SHAKA HILLS FARM (PRIVATE) LIMITED
versus
GREAME SHAUN CHADWICK
and
THE SHERIFF OF ZIMBABWE
and
OFFICER COMMANDING WEDZA DISTRICT
ZIMBABWE REPUBLIC POLICE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6 September & 14 October 2024

Court Application

S M Hashiti, with him *K Kachabwa*, for the applicant
T Mpofu, for the first respondent
No appearance for the second & third respondents

ZHOU J: This is a court application that was instituted under a certificate of urgency. The relief that is being sought is set out in the draft order as follows:

> "(a) The first respondent its agents employees or assignees and all those deriving or claiming authority from it) be and are hereby barred and interdicted from planting any new crop whose physiological maturity extends beyond 31st August 2024 on a certain piece of land known as Vuma and Sheba Section of Shaka Hills Farm measuring 355 hectares.
> (b) The first respondent and all those claiming occupation of a certain piece of land known as Vuma and Sheba Section of Shaka Hills Farm through it be and are hereby ordered to vacate Shaka Hills Farm on or before 1st of September 2024.
> (c) In the event that first respondent fails to vacate the property, the Sheriff of the High Court of Zimbabwe and the members of the Zimbabwe Republic Police are hereby authorized to take all steps necessary to evict the first respondent and all those who claim occupation through him from Vuma and Sheba Section of Shaka Hills Farm."

Applicant claims costs on the attorney client scale according to para 8(f) of the founding affidavit albeit these were omitted from the draft order.

The application is opposed by the first respondent.

The material facts from which the dispute arises may be summarised as follows:

The applicant is the registered owner of the immovable property to which the application relates, namely, Vuma and Sheba Section of Shaka Hills Farm that is located in Wedza.

The first respondent took occupation of the farm pursuant to a lease agreement that was concluded between it and the applicant as lessor in 2015. Following a dispute between the two the applicant instituted proceedings for the eviction of the first respondent under Case No HC 6666/19. The proceedings were resolved by a deed of settlement which, in turn gave birth to an order by consent. In terms of the order by consent the applicant leased the immovable property to the first respondent for the period July 2021 to 31 August 2024. The lease was to terminate on 31 August 2024, on which day the first respondent was enjoined to vacate the farm unless the lease had been extended. The rental per year was also prescribed.

In April 2024 the applicant notified the respondent in writing that the lease would not be extended beyond the stated date of 31 August 2024 because applicant now required the farm for the operation of its own business. Applicant states that in preparing to operate the farm it acquired equipment as detailed in the founding affidavit and entered into agreements with third parties for the purposes of carrying on its planned farming activities at the farm. However by letter dated 9 August 2024 the first respondent informed the applicant that it would not vacate the farm as per the consent order and deed of settlement, but would continue its operations after 31 August 2024. The founding affidavit details the activities of the first respondent which showed that it intended to remain in occupation of the farm after 31 August 2024. The conduct of the first respondent triggered the filing of the instant application.

In addition to contesting the matter on the merits, the first respondent advanced three objections *in limine*, namely (a) that the matter is not urgent; and (b) that the procedure adopted by the applicant is irregular, (c) that the deponent to the founding affidavit has no authority, and (d) that there are material disputes of fact. In the heads of argument, only the objections pertaining to the urgent hearing of the matter and the alleged material disputes of fact were persisted with. Fresh preliminary point were raised, namely (a) that there is no basis for an interdict; and (b) that the process for a *rei vindication* was irregular. Those objections not persisted with must therefore be deemed to have been abandoned.

Urgency

A matter is urgent if it cannot wait to be dealt with as an ordinary court application, see *Pickering* v *Zimbabwe Newspapers (1980) Ltd* 1991(1) ZRL 71 (H); *Dilwin Investments (Pvt) Ltd T/A Formscaff* v *Jopa Engineering Co. (Pvt) Ltd* HH 116-98 at p 1.

In the words of MAKARAU JP (as she then was) in *Document Support Centre (Pvt) Ltd* v *Mapurire* 2006 (2) ZL 232 (H) at 243 C-D:

> "……. A matter is urgent if when the cause of action arises giving rise to the need to act, the harm suffered or threatened must be redressed or arrested there and then, for by waiting for the wheels of justice to grind at their ordinary pace, the aggrieved party would have irretrievably lost the right or legal interest that it seeks to protect and any approaches to court thereafter on that cause of action will be academic and of no direct benefit to the applicant."

In casu, what is being sought to be stopped is the applicant's continued occupation and use of the farm after 31 August 2024. This is not a typical case of attempting to close the stable after the horse has already bolted out merely because of the cut off date by which the first respondent ought to have vacated the farm, for the infringement is continuing. In other words, by remaining on the farm after the entitlement to be there ceased the first respondent is perpetuating the injury which the interdict seeks to stop hence the need for urgent intervention to stop the continuing infraction.

In the opposing affidavit the first respondent states that the need to act arose in May when he planted tobacco seedlings. But his communication that he would continue with his activities at the farm was only made in August. That, to me was when it became clear that the first respondent was planting seedlings because he intended to continue occupying the farm. There was therefore no delay such as would deprive the matter of its urgency.

Accordingly, the objection to the urgent hearing of the matter is dismissed.

Disputes of fact

The alleged disputes of fact pertain to whether the applicant wants the farm for its own use and the nature of the improvements effected by the first respondent and the value thereof. As regards the first issue, the first respondent has not tendered any evidence to contradict the applicant's assertion that it intends to carry on operations at the farm and that it has already put in place preparatory measures as detailed in the founding affidavit. As for the second issue, the facts alleged are not material for determination of the instant case as the nature of the improvements or the value thereof do not constitute a defence to the relief being sought.

For the foregoing reasons, the alleged disputes of fact are being spuriously raised. The objection must therefore fail.

Whether there is a basis for the interdict or the *rei vindicatio*

The matter raised in respect of whether there is a basis for an interdict to be granted and whether a *rei vindication* can properly be sought on the facts alleged are matters that pertain to the merits of the application. These matters cannot be the subjects of objections *in limine.* Accordingly, the objections are dismissed.

The merits

As regards the merits, the first respondent was supposed to vacate the farm on or before 31 August 2024. It is common cause that he is still in occupation of the farm without the consent of the applicant.

The first respondent opposes the application on essentially two grounds namely (a) that the eviction is being sought based on a simulated agreement and (b) that he is entitled to be compensated for the improvements that he effected at the farm.

Both defences are clearly vexatious. As regards the allegation that the cause is founded upon a simulated transaction the applicant has not led any evidence to support that allegation. The written agreement between the applicant and Mossfield Farms (Pvt) Ltd shows that it is a management contract. The mandate of Massfield is explicitly stated as to manage the farm. The suggestion that it is a disguised lease agreement is not based on evidence.

As regards the entitlement to compensation, the position of the law is settled. The first respondent, even if it had a valid claim for compensation for improvements, has no *ius retentionis* in respect of the farm in order to enforce payment of compensation. That is the settled position of the law, see *Bangure* v *Gweru City Council* 1998 (2) ZLR 396 (H) *Derby Farms (Pvt) Ltd* v *Chirunga* HH 82-2007; *Omarshah* v *Karasa* 1996 (1) ZLR 584 (H). The first respondent has acknowledged these authorities in the heads of argument filed on his behalf. He, however, seeks to argue that they no longer reflect what should be the correct position of he law.

In submitting that the court should depart from the settled position of the common law, the first respondent sets out a constitutional ground. The contention is based on the maxim *cessante ratione lege cessat ipsa lex,* reason is the soul of the law; when the reason of the law ceases to exist so does the law itself. *S* v *Mujee 1981* ZLR 176 (A) at 178, also reported in 1981 (3) SA 800 (Z) at 802 – 803. The first respondent's case is that the common law became anachronistic by reason of s 56(1) of the constitution which provides the following:

> "All persons are equal before the law and have the right to equal protection and benefit of the law."

The authorities, including those cited by the applicant, show that the equal protection and benefit of the law provision applies to persons in similar circumstances, see *Gonese* v *President of the Senate* & Ors CCZ 2-23; *Nkomo* v *Minister of Local Government, Rural and Urban Development* & Ors 2016 (1) ZLR 113 (SC); *Zimbabwe Consolidated Diamond Company (Pvt) Ltd* v *Adlecraft Investments (Pvt) Ltd* CCZ 2-24. The applicant is not similarly

circumstanced with those other categories of possessors and occupiers whom the law grants *ius retentionis* in respect of expenses incurred in improving property belonging to another person. A lessee occupies premises pursuant to an agreement, and is at liberty to seek inclusion in the lease agreement of a right of retention to enforce compensation for improvements. The submission that a lessee is in a similar situation as any other possessor is therefore not sound. On this basis the opposition to the application is clearly meritless.

But the application would in any event, have failed on another ground. The common law sufficiently affords compensation to a lessor who has effected improvements on the property of another notwithstanding exclusion of the right of retention to enforce such compensation. The doctrine of constitutional avoidance and the principle of subsidiary enjoin that if a dispute is capable of resolution by or under the existing common law principles or statutory provisions then the court should avoid reaching out to constitutional principles in order to resolve such a dispute. Constitutional law principles must be reserved for genuinely serious disputes. The present case is a simple situation of an occupier of a farm who deliberately choses to perpetuate his occupation in flagrant disregard of an agreement whose obligations he voluntarily assumed. The dispute can be readily resolved under the existing law. If the first respondent has any claim for compensation, he can pursue it even after vacating the farm.

The applicant has made a claim for costs on the attorney–client scale in the founding affidavit although the draft order makes no reference to costs at all. However, I see no reason why there should be a departure from the principle that costs must as a general rule follow the result. Attorney – client costs are a special order of costs awarded in those cases where the conduct of the party affected is reprehensible. The vexatiousness of a defence is a ground for awarding costs on the punitive scale, see *Zimbabwe Online (Pvt) Ltd* v *Telecontract (Pvt) Ltd* 2012 (1) ZLR 197 (H) AT 201A-C.

The first respondent's opposition and, indeed, his conduct in relation to the case, constitute an abuse of the procedures of this court. The attempt to impeach an established principle of law by reference to the constitution through heads of argument where the opposing affidavit has not pleaded any constitutional case shows the vexatiousness of the opposition. The punitive order of costs is therefore justified.

In the result, IT IS ORDERED THAT:

1. The first respondent, his agents, employees or assignees and all those deriving or claiming authority from him be and are hereby barred from planting any new crops on

a certain piece of land known as Vuma and Sheba Section of Shaka Hills Farm measuring 355 hectares.

2. The first respondent and all those claiming occupation through him be and are hereby ordered to vacate the piece of land referred to above forthwith upon service of this order.
3. In the event that the first respondent and any persons occupying through him fail to vacate the property referred to in paragraphs 1 and 2 hereof the Sheriff for Zimbabwe and members of the Zimbabwe Republic Police are hereby authorized to take all steps reasonably necessary to evict the first respondent and all persons claiming occupation through him from the said piece of land known as Vuma and Sheba Section of Shaka Hills Farm.
4. The first respondent shall pay costs on the attorney-client scale.

ZHOU J:……

Mafongoya & Matapura, applicant's legal practitioners
Scanlen & Holderness, first respondent's legal practitioners