JOHN TENDAI ENOCK MAPONDERA
and
SUSAN CHIPO MAPONDERA
versus
PAUL GARUFU
and
LEONARD T RUPANGO
and
EVERJOICE CHIHWAI
and
MAEDZANISE MAKANI

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 31 January & 9 August 2023

**Opposed Matter**

Mr *Makururu*, for the applicant
Mr *Ndoro*, for the respondent

**MANGOTA J**

I heard this matter on 31 January, 2023. I delivered an *ex tempore* judgment in which I granted the application with costs.

On 13 June, 2023 the respondents wrote to me requesting full reasons for my decision. These are they:

At the center of the dispute of the parties is Subdivision 2 of Strathlone Farm ("the farm"). It is in the District of Goromonzi which is under Mashonaland East Province. It is 442.43 hectares in extent.

Government compulsorily acquired the farm at the beginning of its Land Reform Programme. It, at the time, allowed the respondents to stay at the farm. In September, 2006 it offered the farm to one John Tendai Enock Mapondera and one Susan Chipo Mapondera who is his wife. The two are collectively referred to herein as the applicant. On 22 February, 2022 Government gave a 99-year lease of the farm to the applicant. The lease constitutes the applicant's cause of action. It moves me to evict the respondents from the farm whose occupation, it claims,

is without its consent and, therefore, against its will. It alleges that it holds limited real right in the farm which rights are enforceable against the whole world. It couched its draft order in the following terms:

" IT IS ORDERED THAT:

1. The application be and is hereby granted.
2. Respondents and all those claiming through them be and are hereby evicted from Subdivision 2 of Strathlone Farm in Goromonzi District of Mashonaland East Province.
3. 1st and 2nd respondents to pay costs of suit on an ordinary scale."

The respondents oppose the application. They raise four preliminary issues after which they proceed to deal with the merits of the matter. Their *in limine* issues are that:

a) the applicant's offer letter is not stamped and is therefore invalid;
b) the non-joinder of the State makes the application fatally defective;
c) the application which the applicant referred to this court and not to the Administrative Court is in the wrong forum; and
d) the applicant should have exhausted domestic remedies which are available to it.

They allege, on the merits, that the applicant's title to the farm is defective on account of the claim that the same had already been allocated to them when the lease came into existence. They aver that the lease was acquired fraudulently or through gross misrepresentation. The lease, they claim, is defective in the sense that it was granted over the farm which they occupy. They insist that the Minister of Land ("the Minister") gave offer letters to them. They aver that the Minister could not have validly passed title to the applicant when they validly held title to the farm. They claim that a long lease which is granted over the farm owned by them is defective and does not transfer any rights to the applicant. They state that valid offer letters which they hold confer legitimate ownership of the farm to them unless and until the Minister cancels the same on good cause shown. They claim that the applicant's long lease is a nullity on account of the allegation that it was granted before their rights, as predecessors in title, had been extinquished. They insist that the Minister should first have lawfully terminated any previous leases or other holdership of the farm before the same can be delivered to the applicant. The lease, they insist, is fatally defective. The applicant, they allege, should be estopped from disturbing their peaceful enjoyment and/or occupation of the farm. They state that the offer letters which were issued to them created limited real rights in the farm allowing

them to occupy and utilize the same. The Constitution of Zimbabwe, they claim, protects their right to occupy and hold the farm. It does not, according to them, allow arbitrary deprivation of property as what the applicant is trying to do. They state that the offer letters which they hold are a burden upon the farm and they, therefore, constitute a subtraction from the dominium which is real and registrable. They insist that they, and not the applicant, own the farm. The applicant, they claim, does not have the *locus to* evict them from the farm. They state that their offer letters created real rights in the farm and, in the process, confirmed them as the owners of the farm. The applicant, they aver, has not shown any proof that their titles are defective or were cancelled by Government. They dispute the allegation that, in acquiring a long lease over the farm, the applicant acquired the farm. They state that Government did not notify them of its acquisition of the farm. They insist that their offer letters are still valid and extant. They move me to dismiss the application with costs which are at attorney and client scale.

The respondents climbed down on their challenge which relates to the validity of the offer letter of the applicant. The position which they took on their first preliminary issue resolves the same to a point where no further debate of it remains necessary.

The respondents' second preliminary matter relates to non-joinder of the State to the application. Sub-rule (11) of Rule 32 of the rules of court is apposite to this *in limine* matter. It reads:

" (11) No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter"

I have, in terms of the above-quoted subrule, the discretion to order the joinder of the State to the application. In exercising my discretion on the same, however, I am guided by the need, or lack of it, to join the State to the proceedings.

*In casu*, I remain alive to the fact that the dispute is not between the Minister and the parties who are before me. The Minister, I am satisfied, performed the functions of his office well. He is not therefore required to appear before me to clarify any matter. The dispute which the applicant placed before me remains between the respondents and it. The Minister's absence from the proceedings cannot therefore defeat the cause or matter which is before me. The preliminary issue which the respondents raise on this aspect of the application is without substance. It is therefore dismissed.

The application is one for a vindicatory order. Such an order lies in the realms of this court and not in the Administrative Court to which the respondents insist the application should have been taken. The relief which the plaintiff or the applicant prays for does, in a large measure, determine the forum to which he (includes she) should take his case. The respondents' in limine matter which is to the effect that the application should have been taken to the Administrative Court is misplaced. The applicant, in fact, took its application to the correct forum. The in limine matter is therefore dismissed for lack of substance.

It is a cherished principle of law that, before a litigant takes his case to the court, he should exhaust domestic remedies which are available to him. The case of Tutani v Minister of Labour & Ors, 1987 (2) ZLR 88 (H) to which the respondents drew my attention speaks to an equal effect. It reads:

> "Where domestic remedies are capable of providing effective redress in respect of the complaint and secondly where the unlawfulness alleged has not been undermined by domestic remedies themselves, a litigant should exhaust the domestic remedies before approaching the courts unless there are good reasons for not doing so."

The applicant's statement in respect of the respondent' third preliminary issue which relates to exhaustion of domestic remedies is in paragraph 8, page 88 of its answering affidavit. It states, in the same, that the nature of the relief which it is seeking cannot be granted by the chief lands officer but by the court. It submits that the chief lands officer is aware of the fact that the whole of the farm which used to be A1 plots was allocated to it as appears in Annexure A which it attached to its founding papers.

*Tutan*i v *Minister* (supra) states that a resort to domestic remedies by a litigant can only be made where the same have the capacity of providing effective redress in respect of the complaint. The applicant's complaint is the presence of the respondents on the farm. The redress which it seeks is the eviction of the respondents from the farm. The chief lands officer, as the applicant correctly states, does not have the capacity to evict them from the farm. Only the court has the power to do so. The logical conclusion which follows from the observed set of circumstances is that domestic remedies which are available to the applicant are not effective. They do not resolve its complaint. Annexure A which the applicant attached to its founding papers shows that it is the chief lands officer who wrote, on 20 June 2011, advising the officer-in-charge, Juru, Goromonzi

that plot 2 of the farm which is 442.43 hectares in extent was allocated to the applicant. Reference is made in the mentioned regard to the annexure which appears at p 93 of the record.

Given the observed set of circumstances, the respondents do not show how the chief lands officer would have resolved the dispute which exists between the applicant and them. The *in limine* matter appears to have been raised by the respondents more out of fashion than out of any intention on their part to have their dispute with the applicant resolved by the chief lands officer. The *in limine* matter is without merit and it is dismissed.

What the applicant placed before me is a suit for the remedy *of actio rei vindicatio*. The remedy is available to a party who owns a thing which is in the possession of another without his will or consent. For him to succeed, however, he must allege and prove, on a balance of probabilities, that:

i) he is the owner of the thing;
ii) the thing was/is in the possession of the defendant or the respondent at the commencement of the action- and
iii) the thing which he is vindicating is still in existence and is clearly identifiable: Silberberg and Schoeman, *Law of Property*, 6th edition. Page 270.

It is trite that an owner may claim his property whenever, from whoever is holding it. It is in the nature of ownership that possession of the *rei* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some right which is enforceable against the owner such as a right of retention or a contractual right: *Chitungwiza Municipality* v *Maxwell Karenyi*, HH 93/18. It requires little, if any, debate to accept the principle that the law jealously protects the right of the owner in regard to his property and that the court does not hesitate to dispossess the same from one who is holding it against its owner's will or consent. It is for the mentioned reason, if for no other, that the court was pleased to express the stated position of the law in a clear and succinct manner when it remarked in Oakland *Nominees Ltd* v *Gelria Mining & Investments Co Ltd*, 1976 (1) SA 441 at 452 A that:

> "…..at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc with no qualms whatsoever in employing force or chicanery to dispossess fellow humans of ownership of their property. If the law did not jealously guard and protect the right of ownership and

> the corrective right of the owner to his/her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order".

What the court was at pains to place emphasis upon in the above-cited case was repeated with equal force in *Savanhu* v *Hwange Colliery Company Ltd*, SC 8/2015 in which it was remarked that:

> "The *actio rei vindicatio* is an action brought by an owner of property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent".

The Minister who is the land acquiring and allocating authority acquired the whole farm at the inception of Government's Land Reform Programme. At the time of its acquisition, the farm was 647.425 hectares in extent. Reference is made in the mentioned regard to Annexure A which the applicant attached to its answering affidavit. It appears at p93 of the record. It is authored by the chief lands officer for Mashonaland East Province one W. Motsi. He states that the farm which had a total hectarage of 647.425 was divided into two big plots with the first of those being allocated to one Ezekiel Chaanoita and the second plot being allocated to the applicant. According to him, Mr Chaanoita received 205 hectares and the applicant received 442.425 hectares from Government.

It goes without saying that, on 27 September 2006, the Minister allocated 442.43 hectares to the applicant. Reference is made in the mentioned regard to Annexure B which appears at page 55 of the record. It is taken as given that, on 15 November 2021, the Minister signed a 99-year lease with the applicant and had the same registered with the registrar of Deeds as a Notarial Deed of Lease.

That the registration of the lease created limited real rights which operate in favour of the applicant requires no debate at all. The position of the law states to an equal effect. W.E Cooper discusses the nature of the lessee's rights in a long lease. He does so in his *Landlord and Tenant*, 2nd edition, pages 276-277 wherein he states that:

> " A lessee is also entitled to have the lease registered against the title deed of the property. When he is given occupation or the lease is registered, the lessee acquires a real right. Once his real right is so constituted, the lessee can enforce it against the whole world. Consequently, upon being given occupation or the lease being registered, the lessee should be entitled to eject a trespasser".

The remarks of the learned author puts to rest the dispute of the applicant and the respondents. The applicant holds a long lease which Government, through the Minister, who

extended the same to it. It, accordingly, has every right to evict the respondents from the farm to which its lease relates. The law supports its cause in the observed regard. Its claim as against the respondents remains unassailable. If doubt is entertained in the same vein, *dicta* of case authorities clear such. De Villiers JP, for instance, weighed in on the established principle of law when he remarked in *Heynes Matthew Ltd* v *Gibson N.O.*, 1950 (1) SA 13 ( C ) at page 15 that:

> "When once the lessee has been granted a lease of more than 10 years then certain legal qualities attach thereto. One of the legal qualities that attaches to it is that, being a lease in *longum tempus*, it requires to be registered to bind third parties. Registration really may be said to be equivalent to full delivery to the lessee of the rights granted to him by the lease. He is entitled therefore to whatever advantages which flow from a lease of this description. One of the advantages is that upon due registration he is protected for the term of the lease against third parties."

It is evident, from the foregoing, that the applicant has an unfettered right to evict from the farm the respondents and all those who claim occupation of the farm through them. The respondents' assertion which is to the effect that they have a right to remain in occupation of the farm is not only misplaced. It is also unfortunate. Unfortunate in the sense that the pieces of paper which they attached to their notices of opposition do not qualify to entitle them to hold onto the farm. These appear at pages 82, 83 and 84 of the record. They were issued by various district administrators who fall under the Province of Mashonaland East. They are not addressed to the respondents. They are addressed to whoever it may concern. They do not fall into the definition section of the Gazetted Lands (Consequential Provisions) Act. They are not offer letters, permits or land settlement leases. They are, in short, nothing. They do not confer any title to the respondents who hold them.

The respondents, out of ill-advice from counsel, continue to refer to the pieces of papers which they hold as offer letters. They are not and should not, therefore, be referred to as such. Continued reference to them as offer letter places a misconstruction on the law which is as clear as night follows day. The respondents' argument which is to the effect that section 6 of the Act validated the pieces of paper which they hold is seriously misplaced. The section did not validate permits, if such was what each respondent holds. It validated offer letters which the Minister issued in terms of the law which relates to acquisition and allocation of land. The section reads:

> "Validation of offer letters issued on or before the fixed date.
> Any offer letter issued on or before the fixed date that is not withdrawn by the acquiring authority is hereby validated".

The respondents should disabuse themselves of the inclination to refer to what the district administrators issued to them as offer letters. The reality of the matter is that those are not offer letters at all. The respondents stand on no ground to resist their eviction from the farm by the applicant. It holds title to the farm and it can enforce its right against the respondents as well as against anyone who may want to deprive it of its occupation and utilization of the same against its will.

The respondents' argument which is to the effect that the Minister did not cancel the pieces of paper which they hold is without merit. The Minister did not issue those to them. The district administrators did. The pieces of paper upon which they place reliance, as the applicant correctly states, ceased to exist when the Minister consolidated the whole farm into two big plots which he allocated to the applicant and another. The plots which the respondents held ceased to exist by operation of law. The Minister did not have to give the respondents to any notice. He owed no duty to them. CHIDYAUSIKU C.J clarified the stated position of the matter in *CFU* & *ORS v Ministry of Lands & Ors*, 2010 (1) ZLR 576 (S) in which he remarked at p 591 E-G as follows:

> " The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to use….. I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual. Having concluded that the Minister has the legal power or authority to issue an offer letter, a permit or a land settlement lease it follows that the holders of those documents have the legal authority to occupy and use the and in terms of the offer letter, permit or land settlement lease."

The learned Chief Justice proceeded to discuss the case of an applicant who was or is on all fours with the respondents in casu. He did so in *Taylor –Freeme* v *Senior Magisrate*, Chinhoyi wherein he remarked at p 511 C-E that:

> "Lawful authority means an offer letter, a permit or a land settlement lease. The documents attached to the defence outline are not offer letters, permits or land settlement leases issued by the acquiring authority. They do not constitute 'lawful authority' providing a defence to the charge the applicant is facing.
> The applicant did not have an offer letter, a permit, or a land settlement lease. Accordingly, he had no lawful authority to occupy or continue to occupy the farm. The letters from the late Vice President Msika and those of the Ministry of Lands, Land Reform and Resettlement do not constitute 'lawful authority'. 'Lawful authority' in terms of the Act begins and ends with the offer letter, a permit and a land settlement lease. A telephone call or a letter, even from the Minister of Lands, Land Reform and Resettlement is not 'lawful authority'.

I cannot add to, or subtract from, the clearly defined position of the law as was enunciated in the above case by the learned Chief Justice. The *dictum* which he was pleased to make settles the dispute of the parties to this case to a point where no further debate of it remains.

The applicant proved its case on a preponderance of probabilities. The application is, therefore, granted as prayed in the draft order.

*Makururu and Partners*, applicant legal practitioner
*Saidi Law Firm*, respondent's legal practitioner