QOKI ZINDLOVUKAZI INVESTMENTS PVT LTD

Versus

BRIGHTON GWEZERA

And

TENDAI GWEZERA

And

MR STODDART

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 28 MARCH 2024

Opposed Application

Advocate Phulu, for the applicant
1st respondent in person
2nd respondent in person
B Daniel, for the 3rd respondent
4th respondent in default

MANGOTA J: At the center of the dispute of the applicant, a legal entity which is registered in terms of the laws of Zimbabwe, and the first, second and third respondents is a certain piece of land which is known as Lot 2A Nondwene ("the property"). It is situated in the District of Bulawayo. It is 204.3418 hectares in extent.

The applicant holds title to the property. It applies for the eviction of the first, second and third respondents from the same. It grounds its suit in the law of property and specifically under the remedy of *rei vindicatio*. It asserts that the three respondents are in occupation of the property without its consent and/or against its will. They should, it insists, vacate the same within ten (10) days of the granting of the order to it.

The first, second and third respondents oppose the application and so does the fourth respondent who is the land acquiring and allocating authority ("the Minister"). The first three respondents premise their opposition on offer letters which the Minister issued to them after he acquired the property in terms of the laws of Zimbabwe. They claim that their occupation of

the property is lawful. They insist that, as long as their offer letters have not been cancelled or withdrawn by the Minister, the applicant cannot evict them from the property. They move me to dismiss the application with costs which are at attorney and client scale.

The Minister challenges the Agreement of Sale of the property which the applicant concluded with the estate of the Late Christopher Gutherless as a result of which agreement the applicant took title in the property. He insists that the Agreement of Sale is null and void by virtue of its non-compliance with the law. The agreement, he avers, violates section 3 (1) of Statutory Instrument 287 of 1999. He states that the property became State land on 2 June, 2006 when he issued General Notice number 139 B of 2006 in the Government Gazette. He asserts that, after he compulsorily acquired the property, he issued offer letters to the first, second and third respondents each of whom took portions of the property for their farming requirements. The applicant, he insists, cannot evict the respondents from the property because, according to him, they are lawfully settled on the same. He moves me to dismiss the application with costs.

The law under which the application is premised is clear and straightforward. It guards against the respondent's possession or occupation of the applicant's property against the latter's will. The stated position of the law is well articulated in a number of law textbooks of such learned authors as Silberberge & Schoeman and many other authors of law whom I have not mentioned in this judgment. Decided case authorities also speak eloquently of the same law. They do so in a clear and unambiguous manner.

Discussing the remedy of *rei vindication*, Silberberge & Schoeman, for instance, state in their *Law of Property*, *3rd edition*, page 273 that:

> "The principle that an owner cannot be deprived of his property against his will means that he is entitled to recover it from any person who retains possession of it without his consent".

The remarks which the court was pleased to make in *Oakland Nominees Limited* v *Gelria Mining Investment Company Ltd*, 1976 (1) SA 441 (A) at 452 do, in my view, bring out the meaning and import of the concept of ownership of, or in, a thing by its owner in a most appropriate and powerful manner. Riding on the learned works of Silberberge & Schoeman's above-quoted '*Law of Property'*, the court states that:

> "….since time immemorial at every stage of human evolution, societies have suffered inevitable and unfortunate phenomenon of having in their midst an array of thieves,

> fraudsters, robbers, cut-throats and throw-backs with no qualms whatsoever in employing force or chicanery to dispossess fellow human beings of ownership of their property. If the law did not jealously guard and protect the right of ownership and the correlative right of the owner to his or her property, then property would be meaningless and the law of the jungle would prevail".

Whilst the above quotation appears to be coloured by some emotional overtones which may not be properly appropriate in the art of judgment writing, the emphasis which is inherent in the same remains apposite. It cannot be overlooked or ignored. The emphasis is that the right of an owner to his property takes precedence over all rights such as may arise from other forms of relationships between persons-natural or legal- like those which fall under, and/or are created in terms of, the law of contract with many such of its facets as purchase and sale, landlord and tenant, agency, commercial or company law. Unlike ownership which is enforceable against the whole world, rights which arise from contract and its species and/or sub-species create only personal rights as between the parties to that relationship and no more than that.

The concept of ownership as a real right, it is mentioned in passing, is more pronounced than otherwise in the area of real estate where, following the purchase of such an immovable property as land or a house, title of the same remains registrable at the Deeds Office. The mere production of title therefore serves as proof to the world at large that the holder of title in the property owns the same. It is for the mentioned reason, if for no other, that the court was pleased to remark in *Takapfuma* v *Takapfuma,* 1994 (2) ZLR 103 (S) that:

> "The registration of rights in immovable property in terms of the Deeds Registration Act (Chapter 139) is not a mere matter of form. ….It is a matter of substance. It conveys real rights upon those whose name the property is registered. See the definition of 'real right' in section (2) of the Act. The real right of ownership, or jus in *re propria,* is the sum total of all the possible rights in a thing".

The case of *Savanhu* v *Hwange Colliery Company,* SC 8/2015 caps the above expose' of the law in a remarkable manner. It reads, in part, as follows:

> "The *actio rei vindicatio* is an action brought by an owner of the 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".

It is in the context of the above-cited case authorities as read with the learned work of Silberberge & Schoeman that the applicant filed this application. The circumstances of the case show that, on 26 March, 2021 the applicant purchased the property from the estate of the late Christopher Gutherless and, on 9 September, 2021 it took title in the property. Reference is

made in the mentioned regard to Annexures C and G. These respectively appear at pages 10 and 21 of the record. The property, it is evident, is registered in the name of the applicant.

Going by the premise that the applicant holds title in the property, its motion to evict the first three respondents from the same appears to be unassailable. I employ the word 'appears' on the basis that the respondents are challenging its contract of purchase of the property and, therefore, the validity of its title to the same.

The respondents, the Minister in particular, offers a stiff resistance to the contract of purchase and sale which the applicant concluded with the estate of the late Christopher Gutherless. His position is that the property had already been acquired by Government when the parties consummated their contract of sale. He, in support of his argument, placed before me a copy of the Government Gazette in terms of which he claims to have acquired the property. The Gazette is marked Annexure L. It appears at page 32 of the record.

The first, second and third respondents who sing in the Minister's corner placed before me one offer letter which appears to have been issued to one of them. I employ the word 'appears' because the record does not show that the Minister issued any offer letter(s) to the first and third respondents. Annexure A which the first and second respondents attached to their notice of opposition relates to the second respondent only. The annexure appears at page 54 of the record. The first and third respondents did not attach any offer letter(s) to their respective notices of opposition. The third respondent attached to his notice what appears to be his acceptance of the offer of land to him by the Minister. Reference is made to Annexure C which he attached to his notice of opposition. This appears at page 75 of the record.

It shall, however, be accepted, for argument's sake, that the Minister issued offer letters of land at the property to the second and third respondents and not to the first respondent who produced no such offer letter. The question which begs the answer is can the offer letters of the second and third respondents withstand the title of the applicant in the property which is under consideration in this application. The answer appears to me to be in the negative. It is in the negative given the assertion of the applicant which is to the effect that the property which is the subject of this application is not agricultural land in terms of which the Minister has the requisites authority to acquire according to the law which relates to acquisition and re-distribution of land to such persons as the second and third respondents. The land, the applicant insists, lies in the peri-urban area of Bulawayo. Reference is made in this regard to paragraph

7 page 8 of the founding affidavit as read with paragraphs 7 and 14 of its answering affidavit. These are at pages 106 and 107 of the answering affidavit respectively.

None of the respondents, it is observed, saw it fit to challenge the applicant's mentioned statement. None of them did, in fact, challenge the assertions of the applicant as it described the position of land in its founding and answering papers.

It is trite law that what is not denied in affidavits is taken as having been admitted: *Fawcett Security Operations* v *Director of Customs & Excise*, 1993 ((2) ZLR 121 (SC); DD *Transport (Pvt) Ltd* v *Abbot*, 1988 (2) ZLR 92. Not only did the respondents fail to challenge the statement of the applicant, the title deed of the property confirms the applicant's views on the same. It describes the property as being situated in the District of Bulawayo.

The moment it is accepted, as it should, that the property lies in the peri-urban area of Bulawayo, the Minister's hands in respect of its acquisition and/or re-distribution remain tied. He cannot acquire land which lies in a peri-urban area of any municipality. Nor can he allocate it to anyone. The law proscribes him from doing so. Such land does not fall into the definition of agricultural land which the law allows him to acquire and re-distribute. His acquisition of the property is, viewed from the observed context, outside the law and is, therefore, invalid and, with its invalidity, any action by him which flows from such is also invalid.

It follows, from the foregoing, that the offer letters of the second and third respondents are a non-event. They confer no right at all to any of them. The Minister issued them in error and they carry no substance at all at law. They cannot hide behind the Minister's shadow. The Minister exposed them to the vagaries of cruel weather when he failed to appear at court on the date that the application was to be heard. He received notice of hearing of the application on 22 March, 2024. He chose to remain in default for reasons which are not known to me but to himself.

The application cannot be assailed. It is well-stated and it has a lot of substance. The defence of the first, second and third respondents to the application cannot hold. It cannot hold for the reasons which have already been stated in this judgment.

The applicant moves me to order that the respondents pay costs at attorney and client scale. I disagree. All three of them laboured under the genuine but mistaken belief that they were lawfully settled on the property. They cannot therefore be lumped with a burdensome

order of punitive costs. They cannot suffer for having been misled by the Minister who chose to ditch them at their most hour of need.

The applicant proved its case on a balance of probabilities. In the result, I order as follows:

1. The first, second and third respondents and all those claiming occupation through them vacate the applicant's farm known as Lot 2A, Lower Nondweni within ten (10) days of the granting of this order.

2. Failing paragraph 1 above, the Sheriff of Zimbabwe is authorized to evict the first, second and third respondents and all those claiming occupation through them from the property.

3. The first, second and third respondents shall pay, jointly and severally, the one paying the others to be absolved costs of suit at the ordinary scale.

Ncube & Partners, applicant's legal practitioners
Mathonsi Ncube Law Chambers, 3rd respondent's legal practitioners