

GIVEMORE GARANDE  
and  
LAZARUS ZHOU  
and  
WUNGANAYI CHATIKOBO  
and  
ADDITION BARADZANWA  
and  
SIMBA CHITAU  
and  
FARU NDLOVU  
and  
SAMSON TAKAEDZA  
and  
OBADIAH MUDHUMO  
and  
ONIAS MUNEMO  
and  
MARTIN CHAPWANYA  
and  
LANGTON MUJOMA  
and  
ROY MAKANJERA  
and  
NOMATTER MAPFUMO  
and  
EDMORE MATAWU  
and  
ENOCK GANDA  
and  
TSANANA MANDIZVIDZA  
and  
ONAI MUZENGEZA  
And  
KEMPTON KUCHANAYA  
And  
GILSON CHIPINGE  
and  
JULIUS BHANDE  
versus  
PHILLIP CHIYANGWA  
and  
TAFADZWA KWARAMBA

and  
TOMMY MWANZA  
and  
CONSTABLE MAZVIWANZA  
and  
SERGEANT ASANI  
and  
OFFICER-IN-CHARGE CHINHOYI RURAL POLICE STATION

HIGH COURT OF ZIMBABWE  
CHIKOWERO J  
HARARE, 23 October 2020 & 9 November 2020

### **Urgent Chamber Application**

*N Chikono*, for the applicants  
*T.A Chamutsa*, for the 1<sup>st</sup> – 3<sup>rd</sup> respondents  
No appearance for the 4<sup>th</sup> – 6<sup>th</sup> respondent

CHIKOWERO J: Applicants reside at various homes within Old Citrus Farm, Chinhoyi.

It appears that first respondent is a holder of an offer letter in respect of that farm.

Second and third respondents are male adults' resident at the farm while fourth – sixth respondents are police officers based at Chinhoyi Rural Police Station.

On 20 October 2020 the applicants filed this urgent chamber application. Applicants state that during the night of 18 October 2020 the first respondent caused the rest of the respondents to burn some of the applicants' houses and to evict them from their homes. Essentially, as interim relief, applicants pray for an order interdicting the respondents from demolishing the homes, unlawfully ejecting them from their homes and from interfering with applicants' occupation of the farm.

The basis of the application is simply that there is no court order sanctioning the demolition and eviction. The commencement of that process is what triggered the filing of the application.

Second and third respondents did not file opposing papers. However, from submissions made by their counsel at the hearing, I understood the position to be this. They

associated themselves with the opposing papers filed by the first respondent. The submissions made by Mr *Chamutsa* were also made on their behalf. In sum, the argument taken by first – third respondents is this. Applicants occupied Old Citrus Farm through one Patrick Mafusire and 44 others. These 45 persons were convicted for unlawfully occupying gazetted land, being Old Citrus Farm in Chinhoyi. The Magistrates Court, Chinhoyi, in disposing of the criminal matter, ordered the eviction of the convicted persons. The order was registered with the Civil Court in Chinhoyi. A warrant of ejectment was issued. It is on the basis of this warrant that Patrick Mafusire and 44 others were evicted from Old Citrus Farm in Chinhoyi. Also evicted were the 20 applicants. They were the persons alluded to in the warrant as “all those who claim occupation through them at Old Citrus Estate.” The “them” are Patrick Mafusire and 44 others. Each applicant paid a sum of US\$50 to Patrick Mafusire and 44 others whereupon the 45 allocated a 6 hectare piece of land on Old Citrus Farm to each applicant. This was done so as to circumvent the impending eviction of Mafusire and the 44 other persons. However, since the 45 had now been evicted the same warrant authorised the eviction of the 20 applicants as the latter occupied the land through the former.

The fourth, fifth and sixth respondents did not oppose the application.

The first – third respondents raised certain preliminary points.

#### URGENCY

I was told that the application was not urgent. This stemmed from the first – third respondents’ opposition to the merits of the application. I have already summarised the crux of that opposition. I was told that the applicants could not found urgency on the basis of their own wrongdoing. They illegally settled on the farm in August 2020. They paid US\$50 each to Mafusire and 44 others to facilitate the settlement. The Messenger of Court, with the assistance of police details from Zimbabwe Republic Police Chinhoyi Rural, evicted them from the farm. Given their status as illegal settlers, the eviction was always coming. They invited that consequence upon themselves. This was self-created urgency. It is not the urgency contemplated in the rules. I was referred to *Kuvarega v Registrar-General and Another* 1998 (1) ZLR 188 (H).

For their part, the applicants claim that they occupied the farm in 2015. They referred me to an undated petition addressed to the Minister of State for Mashonaland West Province. That petition does not disclose the names of the petitions. In that document, the petitioners state that they have been in illegal occupation of Old Citrus Farm for almost 7 years. They, implore the Minister to help them acquire the right to occupy land.

What is important is this. No evidence was adduced to demonstrate that the applicants are occupying Old Citrus Farm through Patrick Mafusire and 44 others. None of those 45 persons deposed to supporting affidavits speaking to receipt of US\$50 from any of the applicants to facilitate the applicants' occupation of the farm. No evidence of the US\$50 payments was placed before me. It follows that I am unable to find that the applicants are occupying the farm through either Mafusire or any or all of the 44 other persons. No evidence was placed before me that they are covered by the warrant of ejectment and execution against property issued at Chinhoyi under case number 366/20 against Patrick Mafurise and the 44 other persons named in the warrant.

Indeed, there was no evidence that the Messenger of Court served copies of the warrant on any of the applicants as a precursor to the demolition of their homesteads and the driving out of the applicants from their homes.

I am satisfied that the application is urgent. The demolition started during the night of 18 October 2020. Instructions were given to counsel on 19 October 2020. The application was filed on 20 October 2020. This is a case of respondents demolishing the applicants' homes without a court order. See *City of Harare v Tawanda Mukungurutse, Patrick Chikohora, Cledwyn Mutete and Minister of Local Government Public Works and National Housing* SC 46/18.

The preliminary point that the application is not urgent thus finds no favour with me. I dismiss it.

#### MATERIAL NON-DISCLOSURE

I was asked to dismiss the application on the following basis. the applicants did not disclose that what was being carried out was a lawful eviction with the assistance of the police. Mr *Chamutsa* urged me to dismiss the application on the basis of this which he said was material non-disclosure. He referred me to *Graspeak Investments (Pvt) Ltd v Delta Operations (Pvt) Ltd and Another* 2001 (2) ZLR 551 (H).

Mr Chikono argue as follows. This was not an eviction. There is no court order wherein the applicants are cited as defendants and sanctioning their ejectment from the farm. They were not served with copies of a warrant of ejectment and execution against property. There is a recognised way of carrying out an eviction. It involves removing a person, his property, all those claiming through him and their property from the premises in question to some distance away. This was not done. The Messenger of Court does not evict people under the cover of darkness. Neither does he burn homes in the course of carrying out an eviction.

The applicants did not see the Messenger of Court during the night of 18 October 2018. They could not be faulted for not disclosing that which they did not know.

I have already found that the warrant in question did not cover the applicants. Whether the messenger of court was involved or not ceases to matter. The court order on which the warrant was premised did not sanction the ejection of the applicants. They were not party to the criminal matter. There was nothing material which the applicants did not disclose.

Accordingly, I dismiss this point in *limine*.

#### MISJOINDER OF THE MESSENGER OF COURT

I have pronounced myself on this preliminary point in the course of determining the preceding points in *limine*.

I reiterate that there is no court order sanctioning the eviction of the applicants.

It follows that there was no need to join the messenger of court.

I dismiss this preliminary point.

#### CRITICISM OF THE DRAFT ORDER

Mr *Chamutsa* made the following points. Firstly, para (a) of the interim relief effectively reflects that the applicants are seeking a spoliation order when in the notice of the application and the founding affidavits the relief sought is an interdict. The impugned paragraph reads

“(a) The 1<sup>st</sup> respondent be and is hereby ordered to grant applicants access to their homesteads and stop forthwith the burning and demolition of their structures at Citrus Farm, Chinhoyi, Mashonaland West Province.”

Secondly, the requirement of an interim interdict are different from those of a spoliation order. In addition, the latter can only be a final order, not an interim one. See *Blue Ranges Estates (Pvt) Ltd v Muduvuri and Another* 2009 (1) ZLR 368 (S).

Mr *Chikono*'s response was that the court is not bound by the terms of the draft order. It may grant such relief as is merited.

I see a prayer for an interdict in the latter portion of para (a) of the interim relief. The first portion is spoliatory relief. But it is academic in view of para (c) of the same draft order. Paragraph (c) seeks to achieve the same result via what appears to be a prayer for an interim interdict. Unamended, para (c) reads:

“the respondents are ordered not to interfere with the applicant's occupation of the said farm.”

Further, I was asked to dismiss the application on the basis that the interim and final relief sought are substantially similar. I have looked at *City of Harare v Farai Mushoriwa* SC 54/18 at pp 8 and 9 of the cyclostyled judgment. As in that matter, what distinguishes the interim from the final relief sought is that the latter is declaratory in nature. Should I grant the interim relief, and thus preserve the applicant's stay at the farm, the applicants propose to have the court pronounce, on the return date, that their ejection in the absence of a court order be declared unlawful and consequently be finally interdicted to that extent.

There is no merit in this preliminary point. I dismiss it.

### THE MERITS

I have traversed the merits in the course of discussing the preliminary points. The first respondent capitalised on a lawful eviction of Mafusire and 44 others to also begin the illegal process of evicting the applicant.

The Constitution of Zimbabwe Amendment (No. 20) Act, 2013 grants certain rights to the applicants. One of them is freedom from arbitrary eviction. In this regard, s 74 reads:

“74 freedom from arbitrary eviction  
No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”

See also *City of Harare v Mukungurutse and others* (supra)

Tied to this are the applicant's rights to administrative justice and to a fair hearing on the determination of their civil rights and obligations *vis-à-vis* their occupation of Old Citrus Farm, Chinhoyi.

No court sat to determine the lawfulness or otherwise of their stay at Old Citrus Farm. No court ordered their eviction from that farm.

It does not matter that they are illegally occupying that land. They are entitled to protection of the law. Due process was not followed in commencing the process of demolishing their houses and driving them from their homesteads. It does not even matter that their homes may be makeshift structures. See *Zimbabwe Homeless People v Minister of Local Government and National Housing and Others* SC 94/20

I was told that the applicants are still on the farm. I was told that what has happened is that some of them had their houses demolished. But they are still occupying the farm. There is no evidence that the application for an interim interdict has been overtaken by events. A return of service dated 20 October 2020 under case number 366/20 was handed in at the hearing. The plaintiff therein is the present first respondent. The defendants are “Patrick

Mafusire and Others”. The process executed at Old Citrus Farm Chinhoyi was a warrant of ejectment. The remarks column reads:

“Warrant of Ejectment executed and all the defendants removed at Old Citrus Farm and put the same in the position (sic) of the plaintiff.”

The applicants are not the defendants in case number 366/20. The defendants are Patrick Mafusire and others. I cannot allow this return of service to be abused to disentitle the applicants from obtaining the relief that they have *prima facie* proven to be due to them.

#### THE DRAFT ORDER

For purposes of clarity, I set out the terms thereof:

##### “TERMS OF RINAL ORDER SOUGHT

That the respondents show cause to this Honourable Court on the return date why a final order should not be granted in the following terms:

1. That the first respondent be and is hereby ordered not to burn, destroy or demolish the applicants’ homestead at Citrus Farm Chinhoyi, Mashonaland West Province and not to eject them without valid court orders.
2. The first respondent shall pay costs of suit on a higher scale

Terms of interim order granted

(a) The first respondent be and is hereby ordered to grant applicants access to their homesteads and stop forthwith the burning and demolition of their structures at Citrus Farm, Chinhoyi Mashonaland West Province

(b) the respondents are ordered not to unlawfully evict the applicants from their homesteads.

(c) the respondents are ordered not to interfere with the applicants’ occupation of the said farm.”

Mr *Chikono* moved for certain amendments to the draft order. That application was not opposed.

I will grant an interim prohibitory interdict to preserve the status *quo*. The parties can argue the matter fully on the return date. The court seized with the matter at that stage will decide whether to discharge or confirm the order that I am now granting. It will also decide whether the final order sought is merited.

#### DISPOSITION

In the result, the following order shall issue

1. The 1<sup>st</sup> respondent shall forthwith stop the burning and demolition of applicants’ structures situate at Old Citrus Farm, Chinhoyi.
2. The respondents shall not unlawfully evict the applicants from their homesteads situate at Old Citrus Farm, Chinhoyi
3. The respondents shall not unlawfully interfere with applicants’ occupation of their homesteads situate at Old Citrus Farm, Chinhoyi.”

*Ngarava Moyo and Chikono*, applicants' legal practitioners  
*Chamutsa and Partners*, 1<sup>st</sup> – 3<sup>rd</sup> respondents' legal practitioners