KERSHELMAR FARMS (PVT) LTD
And
SEPHANIAH DHLAMINI
And
CHARLES MOYO
And
SIPHOSAMI PATRICK MALUNGA

Versus

DUMISANI MADZIVANYATI

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 22 SEPTEMBER AND 7TH OCTOBER 2021

Urgent Chamber Application for Spoliation

J. Tshuma for the applicants
C. Nyathi & Ms S, Sithole for the respondent

MAKONESE J: This is an urgent application for spoliation. The application is opposed by the respondent.

The draft order is couched in the following terms:

"1. The respondent and all persons claiming occupation through him shall remove or cause the removal of themselves and all such persons within 24 hours from the date of this order from the farm known as a certain piece of land situated in the district of Nyamandlovu, being subdivision A of subdivision B of Umguza Block measuring one hundred and ninety-five comma eight zero nine five (195,8095) hectares and certain piece of land situated in the district of Nyamandlovu being subdivision C of subdivision B of Umguza Block measuring three hundred and fifty-eight comma one seven six eight (358,1768) hectares collectively known as Esidakeni Farm.
2. The respondent should within 24 hours from the date of this order restore to the applicant possession of all its farming equipment including all irrigation pipes and machinery.
3. Failing such removal and restoration, the Sheriff of this honourable court be and is hereby authorized and directed to evict the respondent and all persons claiming ownership through him from

the farms known as certain piece of land situated in the district of Nyamandlovu, being subdivision A or subdivision B of Umguza Block measuring one hundred and ninety-five comma eight zero nine five (195,8095) hectares and certain piece of land situated in the District of Nyamandlovu, being subdivision C of subdivision B of Umguza Block measuring three hundred and fifty-eight comma one seven six eight (358,1768) hectares collectively known as Esidakeni Farm.

4. The respondent is hereby interdicted from tempering, interfering and disrupting any irrigation equipment or any other equipment or machinery belonging to the applicants or located on the above mentioned property.
5. The respondent is hereby interdicted from interfering with the applicants' farm workers and the applicants' farm operations in carry manner whatsoever.
6. The respondent shall pay costs of this application on the legal practitioner and client scale".

Factual background

The applicant was the owner of Esidakeni Farm held under Deed of Transfer 1980/90. The Minister of Lands. Agriculture, Water and Rural Resettlement purportedly acquired Esidakeni Farm by way of notice of acquisition being General Notice 3042 of 202 *via* a Notice of Acquisition being General Notice 3042 of 2020 published in the Zimbabwe Government Gazette on 18th December 2020. Respondent asserts that he has been offered a portion of Esidakeni Farm by virtue of an offer letter. The 2nd and 4th applicants are directors and shareholders of the applicant. Applicant and its shareholders have instituted an application seeking to nullify the purported acquisition and any subsequent offer letters granted as a result of the said acquisition in this Court under case number HC 1054/21. The process is pending before the court. The respondent has instituted eviction proceedings against the applicants in the Magistrates' Court at Tsholotsho under case MC 924/21 by virtue of the offer letter. The proceedings are still pending before the court. It is not disputed that applicant has neither been given a notice to vacate the farm nor is there an extant order for its eviction. It is common cause that applicant has been in peaceful and undisturbed possession of Esidakeni Farm since its purchase in 2017. Applicant and its directors have been engaged in farming activities at Esidakeni Farm. Applicant has installed and equipped the farm with boreholes and submersible pumps. A boaster irrigation pump for irrigation has also been

installed on the farm. The pumps are operated by power supplied by the Zimbabwe Electricity Supply Authority. In order to facilitate this, a 100kw transformer was installed at applicants' expense. Applicant is billed and pays for the electricity used at the farm. Applicants allege that they have planted 150 000 tomato plants which are at various stages of maturity, with at least 50 000 plants ready for harvest. A further 8 million onion plants planted in July 2021 are due to mature around November and December 2021. A total of 65 000 butternut plants were planted in July 2021. The plants are currently irrigated by water drawn from boreholes installed by the applicants.

Applicants allege that in July 2021 the respondent drove over to applicants' onion fields during the process of planting the onions. Respondent dispatched a gang of invaders soon thereafter to intimidate the applicants' employees. The gang was led by one Mr Gumbo who claimed to be acting on behalf of the respondent. The invaders attacked applicants' farm manager one Sipho Nkomo and chased him from the farm. He spent the night hiding in the bush. The invaders switched off all the irrigation pumps and ordered all operations at the farm to be stopped. 2nd to 4th applicants were blocked from accessing the farm. The matter was reported to the Zimbabwe Republic Police, at Nyamandlovu. Applicants were assisted to regain access to the farm. The occupiers were charged with criminal trespass. The peaceful occupation was short-lived. Respondent returned to the farm and caused further disruptions to farming operations. On 10th September 2021 respondent improperly tempered with applicants' borehole installations and connected his own pipes to the main water line, starving applicants' tomatoes and butternut crops of water. Respondent threatened applicants' employees with unspecified action and has continuously interrupted water supplies to applicants' crops.

Applicants contend that this court ought to urgently intervene and restore peaceful and undisturbed possession of Esidakeni Farm to them to protect its machinery and equipment as well as protect the farming operations.

Applicants aver that the matter is urgent as numerous crops have been planted and are at various stages of maturity. Constant irrigation is required as it is critical to the farming operations. Applicants stand to lose substantial sums of money if respondent's unlawful activities are not addressed.

Respondent contends that this application should be dismissed for the following reasons:

1. The form preferred by the applicants in making their chamber application is defective and incurably bad.
2. 1st, 2nd and 3rd applicants lack locus *standi in judicio*.
3. The applicants have failed to establish the requirements for spoliation order or an interdict.

It is necessary to deal with the two preliminary issues raised by the respondents before dealing with the merits. Both parties in this matter have filed detailed heads of argument in support of their respective positions. In oral submissions counsel largely abided by their written submissions.

Whether the form used by applicants in the chamber application is incurably bad

Respondent forcefully argued that the chamber application filed by the applicant is not in compliance with Rule 60 (1) of the High Court Rules, 2021. The provision states that ordinarily a chamber application is in Form number 25. However, if a chamber application is to be served on an interested party, it should be in Form number 23 with appropriate notifications. In that regard a consideration of these two forms so it is argued, reveals that Form number 23 is the one ordinarily used for court applications. The critical question then becomes; what does a chamber application that has to be served on an interested party have to look like? The respondent postulates that Form number 29 and Form number 29B of the repealed High Court Rules 1971 are the equivalent of Form number 23 and Form number 25 respectively. Respondent argues therefore, that with the High Court Rules, 2021, a failure to use Form number 23 in a chamber application that must be served on an interested person renders the application fatally defective. Respondent avers that applicants used Form number 25 of the High Court Rules, 2021 which is a wrong form. For that reason the respondent argues that the application is fatally defective and on that ground alone, the application must be dismissed. In support of this argument respondent relied on the decision in *Minister of High & Tertiary Education* v *BMA Fastners (Pvt) Ltd & Anor* HB-42-14. In that matter this court held that:

> "It is trite law that a chamber application must comply with the Rules governing chamber applicants".

The respondent also cited *Zimbabwe Open University* v *Mazombwe* 2009 (1) ZLR 101 which laid down the position that where an applicant does not adopt the proper form of the application, the court cannot condone departure from the Rules. That application becomes fatally defective.

In response, *Mr Tshuma* appearing for the applicants disputed that the form used is wrong and that the application is fatally defective. He pointed out that the urgent chamber application before court is governed by Rule 60 (3) of the High Court Rules 2021.

Rule 60 provides that:

"(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 25 duly completed and except as is prescribed in sub rule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies:

Provided that, where a chamber application is to be served on an interested party, it shall be in Form number 23 with appropriate notifications.

(3) A chamber application shall be served on all interested parties unless the defendant or respondent, in the case maybe, has previously had notice of the order sought …
…
…

(8) A judge to whom papers are submitted in terms of sub rules (6) or (7) may –
(a) require the applicant or deponent of any affidavit or any other person who may, in his or her opinion, be able to assist in the resolution of the matter to appear before him or her in chambers or in court as may to him or her seem convenient and provide, on oath or otherwise as the judge may consider necessary, such further information as the judge may require;
(b) require either party's legal practitioner to appear before him or her to present such further argument as the judge may require …"

It is trite that where an urgent chamber application is instituted there is no need to insert the *dies induciae* on the application. Ordinarily, urgent chamber applications are served on interested parties unless they are filed *ex parte* in accordance with the provisions of Rule 60 (3) (a) to (e). Once an urgent chamber application is placed before a judge, the judge dealing with the matter may decide to hear the matter, in which event, he will cause the matter be set down for hearing, on notice to all interested parties. In terms of Rule 60 (8) the judge is empowered to direct how the matter should proceed. The respondent

has not sought to argue that the matter is not urgent. The matter is indeed urgent. Respondent was properly served with the application. The court directed that the matter be served on all interested parties and gave a date and time for the hearing of the matter. In my view the cases cited by *Mr Nyathi*, appearing for the respondent do not find application in this matter and are not relevant. The form used is not fatally defective as alleged. The rules are designed to ensure that the litigants are heard and that they be given the opportunity to advance their argument. Failure to use from number 23 in urgent chambers, where such application is served on the affected party does not *per se* render the application defective. I would therefore dismiss this preliminary point.

Whether 2nd, 3rd and 4th applicants lack *locus standi in judicio*

It was submitted on behalf of the respondent that the applicants have no *locus standi* to bring this application before court. In particular, that 2nd, to 4th applicants had no *locus standi* to institute this action. For this proposition, respondent relied, mainly on the case of *Diocese of Harare* v *Church of the Province of Central Africa & Anor* HH-6-08 and the provisions of the Land Acquisition (Disposal of Rural Land) Regulations, 1999 (SI 287/99). Section 10 of the Regulations provides that:

> "Any transfer of land or shares effected in contravention of these regulations shall be void."

It is argued that 2nd to 4th applicants bought shares in 1st applicant in contravention of the regulations. As such the contention is that their shareholding and directorship is a nullity at law as it emanates from a legal nullity. It is contended by respondent that in terms of the regulations referred to no person shall make a significant transfer of shares in a land owning company, unless, he has notified the Minister of his intention to transfer the shares and the Minister has issued him with a certificate of no present interest.

It is not disputed that applicant is a duly registered company in terms of the laws of Zimbabwe. 2nd to 4th applicants are directors of the applicant in terms of the laws of Zimbabwe. Respondent's submission in paragraph 9 of his heads of argument is telling. It is submitted that:

> *"It is the respondent's contention that the applicants have failed to satisfy the requirements of a spoliation order. Indeed, they might have proven*

that they are in possession, but they have failed to prove that they were unlawfully disposed by the respondent."

It seems to me, that respondent concedes that applicants are in possession of the property. In applications for spoliation, it is established law that the court does not concern itself with issues of ownership. The court must be satisfied that the applicant was in peaceful and undisturbed occupation of the property. Whether or not the shareholding in 1st applicant by 2nd, to 4th applicants is being impugned is quite another matter. Once it is accepted that the land in question belonged to the applicant company prior to the purported acquisition on 18th December 2020 and once there is no dispute that applicants are still in possession of the land in question, then there can be no sound legal basis for alleging that applicants have no locus standi *in judicio* to institute proceedings in this court. The respondent appears to have conflated the issue of ownership of the land and the factual and legal existence of the company in terms of the law. The right to occupation of the land is still a matter subject to litigation in this court.

It is clear that this point *in limine* was not well taken. Assuming that applicants have no legal standing to bring proceedings in this matter or defend themselves in the pending eviction proceedings at Tsholotsho Magistrates' Court, then one wonders who shall represent the current occupiers of the land who still have possession as envisaged in spoliation proceedings. Respondent is well aware that applicants are the occupiers of the land. Applicants have authority to institute these proceedings. I therefore conclude that the point *in limine* has no merit and dismiss it.

Whether applicants have met the requirements for spoliatory relief

The argument on the merits is narrow. The facts are by and large common cause. The applicants contend that they have met the requirements for a spoliation order. They have been in occupation of the farm in question and in possession of the farming and irrigation equipment thereon. The applicants' lawful occupation has been unlawfully interrupted by the respondent who forcibly took occupation of the farm as well as the farming equipment.

In *African Apostolic Church (Vaapostora ve Africa) & 5 Ors* v *Mwazha & Anor* HH-412/20 the court held that in order to succeed in spoliation proceedings two requirements must be met:

(a) The applicant must show that they were in peaceful and undisturbed possession of the property; and

(b) That the respondent wrongfully deprived them of that possession.

See also: *Ricnob Supplies (Pvt) Ltd & Anor* v *Mandizera & Ors* HB-262-18.

In the present matter, the applicants have been in peaceful and undisturbed possession of Esidakeni Farm since its purchase and have been engaged in farming activities at the farm. Ownership in the farm is held under Deed of Transfer number 1980/90. Applicants have installed and equipped the farm with a borehole with a 15 HP submersible pump. Two additional boreholes with 20HP pumps and booster irrigation pump powered by a 50HPelectric motor have been installed. Applicants have planted tomatoes which are at various stages of maturity, with at least 50 000 plants being ready for harvest. There are 8 million onion plants that were planted in July 2021 due to mature around November and December. There are 65 000 butternut plants planted in July 2021. The applicants were able to engage in these farming activities because they have been in peaceful and undisturbed occupation of the farm. The respondent had wrongfully deprived the applicants of their occupation. The respondent has through agents, forcibly taken occupation of the farm and has prevented applicants from gaining access to the farm. The current position which is not seriously disputed by the respondent is that respondent through his agents and proxies, continues to remain in occupation of the farm despite the pending criminal proceeding for criminal trespass. Further, the respondent continues to deprive the applicants of possession of their farming equipment by unlawfully disconnecting the applicants' irrigation pipes and connecting his own pipes, thereby denying applicants' crops of water.

The respondent has behaved in the manner he does as he asserts that he has an offer letter granting him authority to occupy the farm. However, the offer letter does not grant the respondent the right to forcibly take occupation of the land being farmed by applicants. It has been established in several decided cases in these courts that the fact that the spoliator may be lawfully entitled to the property does not render his seizure any less legal and applicant can still claim his order. This principle is premised on the fact that parties are not allowed to take the law into their own hands. The position regarding offer letters issued by the Minister responsible for Lands in such matters was set out succinctly in *Forestry Estate (Pvt) Ltd* v *M.C.R. Venganai & Min of Lands in the Office of the President & Cabinet* HH-19-10. In that matter PATEL J (as he then was) held as follows:

"An offer letter does not entitle the holder to occupy the land allotted to him before the current occupier has been duly evicted by due process of the law. Consequently, the offeree cannot resort to self-help in order to dispossess or eject the occupier no matter how intransigent the latter may be in his refusal to vacate the property. The offence must wait until the state has taken steps to evict the occupier through a court order granted by a court of competent jurisdiction under the Gazetted Land (Consequential Provisions) Act (Chapter 20:28) or otherwise.

In the absence of such court order or the consent of the current occupier, the offeree has no self-executing right to occupy the land. See: Forester (Pvt) Ltd v Makuruna HC 6586/07 at page 4; Karori & Anor v Brigadier Mujaji HH-23-07 at p5; Pandoro v Taylor-Freeme & Ors HH-18-08; Bok Estates (Pvt) Ltd v Masara & Ors HH-148-09 at p3. See also my observations in Route Toute Bar & Ors v Minister of national Security & Ors HH-128-09 at p9. … with the greatest respect, it cannot be relied upon to overrule the decision of the full bench of the Supreme Court in Botha & Anor v Bennet 1996 (2) ZLR 73 (S) at 79, enounciating the traditional requirements for the grant of a spoliation order. This traditional approach has been adopted in the overwhelming majority of decisions of this court. I have no hesitation in continuing to follow that approach for the fundamental reason that recognizing any resort to self-help without a court order is the surest recipe for disorder, degenerating into possible violence and the aberration of the rule of law".

In this matter, the respondent admits and does not dispute that he has been to the applicants' farm on a number of occasions. Respondent has not explained why agents acting on his instructions have visited the farm and disrupted farming operations. It is logical and reasonable to conclude that the beneficiary of the violence and chaos caused by the invasion is the respondent. The attitude of the respondent is reflected in his averment in paragraph 21 of the opposing affidavit where he states as follows:

"… It would appear as though the applicants would rather have me hold on to the offer letter at home and not bother checking in on my rights …"

There can be no doubt that the respondent has sought to resort to self-help in attempting to assert what he perceives as his rights. Respondent has no right to resort to acts of self-help.

Disposition

The relief sought in this matter is for an order for spoliation. The nature of this application is the restoration of peaceful possession of property that has been unlawfully disposed by respondent. Applicants contend that they have been disposed of the immovable property being a farm known as Esidakeni Farm through the occupation of the farm by respondent and his agents. The respondent evidently continues to despoil the applicants of their possession and use of the farm by interfering with the irrigation equipment. I am satisfied that peaceful possession can only be restored to the applicants by granting an order as prayed in the draft order. As regards the relief of an interdict as framed in the draft order, applicants made no attempt to canvass and establish the requirements of an interdict in the founding affidavit. An averment is simply made that applicants seek an order preventing respondent from tampering, interfering and causing disruption to applicants' irrigation equipment.

In the result, the applicants have clearly satisfied the requirements for a spoliation order. Accordingly the following order is made.

1. The respondent and all persons claiming ownership through him shall remove or cause the removal of themselves and all such persons within 24 hours from the date of this order from the farm known as certain piece of land situated in the District of Nyamandlovu, being sub-division A of sub-division B of Umguza Block measuring 195,8095 hectares and certain piece of land in the District of Umguza being sub-division C of sub-division B of Umguza Block measuring 358,1768 hectares, collectively known as Esidakeni Farm.
2. The respondent shall within 24 hours from the date of this order restore to the applicant possession of all its farming equipment including irrigation pipes.
3. Failing such removal and restoration, the Sheriff of this court or his lawful deputy be and is hereby authorized and directed to evict the respondent and all persons claiming occupation through him from the farms described in paragraph 1.
4. The respondent shall bear the costs of suit.

Messrs Webb, Low & Barry inc. Ben Baron & Partners, applicants' legal practitioners
Mutatu, Masamvu & Da Silva Gustavo, respondent's legal practitioners