

RANGARIRAI MAGO

vs

GEORGE RUSERE

and

THE MINISTER OF LANDS, AGRICULTURE, WATER, CLIMATE AND RURAL  
RESETTLEMENT

HIGH COURT OF ZIMBABWE

ZISENGWE J.

MASVINGO, 3<sup>rd</sup> June, 2021 (written reasons) & 1<sup>st</sup> October, 2021

### **Opposed Application - Eviction**

*Mr C. Ndlovu*, applicant's legal practitioner

*Mr Chimiti*, 1st respondent's legal practitioner

*Mr Undenge*, 2<sup>nd</sup> respondent's legal practitioner

ZISENGWE J: This is an application for the eviction of the 1<sup>st</sup> respondent from a farm situate in the district of Masvingo referred to as Subdivision 5 of Cambria farm. The applicant avers in main that he is the recipient of an offer letter from the 2<sup>nd</sup> respondent (i.e. The Ministry of Lands, Agriculture, Water, Climate Change and Rural Resettlement, hereinafter abbreviated as the Ministry of Lands) which offer he received on 25 February, 2019 following which he embarked on certain agricultural activities thereon. He claims that the 1<sup>st</sup> respondent has without any lawful cause literally taken over his farm and stubbornly refuses to vacate it leaving him with no option but to approach this court for an order evicting him therefrom.

In his founding affidavit he chronicles the events that led to this application and they are as follows. Sometime in 2019, he went abroad on business leaving the farm in the care of his employees. Upon his return, however, he was surprised to find that the 1<sup>st</sup> respondent had taken occupation of his farm and was grazing his livestock and erecting structures thereon.

According to him efforts to remove the 1<sup>st</sup> respondent proved futile as the latter remained obdurate and unco-operative. Equally fruitless were his endeavours to engage the Ministry of Lands officials for a pacific resolution of the stand-off, the latter who simply advised him to take appropriate action for redress. Frustrated, he turned to the courts and filed the current application.

He contends that the offer letter in respect of the farm (a copy of which he attached to the application) confers him with a clear right to occupy and utilise the same. He further asserts that not only does 1<sup>st</sup> respondent's continued occupation of the farm constitute an unjustified and blatant violation of his rights over the farm, but has also impeded his farming activities from which he derives a livelihood.

The 1<sup>st</sup> respondent, though acknowledging applicant's right of occupation of the farm by virtue of the offer letter in his favour, nonetheless opposes the application. His position is essentially that he entered into some verbal agreement with the applicant for subletting of the farm. According to him that lease was envisaged to subsist for a period of 10 years and constitutes the basis upon which he enjoys occupation of the same.

### **The point in limine**

In his heads of argument, the 1<sup>st</sup> respondent rises a single preliminary point namely that there are material disputes of fact rendering the dispute incapable of resolution on the papers – and it is to this contention that I turn.

The 1<sup>st</sup> Respondent avers in this regard that the fact that the Applicant in his answering affidavit denies the existence of any agreement for the subletting of the farm to him ipso facto constitutes a material dispute of fact incapable of resolution without leading oral evidence.

The first question, therefore, is whether indeed there is such a dispute of fact rendering dispute insoluble without leading oral evidence. The test for the same was succinctly laid out by MAKARAU JP (as she then was) in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H) at 136 F – G where she said the following:

*“a material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence”*

In the same vein it has often been said that a real dispute of fact arises when the respondent denies material allegations made by the deponents on the applicants behalf and produces positive evidence to the contrary; see *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3)

SA 1155 (T); *R. Bakers (Pty) Ltd v Ruto Bakeries (Pty) Ltd* 1948 (2) SA 626 (T); *Plascon – Evans Pains Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623(A).

It is trite that where a respondent alleges a material dispute of fact he bears the onus to prove the existence of the same. His mere allegation of the existence of a dispute of fact alone is insufficient. This is because the respondent may raise fictitious dispute of fact to delay the proceedings (see *Peterson v Cuthbert & Co. Ltd.* 1945 AD 420 at 428, see also the *Room Hire* case (*supra*)). The respondent must place before the court sufficient facts to persuade it that material facts indeed exist.

Finally, on this point, regarding whether or not a real and genuine dispute of fact exists is a question of fact for the court to decide, see *Ismail and Another v Durban City Council* 1973 (2) SA 362(N) at 374.

In the present matter, the respondent dismally failed to establish the existence of any material disputes of fact. The respondent opens his heads of argument by asserting that “the facts of this matter are *common cause* ...” yet proceeds to contradict himself by alleging that there are material disputes of fact will call for the leading of oral evidence. Such patent contradiction on the part of the 1<sup>st</sup> respondent is clearly untenable.

The general approach adopted by the courts is to take a robust approach and endeavour to resolve a dispute on affidavit evidence. The following was said in this regard in *Soffiantini v Mould* 1956 (4) SA 150:

“... it is necessary to make a robust common-sense approach to a dispute on motion otherwise the effective functioning of the court can be hum strung and circumvented by the most simple and blatant strategy. The court must not hesitate to decide an issue of fact on affidavit because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an overjustifications approach to a dispute raised in affidavit”.

See also the *Plascon Evans* case (*supra*) at 634 H – 635 (B).

In the present case, I am of the view that the matter is quite capable of resolution without leading oral evidence or referring the matter to trial. This is because the outcome of this application depends not much (as will soon become apparent in this judgment) on the existence or otherwise of the alleged lease agreement between the parties but rather its legality. It is for this reason that the point *in limine* cannot find traction and is accordingly hereby dismissed.

### **On the merits**

The sole issue in my view is whether the 1<sup>st</sup> respondent has any legally cognizable right, claim or title to remain in occupation of the farm. As stated right at the onset, the applicant produced an offer letter from the Ministry of Lands entitling him to the occupation and utilisation of the farm in question. The 2<sup>nd</sup> respondent which is the government ministry mandated with the right to allocate land for agriculture and rural resettlement filed a consent to judgment wherein it indicated that it was not opposed to the order sought given the applicant is the holder of a valid offer letter.

The subsidiary verbal agreement which the 1<sup>st</sup> respondent purports to rely on cannot come to his aid particularly in view of the express conditions attached to the offer letter granted in favour of the applicant.

Paragraph 1(c) (i) of the offer letter reads as follows:-

*“That you shall not cede, assign, or make over any right or obligation or sublet or part with possession or grant any form of right of occupation in respect of this farm or part thereof without the prior written consent of the minister”.*

Even if one were to take 1<sup>st</sup> Respondent’s word for it and accept that he entered into a lease agreement with the applicant for the subletting of that farm, the prior written consent from the Minister of Lands as contemplated in the above paragraph sanctioning the same is conspicuous by its absence. Counsel for the 1<sup>st</sup> respondent conceded as much.

*Mr Chimiti* on behalf of the 1<sup>st</sup> respondent belatedly attempted to introduce issues which were not specifically raised in the notice of opposition. These include challenges to the validity of the offer letter granted in favour of the applicant and the issue of the counter claim in respect of the alleged subletting agreement.

The express terms of the offer letter stem from Section 28 of the Lands Commission Act [Chapter 20:29] which provides as follows: -

#### **“28 Prohibition of cession, etc.**

- (1) *Subject to the terms of the offer letter, lease or permit in question, an offer letter holder, lessee or permit holder shall not—*
  - (a) *cede, assign, hypothecate or otherwise alienate his or her lease or his or her rights thereunder or place any other person in possession of his or her holding or portion of Gazetted land;*

(b) *enter into a partnership for the working of his or her holding or portion of Gazetted land; without the consent in writing of the Minister.*

(2) *A transaction entered into by a lessee in contravention of subsection (1) shall be of no force and effect”.*

A contract such as the present one which contravenes a statutory provision is void *ab initio* see *Patel v Sigauke* 1994 (2) ZLR; *Horticultural Specialists Ltd v Wyrley-Birch* 1951 SR 197 and *York Estates (Pvt) Ltd v Mutambiranwa* 1961 R & N 943. The lease agreement between the applicant and 1<sup>st</sup> respondent, if ever it existed, therefore, constitutes such statutory illegality and therefore invalid and unenforceable. It can neither constitute a valid cause of action nor a valid defence. The learned authors Van Der Merwe, Van Huyssteen, Reinecke & Lubbe have this to say in their book *Contract, General Principles, 4<sup>th</sup> edition* at page 173:

*“It is generally said that illegal agreements are “void” (or invalid)” in the sense that they are not contracts and do not create obligations. No claim can therefore be brought to enforce what was promised in the agreement – **ex turpi vel iniusta causa non oritur action**. This maxim has been said to be inflexible and to admit of no exception. It applies even where the parties are not aware of the illegality of their agreement. The court should in fact take cognizance mero motu of the illegality of an agreement, if it is not raised by one of the parties but appears from the transaction itself or from the evidence before the court.”*

Dismissing this application, therefore, ostensibly on the basis of some alleged oral agreement for the subletting of the farm would amount to the court aiding and abetting an illegality.

Ultimately therefore there being no legally cognizable right on the part of the 1<sup>st</sup> respondent for him to remain in occupation of the farm and the applicant having proved his right of occupation of the farm via, among others his offer letter, has managed to satisfy the requirements of the relief he seeks.

Upon enquiry from the court regarding the time frame within which the 1<sup>st</sup> respondent is required to vacate the farm, a term which is missing from the applicant’s draft order, counsel for the applicant sought to amend the same to incorporate the term that 1<sup>st</sup> respondent should vacate the farm within 6 months of the order. Counsel for the 1<sup>st</sup> Respondent acceded to this amendment.

**Costs**

Initially the applicant sought an order for costs on the attorney-client scale. There is no justification for order on that superior scale. Accordingly the following order be and is here made.

**ORDER**

It is ordered that:

- (a) The 1<sup>st</sup> respondent and all those who claim occupation through him are evicted from Subdivision 5 of Cambria Farm in Masvingo District of Masvingo Province.
- (b) The 1<sup>st</sup> respondent to vacate the said farm within 6 months of this order.
- (c) The 1<sup>st</sup> respondent to pay costs of this application.

ZISENGWE J.



*Ndlovu & Hwacha, applicant's legal practitioners*

*Machaya & Associate, 1<sup>st</sup> respondent's legal practitioners*

*Civil Division of the Attorney General's Office, 2<sup>nd</sup> respondent's legal practitioners*