

PAUL KABOWA
and
KNOWLEDGE MAFURIRANWA
and
SAMUEL JUMA
and
ONIAS CHABUKA
and
MARGARET TSIKIRA
versus
KAPENTA FISHERIES (PRIVATE) LIMITED
and
GERALD VAN RENSBURG
and
WILFRED MBOMA
and
BRIGADIER MAHACHI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 26 January and 9 February, 2016

Urgent Chamber Application

M. Mavhunga, for the applicants
D. Muunganirwa, for the respondents

MANGOTA J: On 1 November 2012, the applicants entered into a lease agreement with the first respondent. They each leased the respondent's boats. The lease was to endure for the period 1 November, 2012 -31 December, 2017.

The agreed monthly rental for each boat was 240 kgs of Kapenta fish which the applicants paid to the respondent. The applicants took possession of the boats and paid the rentals as and when such fell due. It was the statement of the applicants that, at one time, the fish became scarce as a result of which they accrued various amounts in arrear rentals.

The applicants stated that, on 24 July 2016, the first respondent, through the second respondent, told them that, if they cleared the arrear rentals within three (3) months from the mentioned date, they could own the boats. They said the respondents stated further that, if

they failed to clear the arrear rentals, the respondents would charge them 4 % interest but would not repossess the boats.

The applicants submitted that it was within the spirit of the representations which the respondents made to them that they did not waste any time. They said they made every effort to clear the debt which was then owing. They stated that they paid for the fishing permits as they believed that they were going to own the boats. They attached to their application Annexures J,K,L and M which they said were receipts for payment of the permits.

The applicants stated that, on 15 January 2015, and to their shock as well as surprise, the second, third and fourth respondents summoned, and told, them that the fourth respondent had purchased the boats and that he would collect the boats with immediate effect. They submitted that fuel was organised so that all the boats which were on shore would be towed to the harbour. They made reference to the following boats which they said were towed to the harbour without their consent:

- (a) 1st applicant's boat No. KF 79
- (b) 2nd applicant's boat No. KF 775
- (c) 3rd applicant's boat No 481
- (d) 4th applicant's boat No KF 194 – and
- (e) 5th applicant's boat No. KF 334.

The applicants stated that the fourth respondent who introduced himself to them as Brigadier Mahachi told them that he had bought the boats. They said he told them, further, that the entire harbour was cordoned off and that they were no longer allowed to enter the premises even if they had their personal belongings in the boats. They said he deployed some army personnel at the site as a way of making sure that the applicants would never have access to the boats.

It was on the basis of the foregoing allegations that the applicants approached the court on an urgent basis. They moved the court to grant them a spoliation order against the respondents.

The first and second respondents opposed the application. Their initial statement was, in many respects, similar to that of the applicants. Their point of departure from the applicants was that the written lease of November 2012 to December 2017 was cancelled by mutual consent of the parties in December, 2013. They submitted that the parties negotiated a new verbal lease agreement which started running in January, 2014. That verbal lease, according to the respondents, was to terminate in December, 2014. They said the verbal lease

was subject to renewal at the discretion of the first respondent. The lease, they said, was renewed for the period January to December, 2015. They stated, as the applicants did, that in July, 2015 the verbal lease was renegotiated to the effect that the applicants were offered to clear the arrear rentals after which the latter would take ownership of the boats. They said the agreement was that the applicants would clear the arrear rentals within three (3) months and, if they failed to do so within the stated time frame, the period of payment would be extended for a further three (3) months with interest of 4% accruing. They stated that the parties agreed that, if the applicants failed to pay within the extended three (3) months period, they would surrender the boats to the respondents who would sell the same. They submitted that the applicants failed to clear the arrear rentals as a result of which the respondents advised them that they would sell the boats. The respondents said they eventually sold the boats to the fourth respondent. They said they offered the boats to him on the 10th, and he accepted the offer on 31, December, 2015.

The applicants' claim was that they were despoiled on 15 January, 2015. They filed the present urgent chamber application on 18 January, 2016. They filed it one working day after the cause of action had arisen. They cannot, under the circumstances, be regarded as having not treated the case with the urgency that it deserved.

The applicants premised their application on the lease which they signed with the respondents on 1 November, 2012. They said the respondents deprived them of the boats which were on hire to them during the subsistence of the lease.

The response of the first and second respondents was that the lease upon which the application rested was no longer in existence when they sold the boats to the fourth respondent. They submitted that the written lease of 1 November, 2012 had been cancelled and replaced by a verbal lease which they said ran from January to 31 December, 2014. They stated that the same verbal lease was renewed for a further one year which ran from 1 January, to 31 December, 2015. They said it was in the course of the last mentioned period that they cancelled the verbal lease after the applicants had failed to clear the outstanding rent arrears and sold the boats to the fourth respondent. They attached to their opposing papers the affidavit of one Dorreys Kidwell whom they said supported their statement with regard to the cancellation of the written lease and its replacement with two verbal leases the last of which was allegedly cancelled when the applicants failed to clear the arrear rentals.

The court examined the contents of each of the written lease of 1 November, 2012. It observed that Dorreys Kidwell was not an ordinary contracting party with the respondents as

the applicants were. He occupied a special place in each of the written lease agreements. He was described, in each lease, as the respondents' representative. Paragraphs 3 and 16 of the written lease are relevant in the mentioned regard. They read as follows:

- “3. The Lessee shall pay rent in well dried quality Kapenta fish at a rate of 240 kgs Kapenta per calendar month for the vessel. This to be paid to the Lessor's nominated representative, presently Dorreys Kidwell on a daily basis.
4.
5.
6.
7.
16. 10% of all catches shall be paid in the form of dry Kapenta fish for the rentals and costs as follows: Rack Space, tractor and trailer, Zesa, security, water, rates, Business Licence for Kapenta sales, welding machines, cutting gas equipment, sheer legs, workshop tools and equipment. This to be paid to the Lessor's representative, Dorreys Kidwell on a daily basis [emphasis added]

It is for the above mentioned reason, if for no other, that the court remains of the distinct view that Dorreys Kidwell's affidavit would not take the case of the respondents any further than where they left it. Little, if any, weight would be attached to the affidavit of a deponent who, to all intents and purposes, was working with the first and second respondents.

Be that as it may, however, the court recognises the fact that, in July 2015, the parties made an attempt at cancelling the written lease and replacing the same with a verbal lease. The representations which the respondents made to the applicants did, in the court's view, persuade the applicants to consider the suggestion of the respondents as having been a viable one. The applicants were, not unnaturally, happier than otherwise, if they became owners of the boats which were on hire to them from the respondents.

Whether or not the applicants possessed the boats in terms of the written, or verbal, lease is not the issue. The issue is whether they were despoiled of their possession of the boats.

The respondents' version of events was that the applicants failed to clear their arrear rentals and, in December 2015, the respondents cancelled the lease and, in the same month, sold the boats to the fourth respondent. The date on which the verbal or written Lease was cancelled was not stated with any degree of certainty. The second respondent who deposed to an affidavit on behalf of the first respondent stated, in para 6 of his affidavit as follows:

“.....the first respondent offered the boats to Ephias Mahachi on 11th December 2015 who accepted the offered (*sic*) and agreed to the sale in December 2015. The parties signed the agreement of sale on 13th January 2016 and delivery was done on 14th January, 2016.”[emphasis added]

The applicants said, to their shock and surprise, the second, third and fourth respondents summoned them on 15 January, 2016 on which date the third respondent told them that the fourth respondent had purchased the boats and that the latter would collect the boats forthwith. It is difficult, if not impossible, to countenance the suggestion that the first and second respondents who alleged to have cancelled the lease with the applicants in December 2015, allowed the latter persons not only to remain in possession of the boats but to continue using the same for fourteen or fifteen days running after the alleged cancellation of the lease. A *fortiori* regard being had to the fact that lease, written or verbal, had been cancelled because of the applicants' failure to either pay, or clear, the arrear rentals. There is no doubt that the applicants were not only in possession of the boats but were also using them when news of the purchase of the same was communicated to them on either 14 January [the respondents' date] or 15 January, 2016 [the applicants' date]. The affidavit of Loveton Chareka who is the first respondent's security guard is pertinent in the mention regard. He stated, in para(s) 3 and 5 that:

- “3. On or about 14 January, 2016 I was instructed by the 1st respondent's director, 2nd respondent herein through a telephone conversation to collect the following boats from the lake that is KF334, KF775 and KF481.
4.
5. I confirm that I collected the said boats from the lake together with one Josiah Mupanda and parked the same at the harbour” [emphasis added]

The three boats which Mr Chareka made mention of did not go into the waters of the lake on their own. The first and second respondents did not send the boats into the waters. The applicants did. They possessed and used the boats at the time that Mr Chareka and Mupanda collected them from there on the instructions of the second respondent.

Mr Chareka was not being candid with the court when he stated that the remaining two boats-KF194 and KF479- had already been surrendered and parked by the applicants at the harbour. He did not have any knowledge of what transpired between the applicants and the respondents when they met on 14, or 15, January 2016. He was not at the spot where the parties to this application were. The second respondent, he said, phoned and instructed him to go into the lake to collect the three boats. He might have seen the two boats at the harbour and assumed that the applicants who were using them had surrendered them when those had not done so.

The fourth respondent played a significant role in despoiling the applicants of the boats which they were in possession of. His status in the uniformed forces and the presence

of army personnel who were with him instilled real, as opposed to imaginary, fear in the minds of the applicants. The applicants stated as much. He was, therefore, not an innocent purchaser as he sought to have the court believe.

The relief of *mandament van spolie* is open to any person who lawfully possessed and was unlawfully dispossessed. The applicants lawfully possessed the boats which are the subject of this application. They were unlawfully disposed of by the respondents. The status *quo ante* the spoliation, therefore, obtains. The respondents resorted to self-help. The law does not accept or condone such conduct which is reminiscent of the law of the jungle.

The applicants proved their case on a balance of probabilities. The application is, accordingly, granted as prayed.

Mavhunga & Associates, applicants' legal practitioners
Sinyoro & Partners, 1st, 2nd, 3rd & 4th respondents' legal practitioners