Civil Practice of the High Courts and Supreme Court of Appeal of South Africa (Juta,2016) state as follows at page 1437;-

> 21 "The fact, however, that remedies other than a declaration of rights are available is certainly a consideration that the court will take into account in exercising its discretion as to whether or not to make a declaration of rights." The learned authors then conducted a survey of instances when the granted or declined to grant declaratory orders based on consideration of whether or not other remedies existed. Quite clearly, the discretion of the court in all those instances was largely driven by the specific circumstances of the cases under consideration".

SETTLEMENT OF THE UNDERLYING DISPUTE

21 At page 1438, the same authors reiterate the discretionary authority of the court and state as follows;-"*A court has a discretion whether to grant or refuse an application for a declaratory order. Some factors which could be taken into account are the utility of the remedy, and whether, if granted it will settle the question at issue between the parties."[*emphasis mine]

22 This consideration of likely impact of a declaratory order goes very essence of this type of relief. Declaratory orders are issued by courts in order to deliver effective and lasting remedies to disputes between the parties. They are also meant to eliminate uncertainty, confusion or ambiguity. This is why section 14 of the High Court Act as well as the numerous authorities reference the need for practicality to drive the issuance of declaratory orders.

23 Again this principle has been stated with reiterative consistency in many authorities from *Movement for Democratic Change v President of Zimbabwe and 4 Others (supra)* to *Dongo v Naik and 4 Others HH 73-18* and of course, the authorities cited with approval in these matters.

24 In the matter before me, it becomes necessary to examine the background, context and conflicts associated with the dispute in order to establish the efficacy of any orders which the court may issue. To understand the background and all else that is taking

place around and concerning the farm, it is necessary to refer to the relief prayed for by the applicant.

25 Paragraphs 1 and 2 of the draft order request a declaration of title in favour of the applicant as well as a declaration of the invalidity of first respondent`s purported acquisition of Credo Farm. The third and fourth paragraphs of the draft order tell a slightly different story, and such story is central to the resolution of the matter.

26 Paragraph 3 seeks to compel the second and third respondents to *" ....provide from their records, the title documents or information on ownership of Credo of Lot 1 of Dora Estate measuring +/- 1000 Hectares to the applicant, the second respondent and the third respondent within 7 days of this Order".*

27 What exactly is the import of this request? The applicant seems to recognise one key issue;-that second respondent, as an administrative authority, must be compelled to do that which it ought have done when applicant`s title deeds went missing;-issue a replacement. The second respondent had a duty to not only to facilitate a replacement of such title deeds or other relevant records relating to Credo Farm, but to do so with reasonable promptness.

28 In the same vein, paragraph 4 of the draft order states that *;-" The second and third respondents be and are hereby ordered to recreate title documents of certain piece of land situate in the District of Umtali called Credo of Lot 1 of Dora Estate measuring +/- 1000 Hectares upon application and request by applicant upon first and fourth respondents"*

29 I find the two sets of orders (paragraphs 1 and 2 on one hand; and paragraphs 2 and 4 on the other) gravitating into the incongruent. The reasons for such conclusion are as follows. Firstly, if the prayers in paragraphs 1 and 2 of the draft order are granted, it means the Order will override whatever rights as may presently exist regarding the piece of land in question. No problem will arise if the authentic position regarding ownership of the farm confirms applicant`s averments. But what happens if the position has shifted?

30 Secondly, what will be the basis of retrieving the present records relating to the piece of land if such position is to be overridden by the Order? In my view, the applicant

unwittingly recognises that the real relief needed is to compel the respective administrative authorities involved in the regulation of the Credo Farm to do that which they ought to have done when applicant approached them.

31 Two further issues flow from the declaratory relief sought by applicant as framed in its draft order .Firstly, the court is faced with a matter whose resolution lies squarely in the realm of land administration. If the status of this farm`s title had been disclosed or ascertained, notwithstanding the contestation to such title, it would have been a great deal easier for me to dispose of the dispute. Whose farm is it? Who holds title? Have there been any changes? What about encumbrances? And what exactly is officialdom`s answer to these questions? Given that the second respondent has deigned not to oppose or accede to the relief sought, can the court go ahead and order it to produce the title deed?

32 What is the likely effect of such directive? As matters stand, the primary dispute is between applicant and first respondent (representing the state as the other contestant to title of Credo Farm.)The applicant itself has alleged that the farm has been invaded by "land barons". It further raises in alarm, the misdemeanours by such barons in parcelling out land for residential stands. The probability of further contestations for rights, title and interests in Credo Farm cannot be ruled out. If the declaratory orders sought by applicant were to issued, will they resolve or potentially aggravate the conflicting interests associated with this farm?

33 In *casu*, the applicant, as stated, dwelt at length on the unwillingness the respondents especially the first and second respondents to assist it by providing the replacement title deeds and evidence of acquisition of the farm by the state. These requests fall as entitlements which any consumer of government services ought to be furnished with, subject of course to the fulfilment of requisite formalities. These averments have been disputed. Applicant indicates that the title deeds to the farm were discovered as missing as far back as 2010. Twelve years or so have since lapsed since they discovered the unavailability of the deeds. Their conduct or diligence in pursuing the issuance of a replacement set of title deeds becomes, in my view, a necessary aspect to consider in the exercise of discretion by this court. One will therefore question the steps they took in seeking to get the second respondent to account to them apart from

visits to the second respondent`s offices. Was the complaint escalated? Was second respondent put on notice or ultimatum prior to the institution of the present proceedings?

34 Applicant attached a letter dated 6 December 2018 addressed, on applicant`s behalf by a firm of lawyers, to Mutare Rural District Council .In the letter, the lawyers entreated Mutare Rural District Council to assist with information which could benefit applicant in its quest to secure replacement title deeds. This endeavour reflects diligent effort on the part of applicant to resolve the issue of lost title deeds which confronted it.Did applicant enter into similar correspondence with the other respondents? I also note that this letter to Mutare Rural District Council was written well after the two letters (dated 9/10/2015 and 17/11/2015) from the fourth and first respondent respectively, confirming that the farm in question was had not, and was not earmarked for acquision by government. I may state in passing that Mr. Bhasera disowned these letters on the basis that they were written from an uninformed position.

35 The essence of the matter is that applicant became aware, possibly as early as 2015 that the first and second respondents were not keen to assist him (a) secure replacement title deeds and (b) remove the threat of acquisition of the farm. Mr. Bhasera stated as follows in paragraph 7 of his opposing affidavit. *"The information of the property in question is public information readily attainable at the offices of the respondents"*. This statement was not directly challenged in the answering affidavit.

36 A closer look at the letters shows that the communication dated 15 November 2015 was written by an officer cited as C.Tom on behalf of the Chief Lands Officer in the Ministry of Lands, Land Reform and Rural Resettlement in Mutare. It was addressed to the Provincial Public Works Director in the Ministry of Local Government, Public Works and National Housing in Mutare. This letter referenced previous communication between the correspondents on the subject of "Credo Farm". This previous communication (and therefore wider context) was not availed to the court. Suffice to say, C.Tom confirmed in the letter that "*The farm is owned by Nyamanhindi and is not gazetted"*. This confirmation is only relevant for purposes of establishing

the applicant (as represented by Mr.B.Nyamanhindi) `s interest but it cannot be taken as uncontroverted proof of title.

37 The second letter dated 17 November 2015 was authored by the same officer C.Tom, addressed to the same recipient the Provincial Public Works Director but this time referenced "Report of visit to Credo". The letter gives a brief status report on the activities taking place at the farm. The summary is concluded by the following statement *"The record we have show (sic) that there is Credo of Lot 1 of Dora Estate "A" measuring 811, 5331 ha and owned by Nyamanhindi investments whereas this farm Dora Estate has approximately more than 1000Ha."*Again the context behind this communication was not laid before man.Similarly, the value of the letter is to confirm applicant`s presence on, or interest in the farm. This letter cannot in the light of the contestations, be taken as indisputable evidence of ownership.

38 What I have therefore are conflicting positions regarding the ownership and acquisition status of the farm. Also placed in issue are the applicant`s efforts to exhaust domestic remedies. The biggest challenge lies in the fact the official records relating to the farm have been reported as missing from the offices of the second respondent. That situation is worrisome and compounds the apprehension expressed above regarding potential conflicts. It is also important to picture the scenario in reality;-rights and interest in land can be purchased, sold, leased, donated, pledged, hypothecated or exchanged. Within that spectrum of multiple activities or commercial possibilities also lie various multiple parties, people and interests, to underscore the nature of conflicts on the ground. The question becomes, what is the likely effect of issuing a declaratory on the back of uncertainty regarding the exact status of title to this farm?

39 The court is duty-bound, in making these inquiries raised in the receding paragraphs, to take judicial notice of volume as well as duplicity of disputes coming before the courts and other forums arising from conflicts on land. The technical issues prerequisite to the resolution of these disputes demand that as a best case scenario, the structures and administrative processes established by law and authority undertake such tasks. Naturally, the courts will retain and exercise their normal powers and

jurisdiction through judicial intervention where the burdens of administrative responsibility overwhelm officialdom. But such interventions are circumscribed by the strictures of the law such as fulfilment of the grounds and requirements for judicial review.

40 Part 4 (Chapters 9 and 10) of Constitution, the Administrative Justice Act [*Chapter 10:28*] by section 3 thereof, define the obligations of administrative authorities. In turn, section 6 of the Deeds Registries Act also prescribes the powers and duties of the second respondent (acting through its registrars).

41 In terms of section 6 (c) of the Deeds Registries Act, the registrars shall have the power to "to issue, under conditions prescribed by regulation, certified copies of deeds or other documents registered or filed in his registry*"* This duty forms part of the suite of obligations which the second respondent must discharge to the quality, standards and requirements set out in Part 4 of the Constitution, as well as section 3 of the Administrative Justice Act aforementioned.

42 In seeking redress against the second respondent in particular, and the others in general, the applicant elected to pursue the relief of a declarateur. The applicant did not utilise the option of seeking to have the administrative conduct of the respondent reviewed by the High Court in terms of section 4 of the Administrative Justice Act, as read with sections 26 and 27 of the High Court Act [*Chapter 7:06*].

43 I was inclined to allow part of the order which requests that the second respondents avails the missing records to applicant. The challenge I encountered in processing the option was as follows;-such an order would have amounted to a *mandamus*. Issuance of a *mandamus* must be preceded, by a checklist to establish fulfilment of the requirements of that type of relief. That checklist also includes examining the admistrative body`s conduct in discharging its statutory responsibilities. Such responsibilities must be properly ventilated to establish the extent of any breach or compliance. And beyond identifying lapses in administrative conduct to justify interference, the propriety of issuing a corrective order itself must also be weighed. Will the order be capable of being implemented? Will it offer effective remedial relief? Could the situation not be resolved by simply ascertaining first, the status of

that piece of land from the official records? The series of procedures and considerations outline above also include an assessment of the engagements between the complainant and the relevant administrative bodies to check whether the domestic remedies, structures or processes were sweated in pursuit of a solution. The manner in which the matter was pleaded did not permit such an approach by the court.

44 I am mindful of the guidance issued in authorities such as *Arafas Mtausi Gwarazimba N.O* v *Gurta AG SC 10-15* regarding the need for courts to pay heed to an applicant`s application rather than just the format or appellation under which such an application is brought or the prayer framed. Whether one views this present matter as a review application or other species, the essence is that the matter was not sufficiently pleaded to enable the court to properly (a) evaluate the administrative conduct complained of, (b) ascertain from the facts whether issuance of a practicable *mandamus* was appropriate, and (c) convince the court that domestic remedies provided for, or available to the applicant had been fully engaged and exhausted.

On the basis of the foregoing, the application be and is hereby dismissed, with no order as to costs.

Messrs T.Pfigu Attorneys-Applicant`s legal practitioners,
Civil Division of the Attorney General`s Office-For 1st and 3rd respondents