AUGUR INVESTMENTS OU
versus
THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
and
CITY OF HARARE
and
URBAN DEVELOPMENT CORPORATION
and
XGMA ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PHIRI J
HARARE, 8 & 9 November 2016 and 2 December 2016

Urgent Chamber Application

N. Chamisa, for the applicant
Ms *P Chafungamoyo* & Ms *T. Musangwa*, for the 1st respondent
C. Kwaramba, for the 2nd respondent
C. Chabvepi, for the 3rd respondent
Ms *B. Rupapa*, for the 4th respondent

PHIRI J: This was urgent chamber application in which the applicant firstly seeks an Interim Order that:

Pending the return day the applicant is granted the following order:

1. That the first, third and fourth respondents restore peaceful and undisturbed possession of stand number 654 of Pomona Township.
2. That the first, third and fourth respondents, be and are hereby ordered not to interfere in any manner whatsoever with the applicants peaceful and undisturbed possession of stand number 654 of Pomona Township including further subdividing servicing and selling of stands to third parties.

Secondly - The applicants also seek (on the return day) a Final Order that:

1. The acts of the first, third and fourth respondents of subdividing, servicing and selling of stands in respect of stand number 654 of Pomona Township held and possessed by the applicant is unlawful and therefore constitutes spoliation

2. The costs of the respondents aforesaid, being unlawful cannot be a basis upon which the rights are transferred and acquired.
3. The respondent pay costs jointly and severally, the one paying the others to be absolved, on a legal practitioner and client scale.

There is no order being sought against the second respondent.

It must be emphasised, from the onset that this court made a finding that this matter was urgent. The basis of this ruling is to determine whether or not the applicant is entitled to the Interim Order sought.

This application is founded upon the affidavits filed of record by the applicant.

In the founding affidavit of Michael John Van Blerk it was alleged that the applicant was given stand number 654 Pomona Township as payment for the construction of Harare International Airport Road in terms of what the applicant termed as a Tri-partite Agreement.

The applicant provided details of the aforesaid Agreement from para(s) 12 to 15 of its founding affidavit and most of the facts stipulated therein appear to be common cause and need not be repeated.

The applicants attached, as Annexure "B", a Memorandum of Agreement between the second respondent and the applicant.

Important highlights of this Agreement include the following:

"3.2 The COH (City of Harare) shall pay Augur for the cost of the construction of the road as follows"

3.2.1 90% of the cost of construction shall be paid in the form of land, construction material and services that shall be provided by the COH.

3.2.2 10% of the cost of construction estimated to be US$ 8 million shall be paid in cash in Zimbabwean dollars calculated at the official exchange rate at the time of payment.

4.1.4 The parties agree that as security for the performance COH shall deliver to Messrs Coghlan, Welsh & Guest, not later than 25 June 2008 title deeds for no less than 100 hectares of land in Gunhill Township Harare as specified in schedule "A" as security for due performance by COH.

4.1.10 The parties agree that at the commencement of phase 3 an estimation of the value of the whole project shall be agreed upon between themselves.

4.1.11 The parties agree that at the commencement phase 3 the COH shall ensure that there is adequate land suitable equivalent to the estimated value of the whole project. Any variance between the final value of the whole project and the total land value in phase 1,2 and 3 shall be adjusted by either adding suitable land to Augur or reducing land given to Augur. The COH shall be responsible for obtaining the additional land to be given to Augur

4.1.13. The parties agree that COH will hand over the title deeds of the property referred to in clause 1 to Messrs Coghlan, Welsh & Guest to hold in trust.

4.1.14. Upon commencement of construction and production of the monthly consulting engineer certificate showing expenditure, COH shall instruct the conveyancers to transfer the land to Augur having a value equivalent to that month's expenditure under the contract.

4.2.6. The parties agree that any delay referred to in paragraph 4.2.5 other than due to *vis majeure* shall attract a penalty based on Zimbabwean Association of Consulting Engineer Guidelines.

Assignment

6.2. Neither of the parties shall assign or transfer or purport to assign or transfer any of its rights or obligations under this agreement without proper written consent of the other party.

Utmost good faith

Without limiting the generality of the aforesaid the parties undertake in favour of one another to observe the Utmost good faith in the implementation of the provisions of this memorandum of agreement and each party hereby undertakes in favour of the other party that in their dealings, with each other, it shall neither do anything nor refrain from doing anything which might prejudice or detract from the rights assets interests of the other party.

6.5 Breach

If either party shall be guilty of any breach or non-observance of any of the conditions of this agreement whatsoever or shall neglect or fail to carry out any of its obligations hereto, the innocent party shall be entitled to terminate this agreement after giving the other party seven (7) days to rectify the breach.

6.5.2. The guilty party shall in this event be liable to the innocent party in full for any damages arising from the breach and for legal charges at the legal practitioners to client scale including any administrative charges.

6.9.1. Resolution of disputes
In the event that a dispute or difference arises between the parties relating to the rights and obligations of the parties under this agreement and cannot be resolved within thirty (30) days from the time it arose, the parties shall refer the matter to arbitration to be conducted by the Commercial Arbitration Centre Harare.

6.11. Entire agreement
No addition to, variation or agreed cancellation of the Agreement or its annexures shall be of no force or effect unless executed in writing and signed by or on behalf of the parties."

It is this court's considered view that the solution to the present dispute lies in the interpretation and analysis of issues raised in the context of the aforesaid highlighted provisions of this agreement.

Nonetheless the applicant averred that the title deed, together with the possession and control of the stand were placed in the custody of the applicant, by the first respondent, at the instance of the second respondent. The applicant also avers that it has, since, 2011 to date, enjoyed exclusive possession and control of the stand in dispute.

The applicant also alleges that the first respondent, in partnership with the third and fourth respondents are servicing and selling stands in Stand 654 Pomona Township without the consent of the applicant. The applicant alleges that the second respondent have resorted to self-help, and, jointly created an unlawful situation which cannot be allowed to continue with impunity. The present application is accordingly made before this court to restore the *status quo ante*.

FIRST RESPONDENT'S CASE

The first respondent filed its opposing affidavit through its Permanent Secretary, George Sifihlapi Mlilo. The first respondent submitted that it was the lawful owner of Stand 654 and it authorised the third and fourth respondents to service and sell the stand on behalf of the Ministry. This was because the applicant did not complete the project.

The first respondent submitted that it had since taken possession of its property and "does not owe anything to the applicant." See para 8 of the first respondent's opposing affidavit. It also submitted that "the Title Deed should be released back to its owners, i.e. the State", and that the agreement between the applicant and the respondents "….is therefore of NO consequence in the given circumstances". See para 9 of the first respondent's opposing affidavit.

The first respondent alleged that "ZINARA took over the project and applicant was taken off the project…….. The State then repossessed its land and informed the City of Harare about this position."

The first respondent then refers to Annexure "A", in its para 11, which annexure was not attached to its affidavit.

APPLICANT'S ANSWERING AFFIDAVIT TO FIRST RESPONDENT'S OPPOSSING AFIDAVIT.

The applicant raised several points in answer to the first respondents opposing affidavit. These can be summarised as follows;

1. The applicant pointed out that the first respondent had made an admission that the applicant was given stand 654 Pomona Township by the first respondent, as payment for the construction of the Harare International Airport.
2. The first respondent took the law into its own hands by resorting to self-help wherein it should have sought the applicant's consent.
3. The first, third and fourth respondents actions are based on an illegality. "The first respondent is obliged to tell the court how … it managed to take away possession and control of stand 654 Pomona Township from the applicant without its consent, knowledge or a court order." (paragraph 5 of Answering Affidavit).
4. Whilst the first respondent submits that it has since taken possession of its property and does not owe anything to the applicant, the second respondent has made an admission that the applicant is owed something by way of agreement to deduct 40 5665 hectares from stand 654 Pomona Township to be made in favour of the applicant.
5. The first respondent does also not deny the claim of 2000 hectares owed to the applicant from the stand in dispute
6. The first respondent does not explain why he failed to engage the applicant but instead approached the second respondent when it knew that the piece of land was under the contract of the applicant.

Second Respondent's Case

Although no order was being sought against the second respondent, the second respondent filed a Notice of opposition and opposing affidavit to the urgent application.

Dr Cainos Chingombe the second respondent's Town Clerk, deposed to an affidavit for and on behalf of the second respondent. The second respondent sought a dismissal of the present application on the basis that the application does not satisfy the requirements of an interdict.

It was also argued on behalf of the second respondent that "the circumstances which may in their very nature be prejudicial to the applicants is not the only factor that a court has to take into account (para 5)

It was also submitted that once the applicant proves its claim it will be paid by the second respondent (paras 11 and 16).

Second respondent argued that the applicant "has never been promised transfer for such land …."

However in paras 26 and 28 of the second respondent's affidavit the second respondent stated;

> "The factual background is that the applicant entered into an agreement with the second respondent in terms of which the applicant was supposed to consent the airport road and in return the second respondent would pay for such works in cash or in the form of land. (para 6)

It is true that the second respondent did not have adequate land to give to the applicant as security for settlement of the project value. This led to the letter of 15 March, 2011. (para 27).

In effect the letter was a request to the ministry to provide its land as security for the anticipated indebtedness to the applicant. This is how the disputed title got into the applicant's hands.

The second respondent further alleged that the agreement between the parties collapsed way before the project was even half way. (para 30) and it further averred that it cancelled the agreement due to the failure by the applicant to meet the set targets for the completion of the project.

It is also stated that:

The termination of the agreement changed the entire matrix of the arrangement. The disputed pieces of land had been placed in applicant's trust on the belief that the project would be done to completion. When it was not the basis for holding onto the title fell away. (para 33)

This court takes judicial notice of the fact that the second respondent appears to be both approbating and reprobating to the issues it raises in its opposing affidavit.

Firstly the second respondent avers that the applicant was never promised transfer of the land but on the other hand, it alleges that the applicant held title to the land (See paras 27 and 33).

Secondly the second respondent claims that the applicant will be paid once it proves its claim but on the other hand the second respondent alleges that the agreement collapsed way before the project was even halfway (Paragraph 30 & 46).

Such apparent contradictions lead the court to uphold the applicant's contentions that this court should not rely on the second respondents opposing affidavit. The court agrees with

the applicants submissions that deponent to the opposing affidavit was not fully acquainted with the full facts of this matter.

Fourth Respondent's Case

The fourth respondent also filed its opposing papers to the urgent application.

It submitted that it is in the business of property development and;

> "Was approached by the first respondent sometime in 2015 in terms of which it owned stand 654 Pomona which it intended to subdivide and sale stands but the first respondent did not have capital to execute the project. The first and fourth respondent subsequently concluded a joint venture agreement. In terms of which the fourth respondent injected millions of dollars in working capital and earth moving equipment into the joint venture and that the fourth and first respondent would eventually share income from selling the subdivided stands on the property." (para 7.1.)

The fourth respondent submitted that it entered into agreements with the first respondent in good faith and has nothing to do with the alleged spoliation as they were not aware of any of the alleged agreements be the first respondent, second respondent and the applicant is an innocent third party and cannot therefore be penalised. (See paragraphs 7.4 and 8.21)

It also argued that the spoliated property is now in possession of a third party as a result of a transaction entered in good faith.

It further submitted on behalf of the fourth respondent that;

> …… the fourth respondent cannot be accused of having resorted to self-help when it is in possession of the property based on representations by the first respondent that the property is owned by the first respondent which representation the fourth respondent relied on in entering into the joint venture agreement as subsequently taking co-possession of the property."
> (See paragraphs 22 to 24 of the fourth respondents Heads of Argument).

The fourth respondent averred that the applicant should have instituted vindicatory action which allows the applicant to pursue the third parties.

Court's Analysis of this matter

It is the court's considered view, after a careful considerations of papers filed of record and hearing submissions made for and on behalf of all the parties to this application that the balance of convenience in the application is in favour of the applicant.

This court holds the view that the applicant was given stand 654 Pomona Township by the second respondent in lieu of payment of the construction Harare International Airport Road in terms of the tri-partite agreement between the applicant, the first and second respondent.

This court also holds the view that evidence submitted in this application establishes that the first, second third and fourth respondents have been working in partnership in selling and servicing stands in stand 654 Pomona Township and they continue to do so, with impunity, in total disregard of the existing agreement between the second respondent and the applicant.

That agreement, in the court's view, and specifically in terms of the earlier highlighted provisions, governed the relationship between, the applicant and the second respondent and due process was not followed in addressing whatever grievances arose between the parties.

Clearly the first respondent did not have the authority to alleanate the laid in dispute without the consent of the applicant.

The first respondent took the law into its own hands and unilaterally disposed the applicant of its possession and control of the Title Deed and the stand which was placed in the applicants custody by the second respondent. This court does not condone the actions of the first respondent in resorting to self-help without recourse to the provisions land out in the aforesaid agreement and or through the courts.

The subsequent agreement entered into by and between the first and the fourth respondents on 7 October 2015 and the selling and servicing of the land in dispute amounted to despoliation of the applicants rights.

Similarly the persistence of the fourth respondent in insisting on claiming "co-possession" of the property, in dispute, based on aforestated representations by the first respondent clearly demonstrates that the fourth respondent evinces a clear and deliberate intention to despoil the applicant of its (the applicants) rights. Such conduct is, in the courts view, unlawful, and accordingly the applicants' peaceful and undisturbed possession of all the stand in dispute should be and is hereby restated.

In determining whether or not the requirements of *Mandament Van Spolie* are met, the applicant must prove, on a balance of probability that;

(i) the applicant was in peaceful and undisturbed possession of the thing and

(ii) the applicant was unlawfully deprived of such possession.

See the case of *Augustine Banga and Kevin James* v *Slomom Zawe and the Deputy Sheriff and the Officer In Charge, Borrowdale police Station* SC 54/14. Also *Botha & Anor* v *Barret* 1996 (2) ZLR 73 (SC). GUBBAY J (as he then was).

> "It was further stated in the same case at p 7, (In the judgment of GWAUNZA J); spoliation simply requires the restoration of the Status quo ante pending the determination of the dispute between the parties. The principle is clearly stated thus by the learned authors Silberberg and Schoeman – (*The Law of Property*; *2nd Edition* at pp 135 – 136)
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> > '…… the applicant in spoliation proceedings need not even allege that he has *ius possidendi* spoliations *ante omnia restituendus* cst…… All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession ……..' Also *See Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (SC)."

This court is also not persuaded in the argument advanced, that the applicant should either sue for breach of contract, or, await consideration of payment from the second respondent. It is clear in, the courts view, that the respondents have clearly demonstrated that they have and evince a deliberate intent to continue violating the applicant's peaceful and undisturbed possession of stand number 654 Pomona Township.

In the circumstances this court grants the interim order as prayed for by the applicants namely;

1. That the first, third and fourth respondents be and are hereby ordered to restate peaceful and undisturbed possession of Stand Number 654 Pomona Township of the applicant forthwith.
2. That the first, third and fourth respondents be and are hereby ordered not to interfere, in any manner whatsoever, with the applicants peaceful and undisturbed possession of stand number 654 of Pomona Township including further subdividing servicing and selling of stands to third parties.

Costa & Madzonga, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Mbizo, Muchadehama & Makoni, 2nd respondent's legal practitioners
Dube-Banda, Nzarayapenga & Partners, 3rd respondent's legal practitioners
Zinyengere Rupapa, 4th respondent's legal practitioners