BLEAT ENTERPRISES PVT LTD

Versus

B.W.B CHIKURA

And

THE OFFICER COMMANDING
ZIMBABWE REPUBLIC POLICE

And

MINISTER OF LANDS, AGRICULTURE AND
RURAL RESETTLEMENT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 16 JUNE AND 4 AUGUST 2022

Opposed Application

J. Tshuma, for the applicant
T. Chinyoka, for the 1st respondent
B. Moyo, for the 2nd and 3rd respondents

KABASA J: This is an opposed application in which the applicant seeks the following relief:-

"1. The 1st respondents (sic) and all persons claiming through and under him shall remove or cause the removal of themselves and all such persons occupying certain piece of land being Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo within 24 hours of the service of this order.

2. Failing such removal, the Sheriff of this Honourable Court be and is hereby authorised and directed to evict the 1st respondents (sic) and all persons claiming through and under him from Lot 1 Lot 4AB Nuanetsi Ranch A District of Masvingo.

3. The 2nd respondent be and is hereby directed to provide an escort and any other physical assistance necessary for the Sheriff, during the service and execution of this order.

4. The 1st respondent and all persons claiming through and under him are interdicted and barred from continuing to allocate or apportion or resettle any portion of Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo.

5. The 1st respondents (sic) shall pay the costs of this application on the legal practitioner and client scale."

The background facts to this application are these: - The applicant is said to be the owner of a farm, known as Lot 1 of Lot 4 AB Nuanetsi Ranch A, purchased by a Mr Carl Bradfield from Mutirikwi Sugar Company Private Ltd and held under a Certified of Registered Title "CRT" 4515/2000. The farm was purchased in 1989 and the directors of the applicant and its employees have been in peaceful and undisturbed occupation thereat, carrying out farming activities. In July 2017 the 1st respondent arrived at the farm brandishing an offer letter which gave him subdivision 12 of Lot 15 of Nuanetsi Ranch A Mwenezi, measuring approximately 33 hectares. It later turned out that the property had not been gazetted for acquisition, a fact which gave the deponent to the founding affidavit and her mother some respite as that meant the farm could not be distributed. That relief was short lived following the subsequent gazetting of the acquisition of the farm held under CRT 4515/2000 and described as Lot 12 of Lot 16 of Nuanetsi Ranch A measuring 61, 327 hectares.

The 1st respondent thereafter returned to the farm and this was in November 2017 and left some property at the farm workshop. The property was not interfered with upon advice from the applicant's legal practitioners. In 2018 the 1st respondent returned with farming implements but failed to access the farm as the gate was locked. In 2019 the 1st respondent returned again with an offer letter dated 17 April 2019 offering him Subdivision 1 of Lot 12 of Lot 16 of NRA in Mwenezi measuring 33 hectares. He was denied access.

Undeterred in May 2020 the 1st respondent returned, cut the lock to the gate and left his property. In January 2021 he forcibly took occupation of Lot 1 of Lot 4AB taking over 13 hectares of sugar cane crop which applicant had planted. He also chased away the applicant's employees, broke into the farm house and took occupation of the same.

It is on the basis of the foregoing that the applicant seeks spoliatory relief.

In opposing the application, the 1st respondent took points *in limine*, these are:-

(i) Non-disclosure of material facts

(ii) Lis pendens

(iii) Prescription

(iv) Lack of *locus standi* and

(v) Incompetent relief

On the merits the 1st respondent's opposition contends that he is not occupying Lot 1 of Lot 4AB Nuanetsi Ranch and the applicant has nothing to show the rights or interest it has under CRT 4515/2000, which land was compulsorily acquired in 2017. The land was then subdivided and such subdivision was of the farm applicant claims to be its property, i.e. Subdivision 1 of Lot 12 of Lot 16 of NRA.

He was given an offer letter for Subdivision 1 of Lot 12 of Lot 16 NRA measuring 33 hectares and went to the farm on 25th May 2020 after the completion of all due processes in terms of the law. The Applicant was given notice to vacate the farm and to wind up its activities. The supervisor, one Joram Muvazhi was present when the respondent arrived at the farm but failed to open the farm house for him as he had no keys.

His occupation of the farm is by virtue of an offer letter and therefore lawful. The sugar cane which applicant had planted on the portion of land which he now occupies was duly harvested by the applicant.

The applicant has instituted different proceedings over the same issue as a result of its failure to appreciate that the land was compulsorily acquired. It is the applicant which must vacate the farm as it is now state land, so contended the 1st respondent.

At the hearing of the matter counsel for the 2nd and 3rd respondents withdrew the notices of opposition which had not been filed in terms of the rules of court and stated that the respondents would abide by the decision of the court.

I directed the parties to address me on both points *in limine* and merits so as to avoid re-calling them for further argument in the event that the points *in limine* failed to find favour with the court.

I turn now to consider the points *in limine*.

1) **Non-disclosure of material facts**

The 1st respondent aptly captured what non-disclosure of material facts entails and the effect thereof by reference to BERE J's decision in *Centra (Pvt) Ltd* v *Moyas and Another* HH 57-12 where the learned Judge had this to say:-

> "It is accepted position that courts detest or frown on those litigants or legal practitioners who desire to derive sympathy of the court by deliberately withholding vital information which has a bearing on the very matter that the court is called upon to determine." (See also *Anabas Services (Pvt) Ltd* v *Minister of Health and Others* (HB 88-03)

The question is was there material non-disclosure *in casu*? What are the facts which have a bearing on this very application which were withheld by the applicant?

Counsel for the 1st respondent's argument is that there has been litigation before over the same issue.

The undisputed position is that in HC 208/18 the applicant, Anne Bradfield, mother to the deponent of the founding affidavit *in casu*, was seeking an order declaring the compulsory acquisition of the land in question unconstitutional and cancellation of an offer letter granted to one Webster Mazara.

The disclosure of this information would have had no bearing on the matter I am seized with, except to show the spirited attempts that the applicant has made in trying to retain ownership of this farm.

In HC 239/20, a matter argued before WAMAMBO J, the applicant was again Anne Bradfield and it was an urgent chamber application seeking to bar the 1st respondent from entering the applicant's field pending the determination of HC 208/18.

This application was not determined on the merits as it was deemed not urgent. In essence the applicant was seeking a determination on the ownership of the farm.

Not only was this application removed from the roll for lack of urgency but the applicant *in casu* disclosed this information in the founding affidavit deposed to by Candice Bradfield.

In HC 490/21, a matter that was argued before me, the applicant was seeking spoliatory relief and I struck the matter off the roll of urgent matters having held that it was not urgent. I did not decide the matter on the merits. The present application was filed as an ordinary application following my decision in HC490/21.

The disclosure of the foregoing was not, in my considered view material as such disclosure would not have had a bearing on the matter to be determined *in casu*.

I am therefore persuaded by *Mr Tshuma's* submission that it cannot be said the applicant failed to take the court into its confidence by deliberately withholding information, which information has a bearing on the issues to be decided *in casu*.

The point *in limine* therefore lacks merit and is accordingly dismissed.

2. **Lis pendens**

Mr Chinyoka's submission was that HC 490/21 had not yet been withdrawn at the time the notice of opposition was filed. It follows that had this matter not subsequently been withdrawn, it would have been pending as the urgent chamber application was merely removed from the roll, which meant the matter automatically joined the ordinary roll, in terms of rule 60 (19) of the High Court Rules, S I 202 of 2021.

With the withdrawal of the application, the applicant effectively removed it from the court system. It is therefore not pending.

Counsel referred to several cases regarding the defence of *lis pendens*. In *Nestle SA (Pty) Ltd* v *Mars Inc* 2001 (4) ALL SA 315 (SCA) the court had this to say:-

> "The defence of *lis pendens* shares features in common with the defence of *res judicata* because they share the common underlying principle that there should be finality in litigation. Once a suit has been commenced before a tribunal competent to adjudicate upon it, the suit should, generally, be brought to a conclusion before that tribunal and should not be replicated."

The authors Herbstein and Van Winsen in the *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa, Fifth Edition*, at 605 put it thus:-

> "*Lis pendens* is a special plea open to a defendant who contends that a suit between the same parties concerning a like thing and founded upon the same cause of action is pending in some other court."

The application I am seized with is for spoliatory relief. I have already alluded to the fact that the application before WAMAMBO J sought to bar the 1st respondent from entering the applicant therein's field whilst HC 208/18 seeks to challenge the constitutionality of the acquisition. These cases cannot be said "concern a like thing."

The adjudication of these matters would not address the issue of spoliation and the spoliatory relief which this matter is only concerned with. Spoliation does not concern itself with ownership but on how the applicant was dispossessed. The issue of ownership which the other cases focus on involves a different inquiry altogether, divorced from the inquiry *in casu.*

The requirements for a *lis pendens* defence have therefore not been met. This point *in limine* equally lacks merit and is also dismissed.

3. **Prescription**

Spoliatory proceedings are not concerned with ownership. Reference to the settlement agreement upon which the applicant hinges its claim to the farm is therefore irrelevant.

Mr Chinyoka appeared to have abandoned this point as there was no reference to it in the heads of argument nor in oral submissions. This must have been borne out of the realisation that the point *in limine* was not properly taken.

This point, like the two before it, is also dismissed.

4. **Lack of *locus standi***

The issue for determination in this matter is whether the applicant was in peaceful and undisturbed occupation of the land in question. It is not whether such land is registered in its name or how it was acquired. It equally is not whether the applicant is lawfully on the farm after its acquisition.

A reading of the 1st respondent's notice of opposition and opposing affidavit makes it clear that the applicant was on this farm which has now been compulsorily acquired. This application is concerned with whether due process was followed to remove the applicant.

Mr Tshuma's contention that the *locus standi* is founded on the fact that the applicant asserts that it was in peaceful occupation and was forcibly dispossessed is correct and finds favour with the court.

The point *in limine* therefore lacks merit and faces the same fate as the others before it.

5. **Incompetent relief**

In elaborating on this point, 1st respondent had this to say, as per the heads of argument, paragraph 10 thereof:-

> "The applicant has not alleged any forceful or unwarranted act by the 1st respondent in the year 2017 being the year that the alleged dispossession arose.
>
> It is submitted that the 1st respondent followed all due processes in terms of the law and such an order being sought by the applicant cannot be imposed on the 1st respondent."

The foregoing speaks to the issue of acquisition and the fact that the applicant lost the farm through acquisition, with the 1st respondent's subsequent occupation premised on an offer letter issued after such acquisition.

I must again reiterate that the application for spoliation is not to be considered on the aspect of the applicant having lost rights to the farm through acquisition or the fact that the 1st respondent has a valid offer letter. This matter revolves around the issue of peaceful and undisturbed occupation and how the 1st respondent came to occupy the piece of land which forms part of the farm which was acquired.

That said, this court is not called upon to adjudicate over the acquisition or the validity of the offer letter but whether due process was followed in dispossessing the applicant from occupation of the land.

Where a litigant claims that they were in peaceful and undisturbed possession and were forcefully dispossessed, the relief of a spoliatory order is the appropriate relief in the circumstances. There is therefore nothing incompetent with the relief sought. The issue is whether a case for such a relief has been made.

There is therefore no merit in this point *in limine* and like the others before it, this point also fails and is accordingly dismissed.

I turn now to the merits

In an application for spoliation the applicant must show that he/she was in peaceful and undisturbed possession of the property and that the respondent deprived him/her forcibly of such possession. (*Banga and Another* v *Zawe and Others* SC 74-12, *Hwatirinda v Tavaruva* HMA27/2021)

The applicant chronicled the events which culminated in the 1st respondent breaking the lock to the gate and settling on the piece of land which is part of Lot 1 of Lot 4AB Nuanetsi Ranch A held under CRT 4515/2000.

A reading of the events which led to the applicant seeking a declaratur as to the ownership of the farm (HC 208/18) is indicative of a tussle between the applicant and the 1st respondent who was seeking to access the farm by virtue of an offer letter issued to him dated 17th April 2019. The litigation already alluded to speaks to the applicant's resistance to the attempts that the 1st respondent was making to gain access to the farm. Anne Bradfield was cited in these cases in her personal capacity, for reasons that are not very clear, but it is apparent she was one of the directors of the applicant, just as the deponent to the founding affidavit *in casu.*

Joram Muvazhi, a supervisor employed at this farm deposed to an affidavit wherein he stated that the 1st respondent's occupation of the farm was through force and so was the occupation of the farm house.

I need not detain myself by going through the assertions and counter-assertions regarding how the 1st respondent occupied the portion of land described in the offer letter referred to earlier.

The following excerpt from the 1st respondent's opposing affidavit clearly sets out how he came to occupy the farm or land in question:-

> "As I have stated in the preceding paragraphs applicant fails to appreciate the issues surrounding land distribution as well as land acquisition. Applicant needs to appreciate that part of what used to be its land has been given to me and has a legal effect and force by virtue of the offer letter granted to me by the 3rd respondent."

The thrust of the 1st respondent's argument is that the applicant lost the right to be on the farm upon its acquisition. He earned the right to occupy part of what was applicant's farm by virtue of an offer letter. He goes on to say he followed due processes and it is the applicant whose conduct is unwarranted and is trying to evade the dictates of the law.

The unwarranted conduct of the applicant is its refusal to vacate the farm in compliance with the acquisition order. The issue however is how the 1st respondent managed to settle on this farm despite the resistance by the applicant?

In *Forestry Estate (Pvt) Ltd* v *MCR Venganai and Minister of Lands in the Office of* the *President and Cabinet* HH 19-10, PATEL J (as he then was) had this to say:-

> "An offer letter does not entitle the holder to occupy the land allotted to him before the current occupier has been duly evicted by due process of the law. Consequently, the offeree cannot resort to self-help in order to dispossess or eject the occupier no matter how intransigent the latter may be in his refusal to vacate the property. The offeree must wait until the state has taken steps to evict the occupier through a court order granted by a court of competent jurisdiction under the Gazetted Land (Consequential Provisions) Act, (Chapter 20:28) or otherwise."

The 1st respondent's forays into this farm which were being resisted until he broke the lock and settled on the portion of the land which was subdivided from the whole cannot be sanitised by reference to a valid offer letter.

I got the distinct impression that the 1st respondent believed that the offer letter allowed him to force his way onto this farm. Nothing could be further from the correct legal position.

It does not make much sense to argue that the 1st respondent was allowed onto the farm and did not force his way when the litigation already alluded to clearly show the contrary.

The 1st respondent cannot say he is on his allocated portion whilst the applicant is on its "other subdivision." These subdivisions came about after acquisition but to all intents and purposes the farm in its totality is what the applicant seeks to be restored to because the 1st respondent despoiled it. The reference to Lot 1 of Lot 4AB Nuanetsi Ranch clearly refers to the applicant's farm not to subdivisions which occurred after acquisition. The remarks in *Mutsahuni and Anor v Minister of Lands, Agriculture, Fisheries, Water and Rural Resettlement HH407/21 where MUZOFA J* had this to say apply with equal force*: " In Superintendent Remembrancer Legal Affairs v Aril Kumar AIR 1980 SC 52,* the court noted that a one size fits all definition of possession is difficult but it is agreed that possession has two essential elements, actual power over the object possessed, i.e. *corpus possessionis* and intention of the possessor to exclude any interference from others, i.e. *animus possidendi.* Possession is factual as well as legal concept"

The learned judge went on to say:

"The fact that the main house, the chicken run and the land on that part of the farm lay fallow does not mean there was no possession……Even if it can be said the applicants are now unlawfully occupying the land they must be protected from unlawful conduct. At this stage the court does not have to inquire into ownership, it is about possession only. See *Etheredge v Minister of State for National Security Responsible for Lands, Land Reform and Resettlement and Anor* HH16/09"

The applicant's possession was of the whole farm and not the subdivision the 1st respondent avers the applicant still occupies. In spoliation proceedings it therefore does not make much sense to isolate a part of the whole since the description of the farm is determined by the applicant's cause which informed the legal basis for a spoliatory relief.

Reference was made to a notice which was received by the supervisor, Joram Muvazhi asking the applicant to wind up its activities. It is important to note that attached to such notice was a document which stated;

> "I have read and understood the contents of this letter and will fully comply with the same and undertake to vacate the farm on the given date failure of which the Acquiring Authority will invoke provisions of section 3 of the Gazetted Land (Consequential Provisions) Act, Chapter 20:28 in respect of my eviction."

The notice referred to the farm and not a subdivision of it and the applicant did not voluntarily vacate but sought to challenge the acquisition. I am not concerned with such challenge here but with the fact that the Acquiring Authority did not invoke the provisions of section 3 in seeking the eviction of the applicant. Section 3 (5) of the Act allows for the prosecution of an intransigent former land owner and the court is vested with power to grant an eviction order following the conviction of the former land owner. Failing the utilisation of section 3, the offer letter holder can institute eviction proceedings and obtain an eviction order. These are the two processes which can be resorted to and only when this is done can one say "due processes" were followed.

The due process is not in the acquisition and the possession of an offer letter but it is in not resorting to self-help in order to assert the right obtained from the offer letter. Due process entails following legal procedures in evicting the intransigent land owner before an offer letter holder moves onto the farm.

In *Commercial Farmers Union and Others* v *Minister of Lands and Rural Resettlement and Others* 2010 (2) ZLR 576 (S) the court held that both former land owner and the holder of an offer letter who resorts to self-help will be acting outside the law. The judgment is not authority for the proposition that a former land owner who has been despoiled cannot approach the court for spoliatory relief. On the contrary the decision supports the proposition that where spoliatory relief has been obtained, a former land owner cannot brandish that order in order to resist prosecution and subsequent eviction under section 3 of the Gazetted Land (Consequential Provisions) Act.

In *Mswelangubo Farm (Private) Limited and 2 Others* v *Kershelmar Farms (Private*) *Limited and 3 Others* SC 80-22, the Supreme Court reiterated this position. The court had this to say:-

> "In spoliation matters it is apparent the deciding factor is that deprivation should be effected lawfully. Our law deprecates self-help. Even the *Commercial Farmers Union* case supra makes it clear that anarchy and chaos brought about by self-help is not acceptable. The individual with an offer letter has the *locus standi in judicio* to seek the eviction of a former owner after acquisition of land by the state. This by no means suggests authorisation of invasion in a lawless manner. In spoliation matters, the issue of ownership does not arise. The one seeking spoliation only has to show that they were in peaceful and undisturbed possession and were wrongfully and forcibly dispossessed."

Granted the applicant *in casu*, through probably lack of proper legal counsel, brought applications which sought to address ownership and only filed an urgent chamber application under HC 490/21 much later, resulting in that application being adjudged as not urgent. Be that as it may that did not change the fact that the 1st respondent resorted to self-help.

It is my considered view that allowing the 1st respondent to stay put is tantamount to sanitising a wrongful act and thereby setting a bad precedent.

"The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the *maxim spoliatus ante omnia restituendus est* (the despoiled person must be restored to the possession before all else.) The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. (*Ngukumba* v *Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC).

The argument that the applicant could not claim to be in peaceful possession because the land had been acquired falls foul of case law. So too is the argument that when 1st respondent entered the farm lawful deprivation had already taken place.

If that was the correct legal position section 3 (3) of the Gazetted Land (Consequential Provisions) Act would have sufficed without section 3 (5) which provides that:-

> "A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates."

Such conviction on its own does not entitle any one to force the former owners out or to forcibly move onto the land. A court order has to be obtained, without that, such action is what the law on spoliation frowns upon.

The 1st respondent forced his way onto the land and did not follow due process. He resorted to self-help and entered the farm against the applicant's consent. His actions amount to a failure to observe the dictates of the law and to allow such conduct undermines public order. It matters not that the applicant was not able to obtain relief on an urgent basis for the reasons already canvassed elsewhere in this judgment and the failure to obtain urgent relief does not bar the applicant who has discharged the onus of proving the requisites for a spoliation order from obtaining such relief. (K v K (4711/2020) [2021] ZAFSHC13)

The applicant has therefore made a case for the relief it seeks. *Mr Tshuma* conceded and rightly so that paragraph 4 of the draft order is not competent. The 1st respondent is not the responsible authority who allocates land and even if he was, this court cannot stop that which is legal. If the farm was acquired, its allocation to holders of offer letters cannot be illegal. The Acquiring Authority has to follow due process in evicting the land owner so the offer letter holders can legally move onto the land.

As regards costs I find no justification for punitive costs and will therefore not exercise my discretion as prayed for.

In the result I make the following order:-

1. The 1st respondent and all persons claiming through and under him shall remove or cause the removal of themselves and all such persons occupying certain piece of land being Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo, within 3 days of the service of this order.

2. Failing such removal, the Sheriff of this Honourable Court be and is hereby authorised and directed to evict the 1st respondent and all persons claiming through and under him from Lot 1 of Lot 4AB Nuanetsi Ranch A District of Masvingo.

3. The 2nd respondent be and is hereby directed to provide an escort and any other physical assistance necessary for the Sheriff, during the service and execution of the order.

4. The 1st respondent shall pay costs of suit at the ordinary scale.

Webb, Low & Barry Inc. Ben, Baron & Partners, applicant's legal practitioners
Mutumbwa Mugabe & Partners c/o T J Mabhikwa and Partners, 1st respondent's legal practitioners
Civil Division of The Attorney General's Office, 2nd and 3rd respondents' legal practitioners