FORRESTER ESTATE (PRIVATE) LIMITED
versus
LOVEMORE MAKUNUN'UNU
and
THE MINISTER OF LANDS, LAND REFORM AND
RESETTLEMENT N.O

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 16 September and 6 October 2010

P C P Paul, for the applicant
TST Dzvetero, for the respondent

MAKONI J: This is an application for leave to execute pending appeal. The background to the matter is that the applicant carries on farming operations at Frogmore Farm in Mazoe ("farm"). The first respondent took occupation of part of the farm on 13 May 2007 on the basis of an offer letter issued to him by the second respondent. The applicant issued summons, out of this court, claiming spoliatory relief. The matter went to a full trial and on 29 July 2009 this court granted the applicant's claim. On 30 July 2009 the respondent filed a Notice of Appeal to the Supreme Court. The applicant then instituted the present proceedings.

The law applicable to applications of this nature is well settled. The leading case on this point is the case of *South Cape Corporation* (*Pty*) *Ltd* v *Engineering Management Services* (*Pty*) *Ltd* 1977 (3) SA 534 A at 545 D-F. It sets out the factors to be considered in such an application. These can be summarised as the prospects of success on appeal, the potentiality of irreparable harm or prejudice being sustained by the parties and where there is potentiality of irreparable harm to both appellant and respondent, the balance of hardship or convenience. The *South Cape Corporation* case has been followed in a number of decisions in our jurisdiction. See *Dabengwa & Anor* v *Minister of Home Affairs & Ors* 1982 (1) ZLR 233 (H), *Archer*(*Pvt*) *Ltd* v *Guthrine Holdings* (*Pvt*) *Ltd* 1989 (1) ZLR 152 H and *Kyriakos & Kyriakos* v *Chasi Ors* 2003 (2) ZLR 399 H.

Prospect of Success

I would approach this issue from two angles *viz* whether the farm was acquired and if so whether the offer letter issued to the respondent would entitle him to take occupation before the applicant has been lawfully evicted.

Acquisition

The applicant contended that the preliminary notices issued in terms of s 5 of the Land Acquisition Act *Cap* 20 had been set aside by various judgments of this court before and after the coming into being of Constitutional Amendment Act No. 17. The Constitutional Amendment Act could not purport to legalise that which was declared null and void.

I would agree with the analysis of the issue and the conclusion arrived at by PATEL J in *Forrester Estate* (*Pvt*) *Ltd* v *MCR Vengesayi & the Minister of Lands. in the Office of the President and Cabinet* HH 19-10.

I will quote in *extensio* his concluding paragraph on p 2 of the cyclostyled judgment:

> "Section 16B of the Constitution and Schedule 7 thereto were brought into operation in September 2005 through Act No. 5 of 2005. The clear object of s 16B as read with item 30 of Schedule 7 was to acquire Frogmore Farm in September 2005 and vest title therein in the State. Although s 16B does not explicitly override pre-existing court decisions, the specific and clear intention of the Legislature was to validate the acquisition of all the properties listed in Schedule 7 and to effectuate the vesting of title in the State. By necessary implication, this was intended notwithstanding any prior decisions of the courts to the contrary. The intention emerges fairly unequivocally not only from s 16B(2)(a), which acquires all the lands listed in Schedule 7, but also from the wording of s 16B(3)(a), which precludes any challenge to these acquisitions before the courts. It is abundantly clear, therefore, that Frogmore Farm was duly acquired by the State in terms of s 16B and continues to vest in the State".

I will now turn to consider the second issue relating to the offer letter. The applicant contends that the offer letter does not entitle the respondent to take the law into his own hands and occupy the farm without the consent of the applicant or a court order.

What comes to mind is the question posed by CHIDYAUSIKU CJ in *Nyasha Chikafu v Dodhill* (*Pvt*) *Ltd 2 Ors* SC 28/09 which is:

> "Can unlawful occupation constitutes a defence to a claim for *mandament van spolie*?"

After posing the above question, CHIDYAUSIKU CJ continued with the following remarks:

> "It is quite clear that the authorities are divergent on this issue. One line of authorities, which includes judgments of the High Court of Zimbabwe, supports the contention that unlawful occupation can be a defence; while other authorities that include High Court of Zimbabwe judgments as well, are to the effect that unlawful occupation is irrelevant. Given this situation, whichever party lost in the High Court had prospects of success as its contention is supported by a line of cases."

PATEL J in *Forrester Estate* (*Pvt*) *Ltd*, *supra* was of the view that the respondent in that matter, who is in the same situation as the respondent in *casu*, had minimal prospects of success. He said the view expressed by CHIDYAUSIKU CJ in *Chikafu supra* were made

orbisar and that it cannot be relied upon to overrule the decision of the full bench of the Supreme Court in *Botha & Anor* v *Berret* 1996 (2) ZLR 73 (S) of 79 which enunciate the traditional requirements for the grant of a spoliation order.

With the greatest of respect to PATEL J, I am of the view that the respondents has prospects of success on appeal. The judgments of this court regarding spoliation have sent divergent views to litigants. The issue is now before the Supreme Court for the court to make a pronouncement on the various conflicting judgments of the court. The judgments which support the respondents position make very good reading. See *Konrad Van der Merwe* v *Nixon Chirinda & 2 Ors* HC 3217/07, *Top Crop* (1976) *Pvt Ltd & Anor* v *Minister of Lands, Land Reform and Resettlement & Anor HH 74-09* and *Andrew Roy Ferera & Anor* v *Bessie Nhendera* HC 3995/08. In view of that the best approach, in the circumstances, would be to await the Supreme Court decision which might go either way.

Both parties had made preparation for 2009/2010 farming season. They are both likely to suffer some prejudice. In view of my finding regarding prospects of success the balance of convenience favours that the first respondent remains on the farm pending the determination of the appeal.

Accordingly, I make the following order

1. The application is dismissed.
2. The applicant to pay first respondent's costs.

Wintertons, applicant's legal practitioners
Antonio, Mlotshwa & Company, 1st respondent's legal practitioners