ROUTE TOUTE BV
and
PENINSULAR PLANTATIONS (PVT) LTD
and
MATANUSKA (PVT) LTD
and
BRIGHTSIDE FARM (PVT) LTD
versus
SUSNSPUN BANANAS (PVT) LTD
and
AMBASSADOR-MAJOR GENERAL CHIMONYO

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 27 January & 10 February 2010

Urgent Chamber Applications

Mr G Chikumbirike, for the applicants
Mr J Samkange, for the first respondent
Mr Mlotshwa, for the second respondent

CHATUKUTA J: There have been long running legal battles between the applicants on one side and the 2nd respondent on the other over occupation of the farm. The background to the battles is that the applicants were the owners of Fangudu Farm in the Umtali District. The farm was acquired by the state in 2005. Subsequent to the acquisition, the 2nd respondent was issued by the Minister of Land and Rural Resettlement with an offer letter dated 11 July 2006 to occupy the land and he proceeded to do so.

The first application was an urgent chamber application by the applicants following the 2nd respondent's occupation of the farm. On 22 November 2006, CHITAKUNYE J granted a spoliatory order in case No. HC 7170/06. On November 2009, PATEL J granted a judgment in favour of the applicants in case No. HH 128/2009, being confirmation of the provisional order granted in HC 7170/06. The judgment by PATEL J declared the present applicants' rights to:

(a) continue occupying the farm until a valid notice of eviction is issued;

(b) all plantations crops, crops and movable property on the farm until the same is acquired in accordance with the law

The judgment is extant. However, the 2nd respondent has filed an application in the Supreme Court for leave to appeal against the judgment out of time.

After having moved from the farm following the order in HH 128/09, persons acting on the authority of the 2nd respondent moved back onto the farm. The applicants filed another urgent chamber application in case No. HC 6541/09 seeking yet again spoliatory relief. A third judgment was issued by KARWI J, in default of the 2nd respondent, ordering the 2nd respondent to vacate the property.

The battle is ongoing with the 2nd respondent having, in case No. HH 16/2010, successfully sought an order of stay of execution of the order granted in case No. HC 6541/09. The applicant has also filed the present urgent chamber application seeking the following interim relief:

> "That 2nd respondent desist forthwith from uplifting applicants' produce and delivering it to the 1st respondent or any other person or party and that the 1st respondent be interdicted from transferring the sum of $14 361, currently held in the trust account of Venturus and Samkange to the 2nd respondent."

The facts leading to the present application are that the 2nd respondent has been harvesting bananas from the plantation and selling the same to the 1st respondent. The applicants claim that this is in defiance of the order by PATEL J in case No. HH 128/09 where their right to the plantation crops was affirmed.

Mr. *Samkange*, for the 1st respondent submitted that the proceeds from the sale of the bananas delivered to 1st respondent have been deposited in the trust account of Venturus and Samkange pending determination of the ownership wrangle over the bananas. He submitted that the application would abide by the court's decision as to who should receive the money. He further submitted that 1st respondent has, since becoming aware of the dispute, refused to take any further deliveries from the 2nd respondent.

Mr *Mlotshwa*, the 2nd respondent's legal practitioner, raised three points *in limine* on behalf of the 2nd respondent. The first point was that the certificate of urgency is not proper as it was signed by a legal practitioner from the same firm as that representing the applicants. The impropriety of the certificate would therefore render the application not

urgent. In support of this contention, Mr *Mlotshwa* referred me to the case of *Aaron Chafanza v Edgars Stores Limited & Anor* HB 27/05 (2005 (1) ZLR 299).

I am persuaded by Mr *Chikumbirike*'s submissions that the rules do not prescribe that a legal practitioner who signs an urgent certificate must not be from the same firm that represents the applicant in that matter. Rule 242(2) simply prescribes that where an applicant is legally represented in an urgent chamber application, the application must be accompanied by a certificate from a legal practitioner supporting the urgency of the application. As Mr *Mlotshwa* conceded, the decision in the *Chafanza* case is not binding. It is my view that there is no conflict of interest. Even if there was such a conflict, it does not seem that the conflict would render the application not urgent. I am therefore of the view that nothing much turns on the propriety of the certificate of urgency.

The second point was that the matter was *lis pendens* as there was an application pending before MUSAKWA J in case No. HC 128/09 wherein the 2nd respondent in the present application was seeking an application for stay of execution. It appears that the issue fell on the wayside as Mr *Mlotshwa* produced a judgment by MUSAKWA J.

The last issue was that the applicant did not have the *locus standi* to bring the application as the farm had been acquired by the state. Mr *Mlotshwa* submitted that the farm was gazetted and therefore now vested in the state. He submitted that *s*2 of the Land Acquisition Act [Chapter 20:10] defined "land" to include anything permanently attached or growing on land. As the plantations were growing on the land, they formed part of the land and therefore were also vested in the state. Mr *Mlotshwa* referred me to the case of *Mandindindi Farm Settlers V Mazowe Rural District Council & Anor* HH 53/04. The 2nd respondent's contention was that in light of *Airfield Investments P/L v Minister of Lands & Ors* SC 36/04, the applicant does not have the *locus standi* to seek an interdict against the 2nd respondent.

Mr. *Chikumbirike* submitted that the judgment by PATEL J declared the applicant's ownership of the plantation and the fruits therefrom. The 2nd respondent did not appeal against the decision and therefore the judgment is binding on him.

It appears to me that the determination of this matter rests on the interpretation of the judgment by PATEL J, whether or not the order declared the applicants' entitlement to all the plantation's fruits as contended by the applicants. My understanding of the

judgment by PATEL J is different from that of Mr. *Chikumbirike*. It is necessary to cite the exact order granted by PATEL J in respect of the plantation crop. The relevant paragraph reads as follows:

> "3. It be declared that all plantation crops, crops and movable property on Fangudu **belonging** to the applicants are not subject to compulsory acquisition by the 1st respondent [Minster responsible for land] or to appropriation by any person other than a representative, employee or invitee of the applicants, except in accordance with the law." (own emphasis)

It is common cause that at the time of the order, acquisition of the farm had already taken place and the farm now belonged to the state. It appears to me that the operative word in that order is "belonging". A proper interpretation of the order, in my view, is that the crops which were owned by the applicants were protected from compulsory acquisition except in compliance with the law. It does not declare the applicants as the owners of the plantation crops. The word in my view that connotes a declaration of ownership would have been the word "belong". Had the court intended to declare the applicants the owners of the plantation crops, it appears to me that it would have used the word "belong" instead of "belonging".

The interpretation attributed to the order by Mr *Chikumbirike* would be inconsistent with *s*16(10) of the Constitution which defines the word "land" to include "anything permanently attached to or growing on land;". The definition provided in the Constitution is identical to that which appears in *s*2 of the Land Acquisition Act referred to by Mr. *Mlotshwa*. The interpretation as provided in the Constitution is consistent with the common law that provides that growing things accede to the land. (See *Bangure v Gweru City Council* 1998 (2) ZLR 396 (HC), *Mandindindi Farm Settlers V Mazowe Rural District Council & Anor* (*supra*) Silberberg **The Law of Property** 2nd ed p 214 and *Scheepers v Robertse*1973 (2) SA 508.)

In *Bangure v Gweru City Council* (*supra*) GILLESPIE J observed at p398C-F as follows:

> If there is any basis for the application, therefore, it must be found in the common law. It may be said generally that improvements to property adhere to the property and are acquired by the owner of the property through the process of *accessio*. *Inaedificatio* is the type of non-natural accession by which movables accede to immovables when sufficiently attached and become the property of

the landowner.[1] *Plantatio* or *satio* are the means of non-natural accession by which, subject to any agreement to the contrary between planter and landowner, growing things accede to the soil and become the landowner's property.[2] The intention of the planter is irrelevant to the operation of this law.[3]

Possessors or occupiers of property who improve the property retain certain rights in respect of the improvements. Thus the improver or planter enjoys the *ius tollendi*. The right, during the currency of occupation of the property, to remove the improvement if this can be done without damage to the earlier state of the property itself.[4] A further right enjoyed by the possessor or occupier who improves property is an entitlement to compensation for the improvements, and even a *ius retentionis* to enforce that claim, is permitted to various classes of possessor or occupier of property.[5]"

The order by MUSAKWA J appears to have restored the status *quo ante* which was prevailing before the spoliatory order by KARWI J. The 2nd respondent cannot remain on the land pending the determination of the application for rescission of case No. HC 6541/09. The applicants would therefore not be said to be still in occupation of the farm or in possession of the plantation and therefore would not be entitled to the plantation crops. They would, in my view, be entitled to compensation from the 2nd respondent in the event that their occupation of the farm and possession of the crops is restored to them.

I believe that one cannot separate the produce derived from the plantation from the plantation itself. It would be untenable where one person owns the plantation and another owns the produce therefrom. The case of *Scheepers v Robertse* (*supra*) (cited with approval in *Bangure v Gweru City Council* and Silberberg) is pertinent in this regard as it relates to question of ownership of produce of a plantation. In that case plaintiff bought a farm from the defendant with all improvements thereon. There were 94 acres of wattle plantations on the farm. The defendant had a bark quota granted to her in terms of an act of parliament. The farm was transferred into the name of the plaintiff in October

[1] Carey-Miller The Acquisition and Protection of Ownership p 22
[2] Ibid p 20.
[3] Scheepers v Robertse 1973 (2) SA 508 (N) at 517C.
[4] De Beers Consolidated Mines v London and South African Exploration Co (1893) 10 SC 359.
[5] See generally Silberberg & Schoeman The Law of Property 3ed p 150 et seq.

1969. In September 1970, the defendant proceeded to sell and transferred the bark quota to a third party.

HARCOURT J ruled at p510 that trees in question had stuck roots and therefore the plantation had therefore acceded to the farm. The bark quota also went with the farm as the quota could not be separated from the plantation.

It is therefore my view that the only proper interpretation of PATEL J's order is that applicants ceased to own the plantation and the crops therefrom when the farm was acquired by state. This would be consistent with the constitution and common law. It was stated in the *Airfield* case that the appellants in that case had lost their rights of ownership in the land when the land was acquired by the state and vested in the state. The applicants ceased to be the owners of the land, plantations and fruits in issue when the farm was acquired by the state. The applicants, not being the owners of the farm, therefore do not have the *locus standi* to seek the relief in the draft order.

In the result, the application is dismissed with costs.

Chikumbirike & Associates, the applicants' legal practitioners
Venturus & Samkange, the 1st respondent's legal practitioners
GN Mlotshwa & Co, 2nd respondent's legal practitioners