THE ARGYLE FARM (PVT) LTD
versus
MUNICIPALITY OF CHINHOYI

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 27 July 2023 & 9 May 2024

Opposed Matter

D Tivadar, for the applicant
C Warara with *K Nhakura*, for the respondent

MUNANGATI-MANONGWA J**:** The Constitution of Zimbabwe provides for protection of ownership rights to land. Equally given the historical land distribution imbalances that prevailed prior to the country's independence in 1980, the same Constitution provides for land expropriation to create an even distribution of this finite resource. However, there are legal modalities for carrying out such an exercise. Given the constitutionally provided modalities, it is inappropriate for quasi-governmental institutions to flex muscles and forcibly expropriate land rights of citizens thus behaving wantonlessly in a constitutional democracy. The country's constitution does not allow anarchy and trampling on citizens' rights as it is not only against the rule of law but puts the country's human rights record in bad light. The constitution of Zimbabwe provides for legal ways of acquisition of property and wrestling of property has no place in the legal realm so created by the aforementioned Constitution. This case typifies inappropriate behaviour by an institution in so far as the applicant's ownership rights to land are concerned.

The applicant approached this court seeking a vindicatory order to recover possession and control of property called the Remainder of Umzari situate in the District of Lomagundi under Deed of Transfer 169/69 (hereinafter referred to as "the property"), alternatively applicant seeks for damages in the sum of US$6 900 000 (Six Million Nine Hundred Thousand United States Dollars). The applicant is the registered owner of the property which is 250.0353 hectares in extent and is claiming to vindicate the property. The respondent is a local authority currently in possession

of the property which it subdivided into residential stands and sold to third parties. From the evidence, the property falls within the borders of the jurisdiction of the respondent.

The facts of the matter as per the applicant are that: the respondent expressed an intention to acquire the property in 1998 but it never acquired the property and has never done so. The respondent wrongfully intruded onto the property and subdivided the property and sold portions thereof to third parties who according to the applicant are in their hundreds. It is the applicant's contention that it never agreed to the respondent's possession of the property. The applicant states that the respondent ignored demands to desist from such behavior and overtures for the party to regularize matters. It is the applicant's claim that the respondent at one time falsely alleged that it was the owner of the property as the property had been compulsorily acquired. Given that scenario the applicant approached this court under case number HC 8049/16 seeking a declarator pertaining to its ownership rights to the property. The respondent failed to oppose the application. MAKONI J (as she then was) granted an order declaring that the applicant is the true owner of the property in question and that the respondent's possession of the property amounted to unlawful intrusion which violated the applicant's rights to ownership. The respondent never challenged that order and same remains extant.

The applicant states that after the granting of the order the respondent instead of ending its unlawful possession, it continued with its conduct unabated. The respondent finally engaged applicant with a view of the respondent acquiring title so as to legitimize its continued possession of the property. Two possibilities were in mind, either to expropriate the land or buy the same but nothing has come out of the engagements between the parties. It is applicant's case that despite its willingness to sell the property to the respondent, the respondent has shown reluctance to buy the property, content to continue to illegally occupy the property and collecting monies from third parties. The third parties who are unknown to the applicant continue to occupy the property through the respondent. In fact, the applicant states that the respondent has actively protected the third parties by refusing to furnish information of the particulars of the third parties. The applicant has referred to a letter of 27 August 2020 wherein respondent categorically stated that it would not furnish the requested information.

The respondent continues to bill the applicant for rates which rates the applicant is paying despite not having possession of the property. It is due to the aforegoing, that the applicant prays

for eviction of the respondent and all those claiming occupation through it. The applicant makes it clear that should the respondent demonstrate that it has parted with possession or is unable to restore possession, the wrongfulness of the disposal of the property or the inability to render possession makes the respondent liable for damages. It is the applicant's case that disposal of the property was done with full knowledge and in willful defiance of the applicant's ownership rights. The applicant has had the land valued and seeks damages in the sum of US$6 900 000 (Six Million Nine Hundred Thousand United States Dollars) and this relates to the value of the land alone in the event that the respondent is unable to restore the land. The applicant submitted that if the alternative claim succeeds and payment is made it will transfer the property to the respondent.

The respondent opposes the application. The respondent does not deny having taken control of the property. It justifies its possession of the property alleging the applicant surrendered the land to it in 2003 through its director Peter Dilmitis (now deceased) who accepted that the land be subdivided into numerous stands. The respondent further states that the applicant accepted the intrusions and subdivisions and never evicted the occupiers from the Mzari property. The respondent thus alleges that there is a tacit agreement. The respondent submits that there was an agreement between the parties that compensation be paid despite the 2016 court order by MAKONI J (as she then was). In that regard the respondent accuses the applicant of blowing hot and cold given that in 2022 it had approached the respondent for compensation. The respondent maintains in its opposition that the 2016 order has been overtaken by events of clear negotiations and the fact that the applicants allowed the intruders to remain on the land despite the court orders. It is thus the respondent's contention that *rei vindicatio* is not the proper remedy in the circumstance.

Further, the respondent objects to the valuation presented by the applicant. In so objecting the respondent states in its affidavit the "respondent only accepts valuation done in terms of the law and that means done by the Government valuer not some private single valuer who is not affiliated to government". In essence the respondent's position is that the value of the property is bound by evaluation from government valuers as opposed to findings of private valuers.

The respondent has through a letter dated 2 August 2022 offered to pay US$2 787 900 (Two Million Seven Hundred and Eighty-Seven Thousand Nine Hundred Thousand United States Dollars) to the applicant which the applicant has not accepted. It is important to note that the respondent did not provide an evaluation report to substantiate the amount.

The respondent raised the following preliminary points:

1. Election/*estoppel*.
2. Non joinder of the third parties currently in occupation of the property.

The respondent in its opposing affidavit submits that the applicant cannot vindicate the property because the property was surrendered to the respondent and applicant tacitly agreed to receive a settlement hence it is estopped from claiming the property. On non-joinder of third parties, the respondent in opposition highlighted the issue of non-joinder of third parties who are currently occupying the property. The applicant argued in its answering affidavit that these are not points *in limine* but defences which the respondent is rendering to the claim.

The applicant in answer to the allegations in the opposing affidavit disputed that there was ever an agreement to the subdivision nor handing over of the property to the respondent. It asserts that it is for this reason that it sought a declarator and this did not encompass enforcement issues hence the respondent cannot query why the 2016 order was not effected. The applicant maintains that there was no agreement of any kind hence the continuing reality of wrongful intrusion which has already been pronounced in the order of MAKONI J (as she then was). The applicant contends that the respondent has no defence to proffer and the valuation it produced remains uncontested and its claim ought to succeed.

Determination

On *Estoppel*

Although the respondent has raised *estoppel* as a preliminary point, it constitutes a defence which can also be determined under the merits of the case. In the court's view there is no prejudice in dealing with the point as a preliminary point. The respondent raised the issue of *estoppel* which is a common law limitation that may act as a defence to vindicatory action with the effect of blocking the vindicatory function of the remedy by preventing its enforcement through claims of inconsistencies of the applicant's previous conduct or representations. Ownership in this case is not disputed, but the owner may not regain possession for the duration of estoppel. This amounts to suspension of the owner's entitlement to vindicate his property. For *estoppel* to stand, the defendant has to prove that the respondent culpably or intentionally created an impression, through conduct or otherwise, that ownership has been transferred and that the possessor possesses the property with the owner's consent (see *Curtis* v *Dowdie* (2023) ZAGPJHC 3*; Makate* v *Vodacom*

Ltd 2016 (4) SA 121 CC para 49, Rabie & Sonnekus *The Law of Estoppel in South Africa*, *Butterworths* (2 ed, 2000) at 63 para 5.1).

The respondent is bound to further prove that he acted on the misrepresentation and suffered harm or loss as a result. From the evidence, there is nothing that points to the fact that the applicant made a misrepresentation to the respondent which might have resulted in it acting in the belief that the property had been handed to it. There is nothing to point to the fact that the applicant had, by its conduct agreed to the taking over of the property. The minutes of the meeting with the applicant's late Director Mr Dilmitis which have been provided by the respondent do not reveal such a fact. He did not mention that he had surrendered his land. From the onset the applicant was fighting for the release of its property hence the court declarator it obtained.

Lastly, the respondent submitted that the applicant should be estopped because it was now deviating from an earlier agreement they made when they held a meeting on 2 August 2022. The applicant's representative then, Mr Dilmitis made it clear that the discussion emanating from the meeting is without prejudice, which therefore means that the minutes should not have been brought before the court and used in evidence. In fact, Mr Dilmitis insisted that he was attending the meeting on a without prejudice basis and he was not agreeing to the valuation by the government valuer which valuation lacked in detail as to the extent of the land, value of the land per square meter and ultimately how the value had been arrived at. In addition, in such an instance, *estoppel* would be a defence available to a *bona fide* purchaser. The respondent has not purchased the property, hence he cannot rely on this defence. Therefore, the point *in limine* is dismissed for lack of merit

Non-Joinder of third Parties

Rule 32(11) of the High Court Rules, 2021 provides as follows:

> "(11) No cause or matter shall be defeated by reason of misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of people who are parties to the cause or matter."

The fact that the current occupiers of the property are not cited is not fatal to these proceedings. The fact that the respondent who gave possession to the current occupiers in the guise of being the owner is cited, is enough to enable the case to proceed. Of note is that the respondent has taken the occupiers under its wings and even refused to disclose their identity. It is clear to the court that occupation by third parties is through respondent, the third parties are claiming

occupation through the respondent. There being no fatal bearing on the proceedings the preliminary point is dismissed for lack of merit.

Submissions on Merits

Mr *Tivadar* for the applicant submitted that by virtue of the applicant being the rightful owner of the property, *rei vindicatio* is the appropriate remedy. He maintained that what the respondent is alleging that the applicant surrendered the property in 2003 is a bold assertion not supported by facts. Even if it were so, this was overtaken by events as borne by the High Court judgement in Case No. HC 8049/2016. He further submitted that the respondent is a creature of statute, and is bound in terms s150 of the Urban Council's Act [*Chapter 29:15*] which states that the respondent can acquire land through purchase, lease or donation and the respondent never acquired the property through any of these methods. He further argued that if the respondent should have acquired the land through expropriation, it should have been done in terms of s 151 of the Urban Councils Act and the respondent failed to raise a plea to this effect.

Mr *Warara* for the respondent submitted that the applicant sought to rely on a court order contrary to the position that was previously taken. He further asserted that the applicant was present in the meeting on 2 August 2022 in a bid to reach consensus on the purchase price. He submitted that the position of the applicant was that the respondent acquired the property hence the issue only pertained to compensation, thus in the circumstance the applicant should have approached the respondent and settled the matter.

In summary, as regards merits, the respondent opposed the application made by the applicant on the following grounds:

i. That *rei vindicatio* is not a proper remedy in the given circumstances.
ii. That the respondent's possession of the property is justified as the property was surrendered to the respondent by one Peter Dilmitis through a tacit agreement.

Whether *rei vindicatio* is the appropriate remedy for the applicant?

Rei vindicatio was appropriately described in *January* v *Maferemu* SC 14-20 as a common law action in terms of which an owner of a thing is entitled to claim possession of his property from whoever is in possession of it without his consent. The remedy accords with s 71 of the Constitution of Zimbabwe Amendment (No. 20), Act 2013 which protects the right to personal property. The law that an owner of property is entitled to vindicate it from anyone found in possession of the property

without the owner's consent is settled in this jurisdiction (see *Musanhi* v *Mt Darwin Rushinga Cooperative Union* 1997 (1) ZLR 120 (SC*))*. It is trite that for one to succeed in *actio rei vindicatio*, they must prove ownership of the property which they seek to vindicate, and establish that the person in possession holds it without their consent or any lawful cause.

In *Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) 438 C, it was held that the vindicatory remedy protects the right of an owner to vindicate his property even against an innocent purchaser. Author R.H. Christie, *Business Law in Zimbabwe*, 2nd ed, Juta & Co Ltd p 149-150 further elaborated the point by stating that the owner whose property has been sold and delivered without his consent remains the owner and that a true owner can bring a vindicatory action to recover his property from anyone, including a bona fide buyer, in whose hands he finds it (see *Chetty* v *Naidoo* 1974 (3) SA 13 p 20B).

In casu it is not in contention that the applicant is the owner of the property in issue and that the respondent is holding it. The applicant has also averred that the respondent holds the property without its consent. The onus thus shifts to the respondent to prove the basis upon which it holds applicant's property. The focus is whether the respondent's possession of the property is justified. The fact that the respondent has been expressing intention to purchase the property since 1998 does not act as a defence against the remedy.

There are common law limitations and statutory limitations or defences to the vindicatory action. In *Savanhu* v *Hwange Colliery Co* SC 8/15, the court laid down three defences to *rei vindicatio* which are *estoppel*, right of retention[1] and contractual right. Suffice that the defence of estoppel has already been dealt with when it was raised as a point *in limine* although it could have been dealt with under merits there being no prejudice thereto. The right of retention has not been specifically pleaded, neither has any evidence of such been placed before the court. As regards a contractual right whilst the respondent persisted in its stance that there is a tacit agreement of purchase, it failed to prove the existence of such agreement. Equally there is no evidence of a donation to it by the land owner thus the respondent remains an illegal possessor. The only averment it makes being a bold allegation that applicant surrendered the land in 2003 through the late Mr Dilmitis who accepted that the land be subdivided. This is countered through evidence of the court order of MAKONI J of 19 October 2016 which declared the intrusion on

[1] See *Chetty v Naidoo* 1974 (3) SA 13

applicant's property a wrongful violation of its ownership rights. In August 2022 Mr Dilmitis was still alive and was invited by Council to discuss the issues pertaining to the property. As per the Council meeting minutes presented by the respondent, the purpose of the meeting was to find common ground over the farms one of which is the property in issue *in casu*. Parties could not even agree on the value of the property how then could there have been a tacit agreement of sale when the applicant's conduct at all times showed that it was not bent on releasing its property without cause or an agreement. The court finds that there is no evidence of a tacit agreement of sale nor a donation. To further buttress that, the respondent does not deny that the applicant continues to pay rates for the property which scenario would not play out if the property had been alienated to the respondent. The respondent could have utilized its statutorily provided right of expropriation to acquire the land in terms of s 150 (2) (b) as read with s151 of the Urban Councils Act but it did not.

Failure to discharge the onus to prove a right of retention results in the application for *rei vindicatio* succeeding. The respondent has failed to satisfy the requirements of any of the defences available to it hence the applicant is entitled to the relief of *rei vindicatio*. Thus, it is the court's finding that the applicant is within its right to seek a vindicatory order where the respondent is unable to agree on the purchase of the property and remains holding to it without applicant's consent. Courts are there to protect litigant's rights.

Apart for seeking vindication of the property the applicant alternatively prays for damages. It is trite that where a wrongdoer is unable to restore possession, he/she or it has to pay damages in order to place the owner in the position that he would have been prior to deprivation.[2]

In circumstances where property is involved, evaluation has to be done to enable a court to quantify damages. This is because the court would be at sea as regards the intrinsic value of the land and any developments thereon which affects the value. It is crucial to note that the applicant is willing to accept damages in a sum of US$6 900 000 the alleged equivalent value of the land in issue as per a valuation report it presented to court. The respondent argued that the purchase price is overstated and the price to be adopted by the court should be from the evaluation done by government valuers as opposed to private valuators. The court has to determine whether the value of the property is bound by the price pegged by a government valuer as opposed to findings of a

[2] See *Mlombo v Fourie* HH 3/1998

private valuer? In disputing the applicant's valuation, the respondent relies on provisions of s 41 (5)(c)(ii) of the Regional, Town and Country Planning Act. The cited section reads as follows:

> "If there is no agreement as provided for in subparagraph (ii) of paragraph (b); the appropriate authority shall obtain from the Chief Valuation Officer of the Government a valuation of the land concerned at the date of disposal which shall be deemed to be the value of such subdivision."

It is trite that in interpreting the aforementioned section, it is clear that the section is not applicable in the present case as it applies to subdivisions.

In its claim for damages the applicant has provided a comprehensive evaluation report with diagrams clearly articulating how the property is valued at US$6 900 000. The respondent has not attacked the valuation report apart from boldly maintaining that parties have to go by the amount set by the government valuer and not a single private valuer. To the contrary, the respondent did not proffer an evaluation report done by a government valuer to substantiate the amount it is offering the applicant. The respondent offered US$2 787 900 through a letter dated 2 August 2022 which was tendered in evidence. A mere letter stating a fixed amount does not substitute an evaluation report. Suffice that at the meeting held between parties in 2022 Mr Dilmitis challenged the alleged valuation figure by specifically stating that only a figure had been provided without stating the size of the farm and how the figure was arrived at and the value of the land per square meter. Up until the hearing date the respondent has only been able to present a figure without any substantiation of how the figure is arrived at.

Further, the court finds documents filed by the respondent as well as its opposing affidavit vague and devoid of information material to the determination and quantification of the value of the property in question. An evaluation report is crucial in guiding the court on quantifying damages as it presents the value of the asset in issue.

In its defence the respondent cited *Makoni RDC* v *Diagonal Inv. (Pvt) Ltd & Anor* HH 241/15 which stated that:

> "The question of an agreed value, or a value determined by the Chief Government valuer arises only where the appropriate authority has misgivings about the value as represented by the purchase price. It is a remedy available to the authority and cannot be used as a weapon of defence by the landowner where the authority has not taken issue with the purchase price."

Apparently, this principle does not apply in this scenario as the scenario obtaining herein is different. The difficulty in the offer made by the respondent is that the evidence is not borne by the papers. The court is unable to verify the correctness and reasonableness of that price. The

applicant's evaluation report is a reliable indication of the estimated value of the property. In disagreeing with the value, the onus to prove that the price is unreasonably high shifts to the respondent which has to provide a valuation report for comparative purpose. The evaluation must prove the upper and lower limit of suggested market price, so that the court can be properly guided in making a determination. Where the respondent is admitting to possessing the property and offers compensation which is not acceptable to the owner the respondent in challenging the amount claimed by the owner has to present comprehensive evidence that shows that the amount claimed is overstated and unjustified. This the respondent has failed to do. It has not attacked nor challenged the method and ultimate conclusions that substantiate the amount being claimed by the applicant. In the absence of any meaningful challenge to the valuation report presented as regards its reasonableness, the document remains an integral piece of evidence whose evidential value can be relied upon by the court in assessing damages. Whilst in claims for damages evidence has to be led to prove the quantum of damages. This court finds that a comprehensive report on the extent of the land and the value thereof has been rendered in the valuation report provided by the applicant. In that regard the court accepts the valuation report as an essential piece of evidence justifying and supporting the amount claimed as damages. Accordingly, the alternative claim for damages succeeds as alternative relief.

The application succeeds and there is no reason why the normal rule granting costs to a successful party should not apply. The applicant is being placed in a situation where despite the existence of a court order condemning the respondent's intrusion on its rights to ownership, respondent has continued in the conduct unabated and been reluctant to purchase the applicant's property leading applicant to continuously pursue litigation to recover its property. This is irrespective of the fact that applicant has been reasonable enough to be willing to accept damages upon the parties reaching consensus. After assessing the available evidence and considering submissions by both parties, the court find it appropriate in these circumstances to grant the relief sought by the applicant.

Accordingly, the following order is granted:

1. The respondent shall, within six months of the date of this order, restore the applicant full and unhindered possession of a certain 251.0353 hectares of land called the Remainder of Umzari situate in the District of Lomagundi ("the property").

2. The respondent shall, at its own expense, cause publication of the terms of this order within ten days of its grant and not less than once weekly for three consecutive weeks thereafter
    a. In a national newspaper that enjoys wide circulation in the Mashonaland West Province of Zimbabwe;
    b. On its website and social media pages; and
    c. On all notice boards upon which it customarily broadcasts significant messages to the residents of the area over which it has jurisdiction.
3. The respondent shall, at its own expense, cause the removal of all persons occupying the property through it no later than six calendar months after the date of this order.
4. If the respondent shall default in compliance with para 3, the Sheriff shall thereafter be mandated to eject all persons occupying any part of the property without the consent of the applicant.
5. The respondent shall bear the applicant's costs of suit.

Alternatively;

1. The respondent shall pay the applicant the sum of US$6 900 000 (Six Million Nine Hundred Thousand United States Dollars).
2. Within seven days after payment of the sum set out in para 1 (or within seven days of full recovery consequent upon execution by the Sheriff, as the case may be) the applicant shall tender transfer to the respondent of a certain 251.0353 hectares of land called the Remainder of Umzari situate in the District of Lomagundi ("the property").
3. The respondent shall bear the costs of the transfer contemplated by para 2 of this order.
4. The respondent shall bear the applicant's costs of suit.

Kevin J. Arnott Law Practice, applicant's legal practitioners
Warara & Associates Legal Practitioners, respondent's legal practitioners