

DELATFIN ENGINEERING (PVT) LTD
versus
POLICE COMMISSIONER GENERAL (G.T. MATANGA)
and
OFFICER COMMANDING ZRP SUPPORT UNIT
COMMISSIONER DUBE
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS
& NATIONAL HOUSING

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 30 November, 1 & 8 December 2022

Urgent Chamber Application

C Warara, for the applicant
D Jaricha, for the respondents'

CHITAPI J: In this urgent application the applicant prays for a provisional order which is couched as follows:

“TERMS OF FINAL ORDER SOUGHT:

That you show cause to the Honourable Court why a final order should not be made in the following terms:

1. The 1st, 2nd and 3rd Respondent be and are hereby ordered to vacate and ensure that its officers are removed from the property called Haydon Farm Mt Hampden Zvimba.
2. The 1st and 2nd Respondent's officers are hereby interdicted and barred from entering said property.
3. The 1st and 2nd Respondents shall pay the costs of this application personally.

INTERIM RELIEF GRANTED

Pending the return date of this Application the Applicant is granted the following interim relief:-

1. The 1st and 2nd Respondent be and are hereby ordered to immediately upon service of this order on them to direct their police operatives at Haydon Farm to vacate and hand over the control to the applicant's security guards.
2. The 1st, 2nd and 3rd Respondents be and are hereby interdicted from in any manner interfering with the operations of the applicant at Haydon Farm, Mt Hampden.
3. The 1st, 2nd and 3rd Respondents be and are hereby interdicted from interfering with the construction activities of the stand holders.”

At the onset of the hearing, the respondents' counsel submitted that, save for the Police Commissioner General cited as the first respondent, the rest of the three respondents being the Officer Commanding Support Unit, the Minister of Home Affairs and Cultural Heritage and the Minister of Local Government and Public Works would abide the decision of the court. In my view the position that presents itself is that the other respondents apart from the first respondent did not oppose the application and must be taken as not being opposed to the relief sought.

The facts of the application are these. The applicant is a land developer who in 2015 was allocated by the fourth respondent 120 hectares of a piece of land called Haydon Farm, Mount Hampden for purpose of developing residential stands for sale to the public. The land which was allocated to the applicant was being used for horse breeding by the Zimbabwe Republic Police (ZRP). The fourth respondent in order to accommodate the ZRP for the loss of the land, allocated the ZRP another piece of land in Zvimba called Penrose Farm said to measure 200 hectares. A letter from the fourth respondent to the ZRP dated 16 December 2015 confirms the allocation. The letter was attached as annexure 'B' to the founding affidavit. The allocation of the 120 hectares for residential development made by the fourth respondent to the applicant was confirmed by letter dated 20 April 2015 which was attached as annexure 'B' to the founding affidavit.

The ZRP is said to have relocated to the newly allocated farm. A few of their property remained at Haydon Farm. I will detail the property when I deal with disputed facts and the results of joint inspection reports of the ground situation at Haydon Farm, as observed by counsel for the parties on 30 November 2022 when they attended at the farm. The applicant stated that it constructed houses at the Penrose Farm for ZRP to compensate for houses which ZRP had lost by reason of vacating Haydon Farm. It in fact did so. The houses were however demolished by another company African Transmission Corporation which purported to be rightful possessor or owner under offer letter allegedly granted by the fourth respondent as well. The applicant deposed that it spent the sum of USD\$110 849.56 in constructing houses for the police albeit they were demolished.

The applicant produced a layout plan of Haydon Farm which the fourth respondent approved whereafter the applicant commenced to service the land and sold stands to members of the public some of whom have settled on the land. The applicant alleged that it took possession

of all the land in August 2022 and commenced opening up roads. It deployed security guards to guard the land and equipment. The land referred to herein comprised land sold to individuals, not already sold and that which ZRP had remained occupying.

The applicant averred that on the night of 24 November 2022 at around 2300 hours, ZRP Support Unit details were deployed by the first and second respondent to Haydon Farm where upon arrival the Support Unit details forcibly and using threats of using guns against the applicant's security guards, removed them from their post and guard duties. The applicant averred that the hostile takeover of the farm by the deployed Support Unit details was unlawful and surmised that it was motivated by the desire of the first respondent to raise the issue of compensation which the applicant claimed to have discharged by building houses for ZRP at Penrose Farm. That the houses were demolished was not a concern of the applicant, so the applicant asserted. The applicant averred that the hostile takeover by the Support Unit details occurred at a time that the applicant was in possession and control of the land in dispute and developing roads.

The applicant averred that it stood to suffer financial harm were the roads to be left at the stage they were at because since the rainy season had commenced, the uncompleted roads would be damaged and the whole road construction would have to be recommenced. The redoing of the roads would be a financial burden on the applicant. The applicant averred that apart from the hostile takeover of the land, the support unit details had threatened stand owners who were in the process of constructing their homes to stop construction work or risk demolitions of their structures by police. The applicant further averred that it risked being sued by the stand owners were their structures to be demolished or were they to be ejected from possession of the stands. The law is clear that the seller of property has an obligation to give vacant possession of the property to the purchaser.

The first respondent in his opposing affidavit averred as a point *in limine* that the applicant had omitted to make a material disclosure. The disclosure alleged was that there was a pending case HC 10358/18 which the applicant should have adverted to. In the same affidavit the first respondent averred that the matter was removed from the roll to allow negotiations that were then administrative and hinged on government policy around issues to do with compensation of land and improvements by the Ministry of Local Government and Public Works

(MLGPW). The first respondent averred that the negotiations had taken long to finalize, hence the applicant was motivated to make this application.

The first respondent also averred that the correct position on the ground was that given by the applicant as first defendant in case No HC 10358/18 when it stated in its plea as follows:

“the 3rd defendant (MLGPW) directed the said African Transmission Corporation to put back the structures. They have not yet done so. As a result, the police cannot go to Penrose and the position of that land is that it cannot be serviced whilst the police project is still under way.”

The first respondent then averred that the two issues raised namely the fact of ongoing negotiations and that police could not go to Penrose Farm yet was the evidence to show that the Zimbabwe Republic Police had always been in occupation of the land in dispute herein. He averred that the alleged non-disclosure of the two issues by the applicant non suited its application as “incurably bad and fatally defective” rendering it susceptible to dismissal with costs on the higher scale. Mr *Jaricha* wisely did not push the point *in limine* because the applicant did disclose the issue of compensation in para 20 of the Founding Affidavit. It also disclosed the issue of restricted police movement on account of houses which the applicant had built at Penrose Farm having been demolished by African Transmission Corporation. In any event the gravamen of the current application was simply a complaint of a spoliation having been committed by Support Unit details. It was not in my view a material none disclosure where only the case number was not listed but the facts of the particular case had been traversed. There was no substance to the point *in limine* and to the extent that it was understandably not motivated, it stands dismissed.

The first respondent averred that the applicant could not properly seek an interdict against the respondent who have been at farm since 1996 on the basis of an offer made to it by the fourth respondent. He averred that the offer letter to the applicant was only issued in 2015 which was 26 years after the issue of the offer letter to the police and that the offer letter to the applicant was issued after the “respondents” were already in occupation. There is an obvious misunderstanding of the issue which arises on the matter. The issue does not concern the incidence of offer letters. The issue concerns an alleged act of spoliation which occurred on 24 November 2022 at 2300 hours wherein it was alleged that the first respondent instructed Support

Unit details through the second respondent to engage in a hostile takeover of the farm in dispute and in the process, dispossessing the applicant of peaceful possession of the same.

In the hearing I directed counsel to address the pertinent facts and avoid except to the extent necessary the history of occupation of the farm by the applicant and by the Zimbabwe Republic Police. The first respondent's affidavit conflates his position with that of the respondent. He purports to expound the position of the "respondents" in opposition yet it is only him that opposed the application. The first respondent in fact filed an opposing affidavit in circumstances where the Minister in charge of police did not oppose the application. Whether there is a disconnect between the first respondent and the Minister is a matter I cannot comment upon without sufficient facts. The first respondent averred that there was an outstanding issue of compensation to be finalized by the Minister of Local Government, Public Works and National Housing. He averred that police officers have always been at Haydon Farm. He stated that the offer of Penrose Farm to the police was not compensation for the loss by the police of Haydon Farm but for the loss of "Tomlison". The issue of compensation for Tomlison was not supported by evidence because even the minutes of the meetings held between the Zimbabwe Republic Police, the fourth respondent, the applicant's representative capture that the police were to relocate to Penrose Farm from Haydon Farm. Significantly the first respondent averred that the police had been making deployments of its officers to guard its property at Haydon Farm. He denied that the applicant took possession of the farm or the disputed area in August 2022. He averred that the police had scaled down cropping in anticipation of relocation.

It is important to reflect on the interdict of spoliation. It is a restitutive interdict. The requirements for spoliation were recently dealt with by MWAYERA JA in the case of *HJ Voster (Pvt) Ltd & Anor v Save Safaris (Pvt) Ltd & 2 Ors* SC 41/22 wherein the learned judge stated at p 5 of the cyclostyled judgment:

"...in determining whether or not the court a quo erred by granting the spoliation order, the case of *Botha & Anor v Barret* 1996 (2) ZLR 73 (S) GUBBAY CJ at p 79 D – E is instructive as it states that:

- 'It is clear law that in order to obtain a spoliation order, two allegations must be made and proved. These are:
1. That the applicant was in peaceful and undisturbed possession of the land; and
 2. That the respondent deprived him of the possession forcibly or wrongfully against.'

In discussing the requirements for a spoliation order the Supreme Court in *Streamsleigh Investments (Pvt) Ltd v Autoboma (Pvt) Ltd* SC 30/12 held as follows:

“it has been stated in numerous authorities that before an order for *mandament van spolie* may be issued an applicant must establish that he was in peaceful undisturbed possession and was deprived illicitly. In *scoop industries (Pvt) Ltd v Longlaate Estate v GM Co. Limited* (in vol Liq) 1948(1) SA 91(W) LUCAS AJ said at pp 98-99:

‘Two factors are requisite to found a claim for an order for restitution on allegation of spoliation. The first is that the applicant was in possession and the second that he has been wrongly deprived of that possession against his wish. It has been laid down that there must be clear proof of possession and illicit deprivation before the order is granted.’

The deciding factor is that the deprivation should be done unlawfully and that the applicant was in peaceful and undisturbed possession.”

The applicant and first respondents counsel were not able to assist the court on the occupational positions of the property by the applicants and the police prior to spoliation. Urgent applications allow the judge as provided in r 60(8) of the High Court Rules 2021 to receive evidence from the bar or from any person who may assist the court with information which assists in the resolution of the matter. I reminded counsel of the duty of a legal practitioner who is briefed in an urgent application to investigate and verify the evidence given by the applicant or respondent as the case may be. It is not proper for counsel to simply sit down behind his or her desk and to slavishly record what his or her client says, draft an affidavit based on that without testing the *bona fides* and trustfulness of the deposition. Where convenient, the legal practitioner should acquaint with the scene or evidence on the ground. In these days of technology, video recordings and photographs taken may greatly assist the court. Counsel will if properly equipped with the evidence easily advance the case for the applicant or as the case may be the defence of the respondent without stammering or being tongue tied when asked to make submissions on the evidence or its veracity as advanced by the parties in their affidavits or other statements.

In casu, counsel after exchanging notes following the judges intervention resolved to go to the disputed farm and verify evidence of occupation of the farm immediately before 24 November 2022, the alleged date of spoliation and to gather information on events of 24 November 2022. They carried out the inspection but for reasons of unnecessary refusal to cooperate with each other the parties compiled separate reports. This was undesirable. One report ought to have been produced which would include both agreed facts and points of disagreement or departure. Be that as it may, the reports clearly showed a bias in regard to the party

concerned. What was however significant was that both reports noted that the applicant had been carrying out construction and road works since August 2022 and that the workers were directed to stop. The respondents' report stated that the officer in charge of the police Sergeant Makore did not know who gave the order for the applicants' employees to stop construction and road works. The respondents report also noted that the applicant had five guards on site and a grader and bowser. It was noted from the respondents report that the applicants' construction equipment was parked and not in use. The supervisor of the applicant's operations at the farm a Mr Chikunya reported that police ordered that construction, pegging of stands and road works should be stopped on 24 November 2022. In relation to the general observation made upon a drive around the farm, the respondents report noted that there were horse stables without horses and that the stables were occupied by police officers, a grinding mill, transformer house, water reservoirs and boreholes. It was stated that cattle and goats had gone out for grazing. The report also noted that there were open dust roads crossing the farm opened by the applicant and cabins constructed by stand owners.

The report of the applicant stated that 16 workers and a guard were at the farm and that the workers and guards were ordered to stop construction, pegging stands and grading roads on 25 November 2022. From the report the police allegedly ordered stoppage of work and vacation of guard. The applicant's supervisor one Edward Chaka complained that he had been ordered from site and ordered to park his car outside the entrance gate from which the applicants guards had been ordered away. He was recorded as having stated that the applicant's workers should remove the equipment which was on site. The report stated that there were stand owners constructing houses and wooden cabins on several stands which people had bought the stands from the applicant. The report commented that the distance from the entry gate to the stables was about one kilometer away and that police could guard their structures without interfering with the applicant's projects.

Upon an analysis of the facts placed before the judge, it is clear that the applicant was through its workers deprived of possession and control of the farm and its workers ordered off site. The report by the respondent's counsel speaks to the possession of the farm by the applicant's workers because Sergeant Makore confirmed that construction workers had halted upon a directive to the workers to stop carrying out the works. The officer did not say who

issued the directive. The applicant's workers also spoke to the possession of the property. The possession was in existence since August, 2022.

The first respondent averred that on 24 November, 2022 there was deployed a team to relieve another team. The applicant disputes that. It is not necessary in my view to resolve the question of whether there was a redeployment or not. The issue is whether or not the police team that got to the farm on 24 August, 2022 took over the farm and ordered the applicants workers to halt road works and stand owners to stop construction. The applicant did not consent to the hostile takeover. An act of spoliation was committed against the applicant through the removal of its guards and stoppage of construction works. The first respondent did not in his affidavit deny specifically the allegations of the takeover and how it was alleged to have been carried out. A spoliation order will be granted.

The draft order was subject of interrogation between the court and counsel. It was resolved that the order had to be final because what was sought was a clear right and that a spoliation order is final in nature. It was agreed that the court should make an appropriate order as the justice of the case demanded. From the evidence available, prior to 24 November 2022, applicant was in occupation of the farm together with members of the Zimbabwe Republic Police. There was peaceful co-existence of the parties and the applicant went around stand pegging and road construction without hindrance by the police deployed at the instance of first respondent. The first respondent averred that police needed to safeguard its infrastructure and other property. It can do so without interfering with the activities of the applicant. The applicant has in its inspection *in loco* report stated on the last page thereof.

“Conclusion

It was our observation that the issue of securing police interest or developments on the farm could only relate to their structures which are not it seems the reason they came to take over security of the whole farm.

The police can still guard their facilities without in any manner interfering with applicant's project.”

I agree with counsel that the police can guard its listed infrastructure without interfering with the applicant operations. The applicant's prayer for the complete eviction of the police from the farm cannot be dealt with in spoliation proceedings. The relief of eviction is not legally competent to grant in this application.

Counsel for the applicant prayed for costs on the higher scale. It was argued that the first respondent was stubborn and abusing his position to show off his powers. Costs were sought against the first respondent personally. I have considered the submission. Costs are in the discretion of the court. *In casu*, there appears to be a recognized issue of compensation which the police first respondent appears to lead the first respondent to believe that it gives the police power to control and occupy the farm until compensated. The fact that the first respondent as would appear from the application appears to wrongly think that police are justified to hold on to possession of the farm until compensation is paid does not show *mala fides* but ill advice. The filing of the notice of opposition despite the non-opposition by the rest of the respondents does not justify a costs order against him personally. Costs should follow the event and are to be awarded on the ordinary scale.

Resultantly the application succeeds. The following order is made:

- a) The first respondent shall upon service of this order restore possession and occupation of Haydon Farm to the applicant.
- b) The first respondent through the second respondent and any other police officer shall not interfere with the operations of the applicant to include roads construction and stands pegging, and/or with applicant's guards and stand owners who are on their stands and/or constructing their houses.
- c) For the avoidance of doubt, police may put in place security arrangements to secure their infrastructure listed below without interfering with or encroaching on any area not falling within the listed areas save for pastures as was the case prior to 24 November 2022.
 - (i) a grinding mill
 - (ii) green house steel structures
 - (iii) cattle pens, pig stys
 - (iv) farm house
 - (v) horse stables
 - (vi) shop in front of office
- d) the first respondent in his official capacity bears the costs of the application on the ordinary scale.

Warara & Associates, applicant's legal practitioners

Civil Division Attorney General's Office, respondents' legal practitioners