

BACHI FARM (PVT) LTD
and
COBBLESTONE INVESTMENTS PRIVATE
and
TRIBACK (PRIVATE) LIMITED
versus
OLIVER DZVENE
and
HOWARD MATARE
and
GEORGE MUPAKAVIRI (MATARE)
and
MAVIS NGWENYA
and
JOSEPH MUTIZHA
and
CLEOPAS TSETERE
and
CHAMUNORWA MUSHURE
and
THE MINISTER OF LANDS, LAND REFORM AND RURAL RESETTLEMENT N.O

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 4 October 2010 & 6 October 2010

Urgent Chamber Application

CHIWESHE JP: In this urgent chamber application the applicants seek a provisional order in the following terms:-

“TERMS OF THE FINAL ORDER SOUGHT

1. That the 1st to 7th respondents, their families, workers and/or agents are hereby ordered to restore to the first to third applicant companies and its workers to unhindered access, occupation and possession of the remainder of Weltevrede Estate also called Bhachi Farm (hereinafter called the farm) and specifically:-
 - (a) the farm workshop complex and yards;
 - (b) the 3 farm houses and yards;
 - (c) all the farm structures thereon;
 - (d) The various farm structures and buildings housing the applicants’ various equipment; farm materials, inputs and property and to include:
 - (e) 20 tones of semi-graded tobacco from the 2009 to 2010 tobacco season awaiting bailing and loading for conveyance to the market;
 - (f) The first and second applicant’s joint milling business equipment, and stocks therein;
 - (g) Various irrigation equipment;

- (h) 6 tractors;
 - (i) 2 lorries
 - (j) 2 pick-up trucks
 - (k) Various other farming equipment and workshop materials apart from the ones listed above;
 - (l) 3000 litres fuel (2000 litres diesel and 1000 litres petrol)
 - (m) Various farm chemicals and fertilizers;
 - (n) Various household goods and effects and/or other properties in and at the 3 farm houses thereon belonging to the first and second applicant companies;
 - (o) Various important office documents and records.
2. The 1st to 7th respondents, their families, workers, and agents shall forthwith move off the properties listed in para one (1) above together with all their belongings, so as to restore the status quo ante obtaining prior to the period 26 August 2010 up to 21 September 2010.
- (i) To the extent that it becomes necessary the Deputy Sheriff Chinhoyi be and is hereby authorized and empowered to attend to the eviction of the aforementioned persons and their belongings.
 - (j) Pursuant thereto the Deputy Sheriff Chinhoyi is authorized to and empowered to enlist the services and/or assistance of any member of the Zimbabwe Republic Police to attend to the eviction of any such person so that the provisions of this order are executed and implemented in full.
3. The first to seventh respondents, their families, workers and/or agents are hereby prohibited from occupying or taking over possession and/or utilizing any improvements and properties listed in para one (1) above, through extra judicial means.
4. The 1st to 7th respondents, their families, workers and/or agents shall like wise make no attempt to introduce farming equipment or any material onto the properties listed in para one (1) above and are hereby interdicted and prohibited from interfering in any way with the 1st to 3rd applicants' operations at Weltevrede Estates (Bhachi Farm), Banket or with the applicants' directors, workers and/or agents through extra judicial means.
5. The first to seventh respondents, their families, workers or agents shall make no further attempt to take over possession of the said properties or to utilize any equipment, materials and farm structures on the farm or any part of the farm, either directly or indirectly in the absence of the due process of the law and they shall not attempt to restrain or control the movement of any person or property onto or off the farm unless and until the first to third applicant companies have been lawfully evicted from the farm in terms of the laws of Zimbabwe.
6. The 1st to 7th respondents shall pay costs of this application, on an attorney-client scale.

INTERRIM RELIEF

Pending confirmation of the final order the applicants are granted the following interim relief:-

- (1) That the 1st to 7th respondents and all the other persons claiming occupation and/or possession of the remainder of Weltevrede Estate and specifically:-
- (a) the farm workshop complex and yards;
 - (b) the 3 farm houses and yards;
 - (c) all the farm structures thereon;
 - (d) The various farm structures and buildings housing the applicants' various equipment, farm materials, inputs and property and to include:
 - (e) 20 tones of semi-graded tobacco from the 2009 to 2010 tobacco season awaiting bailing and loading for conveyance to the market;
 - (f) 1st and 2nd applicant's joint milling business and equipment, and stocks therein;
 - (g) various irrigation equipment;
 - (h) 6 tractors;
 - (i) 2 lorries
 - (j) 2 pick-up trucks
 - (k) various other farming equipment and workshop materials apart from the ones listed above;
 - (l) 3000 litres fuel (2000 litres diesel and 1000 litres petrol)
 - (m) various farm chemicals and fertilizers;
 - (n) various household goods and effects and/or other properties in and at the 3 farm houses thereon belonging to the 1st and 2nd applicant companies;
 - (o) various important office documents and records

through them and/or any other person not being a representative, employee or invitee of the 1st to 3rd applicants shall forthwith vacate the said remainder of Weltevrede Estate Banket and surrender all the security locks keys thereto.

- (i) To the extent that it becomes necessary the Deputy Sheriff Chinhoyi be and is hereby authorized and empowered to attend to the eviction of the aforementioned persons, and to remove all the respondent's security locks with the assistance of a lock smith should the respondents fail to remove them on their on in terms of clause (1) above.
 - (ii) Pursuant thereto the Deputy Sheriff Chinhoyi be and is authorized to and empowered to enlist the services and/or assistance of any member of the Zimbabwe Republic Police to attend to the eviction of any such person so that the provisions of this order are executed and implemented in full.
- (2) That the 1st to 7th respondents and all other persons claiming occupation or possession of the property through them or any other person not being a representative, employee or invitee of the 1st to 3rd applicant company are interdicted from entering upon the property or interfering with the 1st to 3rd applicant's normal business and operations, or any of the applicant's movable or immovable equipment or material on the farm or using any threat of violence or force upon the applicant, its representatives, invitees or employees.
- (3) The 1st to 7th respondents, their families, workers and/or agents are hereby prohibited from occupying or taking over possession and utilizing any improvements and properties listed in para one (1) through extra judicial means.
- (4) This order shall not be construed to affect in any way, access to the farm by officers of the relevant government ministries and members of the relevant land committees in the course of their duties in terms of the Land Acquisition Act *Cap 2:10* and allied legislation, should such a need arise."

The founding affidavit attested to by Kelvin Erik Windel, the first applicant's director, representing the applicants is to the following effect:

The three applicant companies have been in a business arrangement wherein the first applicant and the second applicant are contracted to grow tobacco for the third applicant on the remainder of Weltevrede Estate in Banket (commonly referred to as Bhachi Farm). The farm belonged to Parland (Pvt) Ltd, a sister company of the first applicant. Parland (Pvt) Ltd acquired this piece of land from Tumbleweed Investments sometime in 1999. Of the original 1509, 6450 hectares, Tumbleweed retained 484,1697 hectares, thereby subdividing the original farm into two separate pieces of land. To date the business relationship between the three applicant companies subsists.

In September 2004 the eighth respondent issued a s 5 order followed by a s 8 acquisition order in respect of Welterede Estate in terms of the Land Acquisition Act [*Cap 20:10*]. In June 2005 Parland Investments (Pvt) Ltd challenged the legality of eighth respondent's actions in this honourable court under case number HC 2617/05 and obtained an order setting aside the acquisition order and attendant processes.

At all material times prior to the period 26 August 2010 right up to 21 September 2010 the applicants have been having peaceful, quiet, unhindered and undisturbed possession and control of the property listed in the draft provisional order.

The first applicant also states that the applicants have not been prosecuted and convicted for any alleged contravention of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*] nor has the property listed in the draft order been compulsorily acquired in terms of the Acquisition of Farm Equipment and Materials Act [*Cap 18:23*].

The first applicant alleges various acts of spoliation by the first to seventh respondents between 26 August 2010 and 21 September 2010. It states that the first to seventh respondents have, through extra judicial means and in the absence of the applicants' directors, agents or employees' consent forcibly taken over possession, physical control and appropriated the property, thereby, despoiling the applicants of their property.

At the hearing of this urgent matter Mr *Mlotshwa* for the first to seventh respondents raised two points in *limine*. The first point was that none of the applicants were present, preferring to send only Mr *Muchineripi*, their legal practitioner.

Secondly Mr *Mlotshwa* contended that the applicants had no *locus standi* to bring this application. He argued that the interim relief sought is both an eviction and an interdict. To grant that kind of interim relief the court must be certain that the applicant has a right. Any rights that the applicants might have had were extinguished by operation of law upon the passing of Constitutional Amendment (No. 17) Act, 2005 s 2 of which inserted a new s 16 B and Schedule

7 thereto. By operation of law, Bachi Farm, notwithstanding the ruling of this court under case number HC 2617/05, has become gazetted land. It belongs to the State and not the applicants. In turn the State has allocated same to the first to seventh respondents. The respondents have therefore lawful authority to be on the farm.

In response Mr *Muchineripi* conceded, contrary to the assertions of the applicants in their founding affidavit, that the applicants indeed have no right over the land in question. What the applicants have applied for is a spoliation order in which the question of rights or lawfulness does not arise. The issue should not be who has better rights but who had physical possession of the property. He argued that the applicant had all along had peaceful and undisturbed possession prior to the acts of the first to seventh respondents. The respondents had despoiled the applicants through extra judicial means. The legislature has enacted the due process for the prosecution, punishment and eviction of anyone occupying State land illegally. Further, with regards acquisition of farm equipment and materials, the provisions of the Acquisition of Farm Equipment and Materials Act [*Cap 18:28*] clearly establish the procedures to be followed. In *casu* it was argued that no acquisition of equipment or materials by the State had taken place. The applicants argued further that the fact that the first to seventh respondents had permits or offer letters does not empower them to resort to self help or extra judicial means of evicting the applicants.

The eighth respondent advised that the applicants have been issued with eviction notices. The original farm in question is divided into two by the Harare-Chinhoyi highway which passes through it. The portion on the right hand side of the road as you face Chinhoyi has been allocated to the respondents. No allocation has been made to the applicants on either side of the road. According to the first to seventh respondents (and this has not been disputed) all along the applicants have been illegally leasing the portion on the left hand side of the road from one of the beneficiaries of the land reform programme. The “lessor” has since died and his children have no intention of perpetuating the illegal lease. They have removed the applicants from that portion of the land. The first to seventh respondents argue that the present application is a ploy by the applicants to seize land on the right hand side of the road for their own use. They state that they have been in peaceful co-existence with the applicants since 2002. The applicants have been supporting them with farming inputs and tillage. They had access to the tobacco barns for storage of their tobacco and to all the infrastructure on the farm. They argue that the allegations that they have taken applicants’ employees hostage, locked up the sheds and storerooms and removed the property of the applicant are a fabrication. An entry made in the records of one of the guards manning the entrance to the farm has been brought to the attention of the court. It

tends to show that the applicants' employees have had the freedom to move in and out of the farm ferrying whatever property. The accuracy of this entry has not been challenged.

It is not clear whether this is an application for eviction or spoliation or both. While the papers show that what was intended to be achieved was both an order for eviction and an order for spoliation, Mr *Muchineripi*, for the applicants, appeared to be leaning more towards spoliation than eviction.

As for spoliation, it is not true that the applicants had all along enjoyed peaceful and undisturbed possession of the farm and its infrastructure. The undisputed fact is that the applicants and the first to seventh respondents have been in peaceful co-existence since 2002. That does not amount to quiet, peaceful and undisturbed possession.

The major difficulty facing the applicants in this matter is this that there are serious disputes of fact which cannot be resolved on the papers. On that basis alone the application cannot succeed.

In addition, the relief sought by the applicants in so far as it includes the eviction from the farm or any portion thereof of persons who, according to the eighth respondent, are lawfully on the farm cannot be granted. The applicants neither own nor lease the farm. They have no right to it. They cannot therefore evict or restrict the movements of the respondents.

The applicants' employees have been served with notices of eviction by the eighth respondent. They have up to 16 October 2010 (fourteen days from now) to vacate the farm or face the consequences. In the process of vacation or eviction they should be allowed to remove such movable property belonging to them as there maybe on the farm, including equipment and other farm materials, subject to any directions that the eighth respondent might give in terms of the Acquisition of Farm Equipment and Materials Act [*Cap 18:28*].

On the whole this application cannot succeed primarily because the applicants lack *locus standi*, having no right to seek the relief they seek. Further, there are disputes of facts which cannot be resolved without hearing evidence *viva voce*. By and large the balance of convenience in several respects favours the respondents. An order of the nature sought by the applicants would fly in the face of logic and common sense.

It was reasonably foreseeable that there would be disputes of fact in this application. The applicants should have proceeded by way of action. Further, the applicants knew they had no right to the property pursuant to Constitutional Amendment (No. 17) Act, 2005. They nonetheless proceeded to bring the application in its present form. I agree with the first to seventh respondents that an order of costs on the higher scale would be appropriate in the circumstances.

Accordingly it is ordered as follows:

1. The application be and is hereby dismissed.
2. The applicants pay the costs of this application on the legal practitioner and client scale.

Muchineripi & Associates, applicants' legal practitioners
Antonio, Mlohtswa & Company, 1st to 7th respondents' legal practitioners
Civil Division of the Attorney General's Office, 8th respondent's legal practitioners