HJ VORSTER (PRIVATE) LIMITED

Versus

SAVE SAFARIS (PRIVATE) LIMITED

And

PARKS & WILDLIFE MANAGEMENT AUTHORITY

And

MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT N.O.

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 15 MAY AND 1 JUNE 2023

Civil Trial

C. S Ncube, for the plaintiff
J Mugova, for the 1st defendant
No appearance for the 2nd defendant
S. Jukwa, for the 3rd defendant

KABASA J: The plaintiff issued out summons against the 1st defendant on 25th June 2019 in which it claimed the following:-

> "1. Eviction of the defendant and all those claiming through him from Mapari Ranch otherwise known as Lot 4 Devuli Ranch, held under Deed of Transfer 5251/92 within 7 days of service of the order.
>
> 2. Failing compliance with paragraph 1 above an order that, the Messenger of Court/Sheriff of Zimbabwe in charge of Masvingo together with the Zimbabwe Republic Police at the nearest Police Station in Bikita area or Masvingo District be and are hereby directed to evict the defendants and all those claiming through it from the said ranch. (sic)

3. The defendant is to pay cost of suit (sic) on an attorney client scale if the order sought is opposed."

The reference to the 1st defendant as 'it', him, defendants is rather unfortunate and displays a lack of paying attention to detail. The 1st defendant is a duly registered company and so ought to have been referred to as "it" throughout.

It is also important to state that the reference to 1st defendant and not just defendant arises from the fact that the plaintiff sued the 1st defendant and the 1st defendant later sought and obtained an order joining the 2nd and 3rd defendants.

The plaintiff's claim as elaborated in its declaration is to the effect that it is the legal owner of rights, title and interest in Mapari Ranch, more particularly known as Lot 4 Devuli Ranch situate in Masvingo. Such ownership was confirmed by the High Court under HC 3136/18 following the unsuccessful challenge to the High Court's orders under HC 2031/18 and HC 3183/17 declaring the Government's acquisition of the said land null and void. The caveat and encumbrance over the said land was subsequently lifted by the Register of Deeds.

The 1st defendant who had been awarded a lease of the property by the 2nd defendant following such acquisition was therefore in unlawful occupation of the land which is private land.

The 1st and 2nd defendants' attempt to interdict the plaintiff failed with the dismissal of an urgent chamber application by the High Court. The 1st defendant therefore had no right to occupy the plaintiff's property and such occupation was without the plaintiff's consent.

In answer to this claim the 1st and 2nd defendants averred that the land in question was compulsorily acquired by the Government of Zimbabwe and ceded to the 2nd defendant for the protection and management of wildlife thereon. The court orders setting aside such acquisition are a nullity as the court's jurisdiction to entertain challenges to compulsory acquisition was ousted by the Constitution. HC 3183/17 was a nullity as it described a non-existent property and HC 2031/18 which purported to correct HC 3183/17 was equally a nullity as it could not purport to correct a nullity. Without a court order the Registrar of Deeds' upliftment of the caveat would equally be a nullity.

1st defendant was therefore in lawful occupation of the property in terms of a 5 year lease signed between it and the 2nd defendant.

The pleadings were subsequently closed and the parties filed a joint pre-trial conference minute wherein the issues to be referred to trial were agreed on.

I do not intend to regurgitate the issues so agreed and this is so because on the date the trial was to commence the parties agreed that the matter proceed as a stated case. As at the date of trial the 2nd defendant had expressed lack of interest in pursuing the matter. The 3rd defendant although represented by *Mr. Jukwa* had not filed any papers. *Mr. Jukwa's* brief was merely to note the proceedings and consequently it can be inferred, to abide by the decision of the court.

The statement of agreed facts was subsequently filed and I will reproduce it hereunder:-

"The parties confirm the following as agreed facts:-

1. Plaintiff is the holder of title in a certain immovable property held under Deed of Transfer 5251/92 registered in plaintiff's name described as a certain piece of land situate in the district of Bikita, being Lot 4 of Devuli Ranch, measuring twenty-three thousand one hundred and forty three (23 143 000) hectares, also known as Mapari Ranch.

2. Mapari Ranch was compulsorily acquired by the President of the Republic of Zimbabwe under the land reform programme which acquisition was gazetted on 27th May, 2005 (Annexure "A G 1" hereto)

3. The title deed for Mapari Ranch was then endorsed for acquisition by the President of the Republic of Zimbabwe and that endorsement was dated 29th September 2005. (See Annexure 'A G 2')

4. The plaintiff challenged the endorsement or the acquisition at the High Court under case No. HC 3183/17, and obtained an order by default declaring null and void the land acquisition (Annexure "A G 3")

5. On 24th July 2018, plaintiff obtained a subsequent order under case No. HC 2031/18 in respect of the property referred to in paragraph 1 above, which had the effect of varying the order made under case No. HC 3183/17 (Annexure "A G 4" hereto)

6. The orders under case No. HC 3183/17 and HC 2031/18 remain extant.

7. First defendant has challenged the orders in plaintiff's favour in case No. HC 3183/17 as amended by the order made under Case No. HC 2031/18 by way of Case No. HC 865/21. The matter under Case No. HC 865/21 was argued on 29th June 2022 and the judgment is still pending.

8. The Deed of Transfer bearing number 4152/92 referred to in the order made under Case No. 3183/17 does not exist in the records of the Ministry of Justice, Legal and Parliamentary Affairs (Annexure "A G 5" hereto)

9. Between 13th December 2017 and 10th January 2018, first and second defendants concluded a Memorandum of Agreement granting to the latter rights to lease and operate hunting safaris and photographic safaris within the hunting concession in Mapari (Annexure "A G 6" hereto)

10. Second defendant has conveyed its intention to allocate to plaintiff a hunting quota for the year 2023 in respect of the property in issue (Annexure "A G 7" hereto)

What this court has to determine therefore is whether the plaintiff on these agreed facts has made a case for *rei vindicatio* and equally whether the 1st defendant has a legal basis to oppose the relief. Does the 1st defendant have a right of retention in the form of a lease agreement between 1st and the 2nd defendant? Is the 1st defendant's contention that the plaintiff is not the owner of the property legally sound?

Mr. C. S Ncube, counsel for the plaintiff's submissions sought to show that the plaintiff is the owner of the piece of land in contention and therefore has a right to seek the eviction of the 1st defendant whose occupation of the property is without the plaintiff's consent.

Counsel referred to the Deed of Transfer 5251/92 in plaintiff's name which describes the property as Lot 4 Devuli Ranch, also known as Mapari Ranch. This is the property which was erroneously referred to as being held under Deed of Transfer 4152/92 in Case No. HC 3183/17. The error was subsequently corrected under case No. HC 2031/18, identifying the Deed of Transfer as 5251/92.

Case No. HC 2031/18 counsel referred to has an order which states:-

"The order under HC 3183/17 granted on the 19th of April 2018 by the Honourable Justice MATHONSI be varied or amended to read as follows:-

1. An order that the 2nd defendant or his office be permanently interdicted from giving any rights to a third party whether lease or sale in violation of the plaintiff's title of the Mapari Ranch under Deed of Transfer 5251/92.

2. An order declaring null and void any land acquisition, encumbrance by the Government of Zimbabwe or 2nd defendant's office over Mapari Ranch held under Deed of Transfer 5251/92 on account of it being indigenously owned or not necessary for resettlement.

3. There be no order as to costs."

HC 3183/17 as amended by HC 2031/18 are extant and therefore confirm plaintiff as the owner of the property, so counsel argued.

The 1st defendant cannot purport to challenge ownership of the property as that is best left to the 3rd defendant who has chosen not to wade into the melee. The 1st defendant's lease which the plaintiff had issues with has since expired as the 5 years lapsed as at 31 December 2022. Clause 11.1 of the lease stipulated that:-

> "Upon expiration of the lease period highlighted in clause 10.1, this agreement shall be renewed for another five (5) years upon such terms and conditions agreed upon by the parties. The Leasee shall by written application to the Lessor apply for renewal not later than six months before the expiry of the lease."

There has been no renewal and so that which granted "authority" to the 1st defendant to be on the land, albeit still an issue with the plaintiff, has fallen away, so submitted counsel.

Counsel further submitted that the 2nd defendant in a letter dated 9 February 2023 has allocated the hunting and photography quota previously awarded to the 1st defendant to it, putting paid to the 1st defendant's possible claim to occupation of the same. The letter counsel was referring to reads:-

> "**RE: - ALLOCATION OF QUOTA FOR MAPARI RANCH**
>
> Reference is made to your letter dated 21 November and the meeting held between the Authority and yourselves on the 25th of January 2023.
>
> Please be advised that we shall be allocating the 2023 quota to H J Vorster (Pvt) Ltd. Kindly engage our hunting office for further details on payments and collection."

This letter was from the 2nd defendant addressed to the plaintiff. The renewal of the lease in 1st defendant's favour therefore falls away, so counsel argued.

The 1st defendant therefore has no right of retention of the property which is owned by the plaintiff and plaintiff has not consented to the occupation of its property.

Mrs. Mugova, counsel for the 1st defendant held a different view. Counsel argued that the fact that the agreed facts acknowledge that the Deed of Transfer is in the plaintiff's name does not mean ownership is not disputed. Counsel made reference to a letter from the Ministry of Justice, dated 8th January 2018 whose contents state:-

> "This is to confirm that Lot 4 of Devuli Range was registered under the name H J Vorster (Pvt) Limited under Deed of Transfer 5251/1992 and was acquired by the Government of Zimbabwe under caveat 95/94. Deed of Transfer 5251/1992 is missing in our office and we are unable to provide you with a certified copy of the same. Deed of Transfer 4152/92 does not exist in our record."

Since 4152/92 was nonexistent it followed the order under HC 3183/17 was a nullity and HC 2031/18 could not purport to amend a nullity, so counsel argued.

Counsel referred to a decision by MAKONESE J pitting HJ Vorster (Pvt) Ltd and 1st defendant HB 98-19 wherein the plaintiff was seeking an interdict to stop the 1st defendant from conducting business at Mapari Ranch. The application was dismissed and counsel argued that such dismissal was because the plaintiff failed to establish a real right over the property. The judgment therefore delivered a blow to the plaintiff's ownership claim.

The plaintiff is therefore not the owner of the property and the order in HC 3183/17 as amended by HC 2031/18 is awaiting judgment as the 1st defendant is seeking a rescission of the order. Although there is currently no lease between the 1st and 2nd defendant the lapsed agreement was couched in peremptory terms and so renewal of the lease is automatic.

The 1st defendant therefore has right of retention predicated on the anticipated renewal and the litigation seeking to vacate the orders confirming plaintiff's ownership of the property, so argued counsel.

The court must now determine who succeeds between these two protagonists. Both counsel correctly articulated the law regarding *rei vindicatio*. The requirements of ownership and possession of the property by another person without the owner's consent have been stated and re-stated in a plethora of cases (*Chenga* v *Chikadaya & Ors* SC 07-13, *Chimanga* v *Brighton and Anor* HH 551-21, *Stanbic Finance Zimbabwe* v *Chivhungwa* 1999 (1) ZLR 262)

In *Unimark Distributors (Pvt) Ltd* v *ERF* 94, *Silvertondale (Pvt) Ltd* 1999 (2) SA 986 at 996, it was succinctly put thus:-

> "But there can be little doubt that one of its incidents (dominium) is the right of exclusive possession of the *res*, with the necessary corollary that the owner may claim his property whenever found from whosoever is holding it. It is inherent in the nature of ownership that possession of the *res* should be normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some rights enforceable against the owner, e.g. right of retention or a contractual right." (*Nyahora* v *CFI Holdings Private Limited* SC 81-2004)

Is this court to hold that because whilst 2nd and 3rd defendant's efforts to vacate the High Court order in HC 3183/17 as amended by HC 2031/18 failed, the 1st defendant's efforts at vacating these orders may well succeed and so the plaintiff's ownership of the property is likely to be vacated? I think not.

The fact is as things stand the plaintiff is the owner of this property. The property's description as Mapari Ranch is reflected on the lease agreement 1st defendant had with 2nd defendant, it is also so described in the two High Court orders but is described as Devuli Ranch in the Deed of Transfer and the letter from the Ministry of Justice. The argument that the initial court order does not correspond to the property in issue is a lame argument. There is no dispute the land in contention is Mapari Ranch aka Devuli Ranch. I therefore do not intend to unduly exercise my mind on this puny argument. Equally the fact that the letter from the Ministry of Justice stated that the Deed of Transfer 5251/92 could not be located is no basis to hold that such Deed is not in the plaintiff's name for the same letter acknowledges that it is in the plaintiff's name. The caveat related to the acquisition is what the extant court orders are about and until vacated title to the property vests in the plaintiff. Title can be successfully impugned but these proceedings have not impugned such title. The 1st defendant is seeking to have the extant court orders rescinded.

Whether the 1st defendant will succeed where 2nd and 3rd defendant failed is not an argument that should detain the court. The 1st defendant's wish cannot supersede the fact that is currently obtaining. This being that Mapari Ranch was declared as owned by the plaintiff and its acquisition declared null and void. Whether such decision falls foul of the Constitution in that the High Court assumed jurisdiction over a matter where its jurisdiction had been ousted is not an issue that has been properly ventilated in these proceedings. Suffice to say where the challenge is premised on the grounds that it was not done in terms of the law the court's jurisdiction is not ousted (*Campbell (Pvt) Ltd & Ors* v *Minister of National Security Responsible for Land, Land Reform and Resettlement and Anor* 2008 (1) ZLR 17 (S)). This is an argument best left to the court which will be seized with the matter relating to whether the orders of the High Court were legally correct or not.

The High Court orders are extant and until vacated they are court orders which enjoy validity. The letter from the Ministry of Justice must therefore be looked at in light of these extant court orders. Such a letter does not have the effect of vacating the extant court orders.

The judgment by MAKONESE J in *H J Vorster (Pvt) Ltd* v *Save Safaris (Pvt) Ltd* HB 98-19 wherein the plaintiff sought to interdict the first defendant from conducting business at Mapari Ranch is not authority for the proposition that the plaintiff was said not to own the land and so failed to prove a real right entitling it to seek for an interdict. The learned Judge

observed that the 1st defendant was utilizing the land for hunts in terms of an agreement that had not been set aside and the High Court orders did not invalidate that agreement. The hunting concession had not been challenged and set aside by a competent court. The court orders therefore did not have the effect of rendering void the lease agreement between the 1st and 2nd defendant.

I therefore do not read this judgment as declaring that the extant orders are not valid and so the plaintiff has no ownership rights over the property.

Counsel for the plaintiff also submitted that at the time of this judgment the 2nd and 3rd defendants were trying to vacate the extant orders all the way to the Supreme Court, without success. I did not hear counsel for the 1st defendant disputing this fact.

I therefore am not persuaded to hold that MAKONESE J's judgment stripped the plaintiff of ownership of the property, which ownership was confirmed by the extant court orders.

That said, I am satisfied the plaintiff has shown that it is the owner of the property which it seeks to vindicate. There is no doubt the plaintiff has not consented to the 1st defendant's occupation of the property.

> "Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner." (*Oakland Nominees* v *Gelria Mining and Investment Co Limited* 1976 (1) SA 441 (A)"

The 1st defendant cannot possibly claim right of retention by virtue of a lease agreement which has run its course. The fact is the lease has not been renewed and whilst the 2nd defendant's letter to the plaintiff is not in itself an agreement the point is the plaintiff has been offered the hunting quota for the property in question, which hunting quota the 1st defendant enjoyed until 31 December 2022. The 1st defendant therefore has nothing to stand on as regards its occupation of the property in issue. It cannot possibly argue that the renewal was automatic when the agreement specifically states that such renewal shall be by written application made not later than 6 months before the expiry of the lease. The lease has expired and so the condition for such renewal has not been met, at least not to the court or plaintiff's knowledge as there was nothing tendered to show that such condition was met.

The first ground seeking to show an enforceable right or right of retention therefore fails.

The second ground which is anchored on the litigation seeking to vacate the extant High Court orders bestows no right of retention on the 1st defendant. An application for rescission does not halt the execution of the judgment of the court unless an order to that effect has specifically been sought and granted.

A litigant wielding a valid court order cannot be stopped from asserting its rights on the basis that rescission of such order is being sought.

Whilst the circumstances of this case may not be on all fours with the decision in *Lafarge Cement (Zimbabwe Limited* v *Chatizembwa* HH 413-18 where the court said a former employee cannot resist a *rei vindicatio* action on some perceived right of retention arising from the hope that an appeal may reverse the employer's decision to terminate their employment, I would say the 1st defendant has equally not acquired a right of retention on the basis of an anticipated favourable decision on an application for rescission.

I am therefore satisfied the plaintiff has made a case for the relief it seeks.

Has the plaintiff also made a case for punitive costs?

There is no doubt that the 1st defendant put up a fight not just for the sake of it but because it genuinely believed it was entitled to occupy Mapari Ranch by virtue of a lease agreement which lease agreement it believed would be renewed without any hindrance.

The decision to seek the rescission of the High Court orders is testimony of the 1st defendant's conviction that its case is worth putting up a fight for.

I am unable to say the 1st defendant was deliberately defending a lost cause out of malice or a desire to unnecessarily put the plaintiff out of pocket.

Where a litigant genuinely believes in their cause and puts up a fight to protect such cause, I do not think they should be mulcted with punitive costs.

I am consequently not persuaded to hold that the 1st defendant's conduct is deserving of censure. Costs however shall follow the cause as there is no reason to depart from the norm.

In the result I make the following order:-

1. The plaintiff's claim succeeds as claimed in the summons, the 1st defendant and all those claiming through it be and are hereby evicted from Mapari Ranch, held under Deed of Transfer 5251/92 within 7 days of service of this order.

2. Failing compliance with paragraph 1 above, the Sheriff of Zimbabwe be and is hereby directed to evict the 1st defendant and all those claiming through it from the said ranch.

3. The 1st defendant shall pay costs of suit at the ordinary scale.

Mabundu and Ndlovu Law Chambers, plaintiff's legal practitioners
Mlotshwa Solicitors Titan Law, 1st defendant's legal practitioners
Chinogwenya and Zhangazha c/o Coghlan & Welsh, 2nd defendant's legal practitioners
Civil Division, 3rd defendant's legal practitioners