BINGA ESTATES (PRIVATE) LIMITED
versus
BVUNZO ANCERIMO
and
ELIAS CHIBAYA
and
MACLEAN MAHUVA AND 11 OTHERS
and
MINISTER OF LANDS, LAND REFORM & RESETTLEMENT

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 MAY 2017

OPPOSED MATTER

A Demo, for applicant
I Mataka, for 3rd respondent
K Warinda, for 14th respondent
No appearance for 1st,2nd, 4th to 13th respondents

TAGU J: After reading documents and hearing counsels I delivered an *ex tempore* judgment on the 18th of May 2017 granting the order sought on the following terms-

"IT IS ORDERED THAT:

1. The third respondent, and all those that claim through him, be and are hereby evicted/ejected from:

CERTAIN	piece of land situate in the district of Charter
CALLED	the Remainder of Palgrave;
MEASURING	one thousand six hundred comma eight six zero seven (1 600.8607) hectares

and

CERTAIN	piece of land situate in the district of Chilimanzi
CALLED	Uamvar Estate;

MEASURING one thousand seven hundred and forty two comma five six four two (1 742,5642) hectares

BOTH REGISTERED in the names of the applicant under Deed of Transfer (Regd No. 4847/83. Dated the 30th day of August 1983 (hereinafter referred to as "the farm".

2. The third respondent, and all those that claim through him, be and are hereby interdicted/restrained from entering the farm.
3. The third respondent, be and is hereby ordered to pay costs of this Court application on a legal practitioner – client scale."

The counsel for the third respondent requested for a typed judgment for purposes of appealing against my judgment. The following is the full judgment.

On the 21st of January 2014 the applicant filed a court application before this Honourable Court seeking an order for *inter alia*, eviction of the first to the thirteenth respondents and all those that claim through them from a certain piece of land situate in the district of Charter called the remainder of Palgrave measuring one thousand six hundred comma eight six zero seven (1 600,8607) hectares and a certain piece of land situate in the district of Chilimanzi called Mamvar Estate measuring one thousand seven hundred and forty two comma five six four two (1 742, 5642) hectares both registered in the names of applicant under Deed of Transfer (Registered No. 4847/83) dated the 30th day of August 1983 (hereinafter referred to as the farm), and an order for an interdict against the first to the thirteenth respondents and all those that claim through them.

The fourteenth respondent who is the Minister of Lands, Land Reform and Resettlement filed his Notice of Filing on the 5th of February 2014 consenting to the order sought by the applicant. The first, second fourth to the thirteenth respondents did not file their respective Notices of Opposition and were accordingly barred in terms of Order 32, Rule 233 (3) of the High Court Rules, RGN 1047/1971. Accordingly, on the 26th of March 2014 an order was granted by this Honourable Court against the first, second, fourth to thirteenth respondents. It is only the third respondent who filed his Notice of Opposition on the 11th February 2014. Hence the application is being pursued against the third respondent only.

In his notice of opposition the third respondent raised two preliminary points. The first point *in limine* was that the applicant had elected a wrong procedure that is Application procedure instead of Action procedure in view of what he termed material disputes of facts as to how the third and other respondents ended up at the piece of land in question. The second

point *in limine* was that the applicant lacked *locus standi* to institute these proceedings against the third respondent.

At the hearing of the matter counsel for the third respondent Mr *Mataka* suggested that the parties deal with the whole case at once rather than dealing with the preliminary points firsts. This procedure was accepted by the counsel for the applicant Mr *Demo*.

The brief facts are that the original owner of the farm in question was Ngwali Estates (Private) Limited. In or about 1983 the late Crispen Mandizvidza and his wife the late Auxillia Maema Mandizvidza purchased the farm in question. On the 18th of July 1983 the name of the farm was changed from Ngwali Estate (Private) Limited to Binga Estate (Private) Limited. When the owners who were indigenous people passed on in 2006 and 2007 respectively the deponent to the applicant's founding affidavit one Simplisius Julius Rugede Chihambakwe became one of the sole shareholders and directors (by nominee) of the applicant as well as the Executor Dative of both estates. It was on these dual capacities that he deposed to the founding affidavit.

According to Mr Simplisius Julius Rugede Chihambakwe the first, second, fourth to the thirteenth respondents invaded the farm without a court order and took occupation thereby forcing farming operations to be disrupted and or to come to a standstill. This amounted to self- help or an act of spoliation hence the need to have them removed/evicted/ or ejected from the farm forthwith.

The other respondents did not challenge the application save for the third respondent. According to the third respondent the applicant proceeded by way of Application instead of Action procedure. Further, the applicant did not have *locus standi* to sue the third respondent. The third respondent claimed that he is on the farm by virtue of a letter given to him by Chirumanzu Rural District Council dated the 12th July 2013.

Having read the papers filed of record and hearing the parties the issues which seemed to fall for determination before this Honourable Court are whether-

1. the matter should have proceeded by way of Action than by way of an Application,
2. the applicant has locus standi to institute the present application;
3. whether the dispossession of the applicant from the property was lawful; and
4. whether the applicant is entitled to the remedy of eviction and an interdict.

Before dealing with the issues one by one it is necessary that I summarize what appears not to be in dispute. All having been said and done it is clear from the papers that the

deponent to the applicant's founding affidavit one Simplisius Julius Rugede Chihambakwe is the executor dative to the estates of one Crispen Mandizidza and Auxillia Maema Mandizvidza who are said to be the owners of Binga Estates. It is clear that Binga estate in question was formerly known as Ngwali Estate but the name was later changed per Annexure "B" filed in the record on page 26 of the bound copy. Further, it is not disputed that Binga Estate was later gazetted for resettlement by the government although the fourteenth respondent has conceded and indicated that the gazetting of the applicant for resettlement was done in error. It can therefore be assumed that Chirumanzi Rural District Council then issued the document relied upon by the third respondent on p 37 following the erroneous gazetting. Assuming but not accepting that the document authored by Chirumanzi Rural District Council is an offer letter, since offer letters are issued by the fourteenth respondent on behalf of the acquiring authority, (who does that in terms of s 2 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20: 28*] the third respondent occupied the farm on the strength of that document. Be that as it may that letter or certificate of occupation falls squarely under permits to occupy land. A permit is defined in s 2 of the Act as:

> *"Permit; when used as a noun, means a permit issued by the state which entitles any person to occupy and use resettlement land…."*

This being the factual position I will now deal with the issues.

1. SHOULD THE MATTER HAVE PROCEEDED BY WAY OF APPLICATION OR ACTION PROCEDURE?

The third respondent's contention was that the applicant should have proceeded by way of action procedure and not application procedure because the matter at hand is fraught with material disputes of facts and cannot be effectively decided on affidavit evidence. The dispute of facts perceived by the third respondent relate to how the third respondent and other respondents ended up at the piece of land in question, and his denial of allegations of invasions and theft alleged by the applicant. He further denied that the land was occupied by the applicant and averred that it was indeed vacant and the applicant and its agents are the ones who perpetrated violence in a bid to unlawfully eject third respondent. The third respondent relied on the cases of *Room Hire Co. (Pvt) Ltd* v *Jeppe Mansions (Private) Ltd* 1949 (3) SA; *R. Bakers (Pty) Ltd* v *Ruts Bakeries* 1945 (2) SA 626; *Joasab and Ors* v *Shah* 1972 (4)SA 298 (R) and *Zimbabwe Bonded Fireglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S).

On the other hand the applicant vehemently denied that there are material disputes of facts. The applicant submitted that what the third respondent stated are general denials not enough to raise a genuine dispute of fact. The applicant relied on the case of *Soffiantini* v *Mould* 1956 (4) SA 150 at 154 where PRICE JP had this to say-

> *"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust common sense approach to a dispute on motion as otherwise the effective function of the court can be hamstrung and circumvented by the most simple and blatant stratagem. The court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in affidavits."*

See also *Shana* v *Shana and Others* 1990 (2) ZLR 129 (HC).

The applicant without conceding that there are disputes of facts said the court may invoke Order 23, r 159 of the High Court Rules 1971. While commenting on a provision equivalent to r 159, BEADLE J in *Barline* v *Briddle* 1956 (2) SA 103 indicated as follows on page 105, paragraph A-C-

> *" I wish to digress for a moment on a point of procedure. The applicant in her replying affidavit asked for permission to call oral evidence generally on all issues of the case. She apparently relied on a right which she thought she had to demand this privilege by virtue of Order 17, Rule 10 of the Rules of the High Court. I wish to make it perfectly plain to all practitioners that the intention behind this Rule was never to convert proceedings onto a full scale trial action. That Rule is intended for the case where the bulk of the issues between the parties can be decided on motion, but where there may be one or two issues which cannot be so decided and which may require the calling of one or two witness to resolve the issues."*

In my view there are no material disputes of facts at all in casu as alleged by the third respondent. It is not disputed that the third respondent occupied the farm in question by virtue of the document authored by Chirumanzi Rural District Council following an erroneous gazetting of the farm in question by the government. The first preliminary point is therefore dismissed since the bulk of the issues can be decided on affidavit.

2. DID THE APPLICANT HAVE *LOCUS STANDI* TO INSTITUTE THE PRESENT APPLICATION?

The third respondent took another point in limine that the applicant did not have locus standi to institute these proceedings against the third respondent. The third respondent's argument is that Annexure "C", the Deed of Transfer refers to Ngwali Estates (Pvt) Ltd and although Annexure "D" shows a change of name there is confusion as to the shareholders of applicant and their relationship with the Estates of the late Crispen and Auxilia Mandizvidza.

From the papers filed of record the applicant is the owner of the disputed property in question and has attached evidence to prove its ownership over the property. The piece of land was purchased in or about 1983 by the late C Mandizvidza and the late A M Mandizvidza who bought the entire shareholding from Ngwali Estates (Private) Limited. The said two were the directors and shareholders of the applicant. In or around July 1983 the applicant's name was changed from Ngwali Estates (Private) Limited to Binga Estates

(Private) Limited. Following the death of the late C Mandizvidza and the late AM Mandizvidza, the current shareholders and the directors of the applicant are the deponent to applicant's founding affidavit S J Chihambakwe (in a nominee capacity), Haruchemwi Christian Mandizidza and Hedwick Tsungirirai Mandizvidza. The applicant therefore has substantial interest over the said property and therefore has the legal requisites to file the present application. The second preliminary point is therefore dismissed. See *Stevenson* v *Ministry of Local Government and Others* 2002 (1) ZLR 498 at 500 C-D, *S A Optometric Association* v *Frames Distributors (Pvt) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O) at 103 I to 104F.

3. WAS THE DISPOSSESSION OF APPLICANT FROM THE PROPERTY LAWFUL?

The third respondent is claiming that he was lawfully and procedurally allocated the land in dispute. He referred to an Agreement Form between himself and Chirumanzi Rural District Council and to a proof of payment. He said the piece of land at the farm had been gazetted for compulsory acquisition by the President in terms of s 5 (1) of the Land Acquisition Act [*Chapter 20.10*] in the year 2005. He disputed the averments that he despoiled the applicant.

On the other hand the applicant submitted that at all material times it was in quiet, peaceful and undisturbed possession of the farm, and has been despoiled by the first respondent to the thirteenth respondent and those that claim through them.

In my view, the law has since been settled that even holders of valid offer letters cannot occupy a piece of land without following due process. What this means is that a holder of an offer letter and or permit must first of all obtain a court order before taking over the farm unless the former occupier has consented. In casu the third respondent occupied the farm in question without a court order. In my view this amounted to self- help and where a party resorted to self- help the *status quo* ante has to be restored. It amounts to spoliation. I will demonstrate this point by referring to a few cases below where it was stated clearly that a court order is required before one occupies another's piece of land.

In the case of *R.H. Greaves (Pvt) Ltd* v *The Minister of Lands, and Rural Resettlement, The Commissioner of Police and The Officer in charge, Zimbabwe Republic Police, Nyamandlove* HB-44/10 the police officers accompanied by officers from the office of the Chief Lands officer, Matebeleland North went to the applicant's farm looking for the former owner of the farm that had been Gazetted for resettlement and had not vacated it

within 90 days, and having failed to locate the former owner, who is the deponent to the founding affidavit, proceeded to occupy the farm and prevented the workers from carrying on their daily duties. At pages 4 to 5 of the cyclostyled judgment CHEDA J remarked as follows-

> *"The sitting owner or occupier is supposed to cease his operations within a total of 90 days after land has been acquired. Should he fail to vacate the land he should be charged under the Gazetted Land (Consequential Provisions) Act. Upon conviction, the court is obliged to sentence him/her and issue an eviction order. in the absence of an eviction order by a competent court, the owner /occupier cannot be evicted.*
>
> *It follows, therefore, that no one can take over applicant's farm without a court order, as to do so amounts to spoliation and as such is unlawful."*

Although the applicant was unlawfully occupying the said farm after the expiration of the 90 day period, the application for eviction was granted in favour of the applicant.

In the case of *Allan Mcgregor* v *Nehemiah Saburi, Attorney General, Commissioner General Zimbabwe Republic Police and Minister of Lands, Land Reform and Rural Resettlement* HH-33/11 it was said among other things at page 5 of the cyclostyled judgment that-

> *".....The holder of an offer letter is perfectly entitled to seek an eviction order against persons who may illegally be in occupation of such property. He may not however take the law into his own hands and act without a court order."*

However, the owner of the land which had been Gazetted for resettlement, and who was resisting to vacate the farm lost the case following the land mark decision in the Supreme Court case of *Commercial Farmers Union and Others* v *The Minister of Lands and Rural Resettlement & Others* SC -31/10. Although the Commercial Farmers Union and Others lost the case CHIDYAUSIKU CJ (as he then was) at page 27 of the Cyclostyled judgement summarised the legal position as regards land matters in his wise words as follows-

> *"(1)……*
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> *(2) ……*
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> *(3)……*
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> *(4)…..*
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> *(5)…..*
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> *(6)…..*
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> *(7)…..*
>
> *(8)…..*

> *(9) The holders of offer letters, permits or land settlement leases are not entitled as of law to self –help. They should seek to enforce their right to occupation through the courts. Where therefore the holder of an offer letter, permit or land settlement lease has resorted to self-help and the former owner or occupier has resisted, both parties are acting outside the law. If either party resorts to violence, the police should intervene to restore law and order."*

In casu I found that the third respondent who was in possession of a permit authorising him to occupy the farm, did not follow due process. He argued that this was vacant land. I do not agree for the simple reason that in his own words the farm was known as Ngwali (Pvt) Ltd and that there were or ought to have been some directors or shareholders other than those stated by the applicant's deponent. If that was so why did he not engage with those people before occupying the farm in question? I therefore found that he occupied the said farm without a court order. The dispossession of the applicant by the third respondent was therefore unlawful as it amounted to self-help and the status quo ante had to be restored.

4. WHETHER THE APPLICANT IS ENTITLED TO THE REMEDY OF EVICTION AND INTERDICT?

At the hearing of this matter the applicant applied to produce an amended draft in view of the fact that this matter was now proceeding against the third respondent only reflecting the order that I gave above. That application was not opposed. As can be seen from the order the applicant sought for an eviction order against the third respondent based on spoliation.

It is trite law that in an application for a spoliation order an applicant has to establish the following requirements-

(a) That he or she was in peaceful and undisturbed possession of the property, and
(b) That he or she was forcibly or wrongfully deprived of such possession without their consent.

In this respect see the case of *Bother & Another* v *Barrett* 1996 (2) ZLR 73 (S).

In the case of *Marsden Farm (Pvt) Ltd* v *Chief Mashayamombe, Tendai Chiketa, Kudzayi Gwenhure, D, Shoniwa and Minister of Lands, Land Reform & Resettlement* HH-314/12 the court commented among other things as follows at page 3-

> *"The issue which arises therefore is whether the applicant is entitled to protection of the law against the actions of the respondents. There is no doubt in my mind that the applicant was in peaceful and undisturbed possession until the respondents moved in. it cannot be disputed that the respondents also acted outside the law by resorting to self-help measures without due process and taking occupation of the farm the way they did... In respect of the third respondent who holds an offer letter, he has also acted unlawfully by resorting to self-help. However, my hands are tied by the pronouncement of the Supreme Court in Commercial Farmers Union supra to the effect that holders of offer letters should be assisted by the courts.*

> *It is time this construction of the law may lead to anarchy where both the occupier and the holder of an offer letter are acting outside the law. The correct approach is for the holder of an offer letter to approach the court for an eviction order against the occupier instead of resorting to self-help thereby acting unlawfully…"*

I share the same sentiments. See also *Margret Mugadza* v *Knight Frank and National Railways of Zimbabwe Contribution Pension Fund and Deputy Sheriff N.O.* HB-78/09; *Gordon Charles Spencer and Garry Robert Brown* v *The Minister of Lands & Land Resettlement* HB-11/10; *Maria Sjambok & Beauty Chirau* v *Trust Cinyama & Minister of lands & Rural Resettlement* HH-118/15 and *Harland Brothers (Pvt) Ltd and Anor* v *Minister of Lands 7 Rural Settlement & Anor* HH-6/10.

In my view the main thread that runs through the cases cited above is that even holders of valid offer letters and or permits must follows due process before occupying any land, rather than to resort to self-help. *In casu* I was persuaded that the applicant was in peaceful and undisturbed occupation of Binga Estates (Pvt) Ltd until the third respondent came in without a court order. An act of spoliation was committed and the applicant was entitled to the relief it sought.

It was for these reasons that I granted the order sought.

Chihambakwe Mutizwa & Partners, applicant's legal practitioners
Chambati and Mataka Attornets, 3rd respondent' legal practitioners
Civil Division of the Attorney General's office, 14th respondent's legal practitioners.