HB 36-18
HC 531/16

PAOLA CARLOTTA LEVENDALE
and
JAMES ALASTAIR LEVENDALE
versus
ERASMUS NDLOVU
and
DUMISANI NDLOVU
and
NDUMISO PHANGWANA
and
EDMOND D. MOYO
and
MR DUBE

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 13 FEBRUARY 2018 AND 22 FEBRUARY 2018

Civil Trial

P Madzivire for the plaintiff
L Nkomo for the 1st defendant
2nd, 3rd, 4th & 5th defendant in default

MATHONSI J: The two plaintiffs are husband and wife and indigenous Zimbabweans who jointly own a farm in Ntabazinduna Matabeleland North generally known as Goodview Farm being subdivisions A and B of Subdivision C of Maxim Hill (hereinafter referred to as "the farm".) They hold title to the said farm by Deed of Transfer Number 2450/86. At the time that the government of Zimbabwe embarked on the fast track land reform programme, commencing in year 2000, a programme in which the government seized farm land owned and occupied by white commercial farmers for purposes of redistribution among the landless indigenous citizens of this country, the farm was not gazette for resettlement of the landless. This was clearly in recognition of the fact that the farm was indigenously owned. It has never been gazetted up to now.

The plaintiffs have brought a vindicatory action against the five defendants seeking an order for their eviction, together with all those claiming occupation through them, from the farm

and costs of suit on the scale of legal practitioner and client. They averred that the defendants illegally invaded and settled on their farm without lawful authority and after being advised of their illegal occupation of the farm the defendants refused to vacate.

Although R. Ndlovu and Company legal practitioners initially entered appearance to defend and filed a joint plea on behalf of all the defendants they abandoned the other four defendants midstream electing instead to represent only the first defendant. Indeed the other defendants defaulted at the trial despite being served with notices of set down for trial. Only the first defendant contested the action all the way to the wire. His defence is that he was lawfully settled at the stand he occupies pursuant to section 9 of the Communal Lands Act [Chapter 20:04], is the owner of the stand he occupies and therefore strongly resists any effort to evict him especially as he is the holder of a Certificate of Occupancy issued to him by Umguza Rural District Council under whose jurisdiction the piece of land in question falls.

The issues for trial were settled by the parties at a pre-trial conference held before a judge on 22 November 2017. They are:

1) Whether the plaintiffs have a real right over the farm.
2) Whether the first defendant is empowered by law to occupy the farm in dispute.
3) Whether the first defendant invaded the farm and if so when such invasion took place.
4) Whether the plaintiffs are entitled to an eviction order against the defendants.

Straight away, without more, it is apparent that most of the issues are superfluous either because the law as it stands settles them or they resolve themselves. I say so because it is common cause that the plaintiffs hold unfettered title to the farm as shown by the deed of transfer I have alluded to which is untainted by registration of a caveat symbolizing the gazetting of the farm by the government for resettlement as happened to most of the white owned commercial farms seized for resettling people. To that extent therefore the farm is private property and the registration of title means that the plaintiffs hold real rights in the farm in question. That is a point seminally settled by McNALLY JA in *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (S) at 105 G, 106A where the learned judge pronounced;

> "The registration of rights in immovable property in terms of the Deeds Registries Act [Chapter 139] (now chapter 20:05) is not a mere matter of form. Nor is it simply a devise to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real

right' in s2 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' – see *Wille's Principles of South African Law* 8 ed p 255."

It cannot be an issue for determination at the trial whether the plaintiffs have real rights over the farm when the authenticity of the title deed registering their rights of ownership is not in dispute and its validity is not contested. It is equally superfluous to decide whether the holder of title has a right to evict an occupier of his or her property when the law is clear that the *actio rei vindicatio* is available to the owner against the whole world. In my view the existence of a valid title deed in the name of the plaintiffs shifts the onus on to the occupiers of the plaintiffs land to prove a right of retention. That in my view narrows the issues leaving only issues 2 and 4 above to be decided, it being unnecessary in my view to decide issues 1 and 3. I will however discuss the allegation by the first defendant that he is not occupying a portion of the plaintiffs' farm but some other land.

The evidence presented on behalf of the plaintiffs is simply that they own the farm. They produced Deed of transfer Number 25450/86 in terms of which they hold title. The farm was never gazetted by the government of Zimbabwe for resettlement and remains private property. That notwithstanding the first defendant and others settled themselves at the farm starting in July 2012. Prior to that the second plaintiff, who testified in court, had observed a certain Mr Ngwena from the District Development Fund (DDF) coming to his land and pegging stands. When he drew Ngwena's attention to that he was pegging on private land Ngwena acknowledged that indeed he was but advised the second plaintiff to take his queries to York House in Bulawayo suggesting perhaps that Ngwena was taking instructions from that tall building.

Jame Alastair Levendale went on to say that instead of heeding Ngwena's advice, he registered his concerns at the Ministry of Lands office. That office has been seized with the issue of the illegal occupation of the farm since then. Notices have been given to the first defendant and other occupiers to vacate but they have remained steadfast having resolved that they would not move from the farm. For that reason they have approached the court for relief. Levendale acknowledged that there is an adjacent farm known as Maxim Hill farm which was gazetted and people were settled on it. That farm is however distinct from Goodview Farm and the boundaries are clear. Therefore there is no boundary dispute of any nature to talk about.

Possenti Nkiwane also testified on behalf of the plaintiff having been subpoenaed to do so. He is the Provincial Lands Officer for Matabeleland North employed by the Ministry of Lands, Agriculture and Rural Resettlement. He testified that the Ministry of Lands had indeed received a complaint from the second plaintiff that there were illegal settlers who had helped themselves to portions of his farm. Land officers visited the farm to investigate and indeed lo and behold there were settlers there. Nkiwane emphasized that the farm was not gazetted for resettlement and as such as a Ministry they had no mandate to settle people on it.

The witness referred to letters that were generated by the Ministry addressed to all the defendants between November 2012 and August 2015, pages 1 to 4 of the plaintiffs bundle of documents (exhibit 1), in which it was made clear that the farm was private property and that those who had settled there had done so illegally. They were also advised to vacate the farm. He stated that despite being so advised by the acquiring authority the defendants remained adamant that they would not vacate.

His attention was then drawn to the Certificate of Occupancy issued to the first defendant by Umguza Rural District Council in terms of s 9 (1) of the Communal Lands Act [Chapter 20:04] and the receipts of payments issued by that local authority between 2012 and 2015 showing that the first defendant had paid $50-00 on 18 July 2012, $20-00 on 8 July 2014 and $40-00 on 18 May 2015 as land levy for stand number 6 Maxim Hill Farm. There were further receipts of $20-00 on 1 July 2016, $10-00 on 31 December 2016 and finally $20-00 on 8 November 2017 issued by the Ministry of Lands office in Bulawayo which the first defendant relies upon as proof that he is in occupation of stand number 6 Maxim Hill Farm lawfully.

Nkiwane explained that there is a difference between the plaintiff's farm which was never gazetted and Maxim Hill Farm which was gazetted in 2002 for resettlement purposes. As the copy of the government gazetted produced by the first defendant shows, the latter farm belonged to Maxim Hill farm (Pvt) Ltd which held title by Deed of Transfer number 2023/98, quite distinct from the farm which is the subject of this action. He confirmed that Maxim Hill Farm is adjacent to the farm in question and on it were settled people who were paying land levies to the local authority until 2015 when the Ministry of Lands took over the responsibility of receiving those levies.

According to him, if someone came to the cashier at Umguza Rural District Council or indeed the Ministry with a Certificate of Occupancy they would be allowed to make payment because the cashier is not on the ground and does not know the status of the occupancy. This is what the first defendant was doing using the certificate to pay in order to justify his continued illegal occupation of the plaintiffs' farm. Only that he is not in occupation of stand number 6 Maxim Hill Farm as his papers suggest but illegally occupies the farm belonging to the plaintiffs. Therefore the documents relief upon are cold comfort to the first defendant. In any event, there is no record whatsoever of the first defendant being allocated land by the Ministry at Maxim Hill Farm or anywhere else in Matabeleland North.

On the validity of the Certificate of Occupancy Nkiwane maintained that while he is not aware of the circumstances under which the local authority issued it, there is no doubt that it is an invalid and bogus document. This is because a Certificate of Occupancy could not be issued on private land. It is a document issued in terms of the Communal Lands Act in respect of communal land. It could not be validly issued for occupation of commercial farmland which the farm is. Even when so issued, a Certificate of Occupancy would only be valid when accompanied by further documents emanating from the Ministry of Lands showing allocation of land to the holder like a temporary permit. Without a permit issued by the Lands office the Certificate of Occupancy is not valid. This is because it is only the Ministry of Lands which allocates land and settles people. A Rural District Council can only issue land as provided for in the Act. In concluding, Nkiwane denied that there is a boundary dispute in this matter maintaining that the first defendant is firmly on the plaintiffs' farm as they found out on their several visits to the place.

Nkiwane's evidence was generally unchallenged. It was presented very well by a witness who struck me as a truthful. An attempt by counsel to suggest under cross examination that he either has a corrupt relationship with the plaintiffs or favours them at the expense of the first defendant was adequately repelled. Having been brought to court by way of a subpoena the witness explained that it is his duty as a Provincial Lands Officer to ensure that sanity prevails at the farms. He has no reason to mislead the court. I was impressed by this witness and have no hesitation in accepting his evidence.

The first defendant testified that he has resided at Plot 6 Maxim Hill Farm from November 2012 having set up a homestead there. He occupies that land in terms of the Certificate of Occupancy I have already referred to which was issued to him by Umguza Rural District Council whose officials settled him and others there although unnamed officials from the Ministry of Lands were also in attendance. He stated that the lawfulness of his occupation is shown by the acceptance of land levy by both the Rural District Council and the Ministry of Lands. He denied being on plaintiffs' farm but on Maxim Hill farm which was gazetted in 2002.

The first defendant admitted receiving letters from the Ministry of Lands directing him to vacate the land he occupies. His understanding is that the letters related to occupancy of Goodview Farm which he does not occupy. For that reason he had no business complying with the instructions given especially as Umguza Rural District Council which issued him with a Certificate of Occupancy has never revoked it. Significantly, the first defendant affirmed that he has never applied to the Ministry of Lands for land allocation and that he has never been issued with a permit to occupy the land that he occupies.

The first defendant struck me as an arrogant, stubborn and intransigent witness who thinks that this matter can be decided by hiding behind a finger. Other than clinging onto a myth, the Certificate of Occupancy whose legal invalidity has been laid bare by a genuine Lands Officer who has thoroughly investigated the dispute, he really has no leg to stand on. The first defendant seems to wallow under the misconception that he can have a better title than the holders of title deeds to a farm merely because he has managed to lay his hands on a Certificate of Occupancy irregularly issued by a local authority. It cannot happen.

I have already stated that the plaintiffs have real rights over the farm by virtue of a valid Deed of Transfer registered in their favour and that there are legal consequences which flow from such registration of title. It is trite that the owner of property has a vindicatory right against the whole world. It is called the *actio rei vindicatio* a remedy available to the owner whose property is in the possession of another without his or her consent. Roman-Dutch law has always protected the right of an owner to vindicate his or her property as a matter of policy even against an innocent occupier or innocent purchaser where the property would have been sold. The latter would only have the defence of estoppel. See *Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 438 C; *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20 A-C.

In my view that is as it should be which is the point made by HOLMES JA when placing emphasis that our law jealously protects the right of ownership and the correlative right of the owner over his or her property. He said in *Oakland F Nominees (Pty) Ltd* v *Gelria Mining and Investment Co Ltd* 1976 (1) SA 441 (A) at 452A:

> "The legal principle enunciated above is solidly noble because since time immemorial, at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc with no qualms whatsoever in employing force or chicanery to dispossess fellow humans 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/her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order."

The concept of the *actio rei vindicatio* is that an owner cannot be deprived of his property against his will. Such owner is entitled to recover the property from any person who is in possession of it without his or her consent. All the owner is required to prove is that he or she is the owner and that the property is in the possession of another at the commencement of the action. Proof of ownership shifts the onus to the possessor to prove a right of retention: See *Jolly* v *Shannon and Another* 1998 (1) ZLR 78 (H) at 88A-B; *Stanbic Finacne Zimbabwe Ltd* v *Chivhungwa* 1999 (1) ZLR 262 (H); *Zavazava and Another* v *Tendere* 2015 (2) ZLR 394 (H) at 398 G.

The plaintiffs having proved that they own the farm, the onus shifts to the first defendant to prove the right of retention. Mr *Nkomo* for the first defendant relied initially on the ground that the first defendant is lawfully settled on the land he occupies having been issued with a Certificate of Occupancy by the Rural District Council. He made that point despite the evidence of Nkiwane which I have embraced, that the Rural District Council could not lawfully issue a valid certificate where the beneficiary is not the holder of a permit issued by the acquiring authority. Mr *Nkomo* then submitted, obviously troubled by the fact that the Certificate of Occupancy does not relate to the plaintiffs' farm, that in any event the first defendant does not occupy any part of the plaintiffs' farm but cherishes residency at Plot 6 Maxim Hill Farm. One then wonders why the first defendant has bothered to defend the action all the way to the bitter end if he is located next door.

I am satisfied from the reliable evidence of Nkiwane that the plaintiffs have got their man. This is because the Provincial Lands Officer physically inspected the settlement and testified that the settlers who include the first defendant are on the plaintiffs' farm. He went on to explain that the first defendant has continued to wield a Certificate of Occupancy for Plot 6 Maxim Hill Farm as a ruse when he is not at such plot but on the plaintiffs' farm. Even if he was on Plot 6, which is not the case, he would be there illegally not having been allocated such land by the acquiring authority.

It is now settled that in respect of resettlement land the Minister of Lands is the acquiring authority imbued with power to allocate land to individuals. In terms of section 2 of the Land Acquisition Act [Chapter 20:10] lawful authority to occupy land means an offer letter, a permit or a land settlement lease. The legislation confers on the acquiring authority the power to issue offer letters, permits or leases to individuals and no one else. That position was settled by the Supreme Court in *CFU and Others* v *Minister of Lands and Others* 2010 (2) ZLR 576 (H) at 591C-E where CHIDYAUSIKU CJ writing for the full bench said:

> "I have no doubt that the Minister as the acquiring authority can distribute land he has acquired in terms of s 16 B of the Constitution by means of the following documents: (a) an offer letter; (b) a permit; and (c) a land settlement lease. The Minister is entitled to issue a land settlement lease in terms of section 8 of the Land Settlement Act [Chapter 20:01] ---. The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to use."

I therefore do not agree with Mr *Nkomo*'s submission that there is no law requiring that a Certificate of Occupancy issued by a Rural District Council to a beneficiary should be validated by a permit. In respect of land acquired for resettlement in terms of the Land Acquisition Act [Chapter 20:10] it is only the Minister who can allocate that land.

Which then brings me to the Certificate of Occupancy relied upon by the first defendant. Let me begin by stating that even if indeed such certificate were issued by Umguza Rural District Council it cannot override a valid Deed of Transfer conferring real rights to the registered owner. The case of *Takafuma* v *Takafuma, supra* is authority for the proposition that registration of title in terms of the Deeds Registries Act [Chapter 20:05] conveys real rights upon those in whose

name the property is registered which is the sum total of all possible rights in a thing. It is from those rights that the *actio rei vindicatio* is premised.

In my view the Rural District Council, not being the holder of a real right over the farm which is better than that of the plaintiffs' could not possibly confer a right of retention to the first defendant which could hold against the overriding real rights of the plaintiffs. There is however another reason why the Certificate of Occupancy relied upon by the first defendant is illusory. It is that it was issued in terms of section 9 (1) of the Communal Lands Act [Chapter 20:04]. That Act was enacted to provide for the classification of land as Communal Land and for the alteration of such classification as well as to alter and regulate the occupation and use of such land. In that regard section 3 defines Communal Land as:

> "Communal Land shall consist of land which, immediately before the 1st February 1983, was Tribal Trust Land in terms of the Tribal Trust Land Act, 1979 (No 6 of 1979), subject to any additions thereto or subtractions therefrom made in terms of section six."

Section 6 confers upon the President the power, by statutory instrument, to declare that any State Land shall form part of Communal Land or to declare that any part of Communal Land has ceased to be such in consultation with a Rural District Council. Clearly therefore the plaintiffs' farm cannot, by any stretch of the imagination, be said to be Communal Land as to permit Umguza Rural District Council to exercise jurisdiction over it. It has not been suggested that the President declared it or part of it as Communal Land as provided for in section 6 of the Act.

As if that was not enough I do not understand how the Rural District Council could purport to issue a permit to the first defendant to occupy the land in question in terms of section 9 (1) of the Act. That section provides:

> "(1) A rural district council may, with the approval of the Minister, issue a permit authorizing any person or class of persons to occupy and use, subject to the Regional, Town and Country Planning Act [Chapter 29:12] and any order issued in terms thereof, any portion of Communal Land within the area of such rural district council, where such occupation or use is for any of the following purposes—
>
> (a) administrative purposes of the state or a local or like authority;
> (b) religious or educational purposes in the interests of inhabitants of the area concerned;

(c) hospitals, clinics or other such establishments for the benefit of inhabitants of the area concerned;
(d) hotels, shops or other business premises;
(e) any other purpose whatsoever which, in the opinion of the rural district council, is in the interests of inhabitants of the area concerned."

The first defendant stated in his evidence that he was allocated a stand by the local authority for purposes of building a home like any other citizen of Zimbabwe. He lives there having constructed a home. I agree with Mr *Madzivire* for the plaintiffs that such use does not fall under any of the purposes set out in that section in terms of which a local authority is empowered to issue a certificate. It does not even qualify under paragraph (e) of subsection (1) of section 9 because that permissive provision still requires the allocated land to be used in the interests of the inhabitants of the area. A homestead for personal use cannot be said to benefit the inhabitants. The section envisages use of land that benefits the community at large not an individual only. It is not without reason that Mr *Nkomo* did not even attempt to suggest that.

The question then arises: On what basis did the Rural District Council issue the first defendant with a Certificate of Occupancy purported to be issued in terms of section 9 (1) for him to settle with his family. It is unfortunate representatives of that local authority did not come forward to explain what, on the face of it, appears to be a glaring illegality. I have no doubt in my mind that council acted *ultra vires* the provisions of section 9 (1) of the Act. The certificate is a nullity and does not give rise to a legal entitlement to resist a vindicatory action. That settles all the issues for trial.

It remains for me to consider the issue of costs. The plaintiffs have asked for an award of costs on the scale of legal practitioner and client. This is a matter in which right from the beginning in July 2012 the plaintiffs asserted their rights to what is demonstrably private property. They elicited the assistance of the Ministry of Lands which did not hesitate to notify the defendants that they were off side. The first defendant admitted that all the notices were brought to his attention. In light of what has been observed above the first defendant in particular had no reason whatsoever to defy the lands Ministry and the plaintiffs and to contest the matter right up to trial.

The first defendant cannot be allowed to be a law unto himself and in the process to unnecessarily put the plaintiffs out of pocket. There should be dire consequences for such

defiance as the court frowns upon it. Therefore as a seal of disapproval an award of punitive costs against the first defendant is appropriate. In respect of the other defendants. I am not even satisfied that they did at one point contest the claim because they have never featured anywhere. It may be a case of the first defendant's legal practitioners having filed an appearance on behalf of "the defendants" only to renounce agency on their behalf because they had no instructions from them. I am disinclined to make an award against the rest of the defendants.

In the result, it is ordered that;

1. Judgment be and is hereby entered in favour of the plaintiffs for the eviction of the 1st, 2nd, 3rd, 4th and 5th defendants and all those claiming occupation through them from Goodview Farm also known as Subdivisions A and B of Subdivision C of Maxim Hill in Ntabazinduna Matabeleland North.

2. The 1st defendant shall bear the costs of suit on a legal practitioner and client scale.

Joel Pincus, Konson & Wolhuter, plaintiffs' legal practitioners
R Ndlovu and Company, defendants' legal practitioners