HB 05/17
HC 1618/15

SILKYSIDE TOURS P/L t/a RUNDE LODGE

Versus

RUNDE RURAL DISTRICT COUNCIL

And

MINISTER OF LANDS, LAND REFORM & RESETTLEMENT

And

MAKANAKA HOLDINGS (PVT) LTD
t/a CHRISTINE COLLEGES

IN THE HIGH COURT OF ZIMBABWE
BERE J
BULAWAYO 6 OCTOBER 2016 & 12 JANUARY 2017

Opposed Application

L. Mudisi for applicant
L. Nkomo for 1st respondent
No appearance for 2nd respondent
T. Midzi for 3rd respondent

BERE J: On 23 June 2015 the applicant issued out court process in this court seeking an order crafted as follows:

"It is hereby declared that:

1. The 3rd respondent's legal rights of ownership on the unnamed piece of land to the extent of the inclusion of the applicant's piece of land measuring 2,86ha along Zvishavane Masvingo Road is hereby declared invalid.
2. The 1st and 2nd respondents be and are hereby ordered to permit the applicant all necessary authority in respect of land measuring 2,86ha along Zvishavane Masvingo Road and all necessary development in respect of the land thereof.
3. The 3rd respondent be and is hereby ordered to remove the fence to an extent of enclosing the applicant's piece of land.
4. The 1st respondent and 2nd respondent are hereby ordered to pay costs of this suit at an attorney-client scale one paying the other."

The basis of the applicant's application and the relief sought was rooted in the applicant's founding affidavit deposed to by one Norah Kanganga Mushore which alleged inter alia that sometime in the year 2000, the applicant had concluded a sale agreement of an unnamed piece of land with the 1st respondent and that this same piece of land which had been transferred to the applicant had subsequently been improperly allocated to the 3rd respondent by the 2nd respondent.

There was emphasis in the applicant's founding affidavit that the 1st respondent had sold and transferred to the applicant the unnamed piece of land before the 3rd respondent came into the picture.

The 1st respondent denied the averments as put forward by the applicant and alleged that the applicant had not purchased ay land from it but had shown some strong interest to do so and that the process was never concluded.

The 3rd respondent denied the alleged impropriety in its acquisition of the land amounting to 60.26 hectares on which it has constructed an agricultural institution and alleged that the piece of land had been acquired above board and following due process.

Analysis of submissions and documentary evidence

It was incumbent upon the applicant to properly lay the foundation of its cause of action in order to sustain the relief it sought.

Given the nature of the applicant's claim as formulated in its founding affidavit, it was important for it to bring to the fore evidence confirming it had indeed purchased the unnamed piece of land from the 1st respondent. The need for the applicant to have done this became even more compelling following its bold declaration in its founding affidavit that:

> "6. On the 21st of February 2000, the applicant made a formal written application for allocation of a piece of land for the construction of a lodge to the 1st respondent. I beg leave of the court to attach … annexure B.

7. Thereafter in the year 2000, the applicant and 1st respondent concluded a sale contract of land by which the applicant was granted a piece of land measuring 2,86ha along Zvishavane Masvingo Road".[1] (my emphasis)

The applicant's counsel Mr *Mudisi* was not able to table before the court the alleged agreement of sale despite him being challenged by both the 1st and 2nd respondents' counsels. Feeling the heat and the natural inability to sustain the existence of the alleged sale agreement, and much to the surprise of the court, Mr *Mudisi* for the applicant somersaulted and changed goal posts by alleging that the applicant had in fact entered into a lease agreement which agreement had been misplaced. There is a world of difference between a lease agreement and a sale agreement. By departing from the applicant's founding affidavit which procedurally spoke to the cause of action of the applicant, Mr *Mudisi* projected the applicant in bad light. This is so because in application procedure, the founding affidavit forms the core of the applicant's application. An applicant's application can never be pinned on an answering affidavit but the founding affidavit.

It was even more curious to the court that the applicant would attempt to speak to either a sale or lease agreement for an unidentifiable or unnamed piece of land. Even the description of the land in question left much to be desired. In the court's view, the 1st respondent could not possibly have sold an unsurveyed, and consequently unnamed or unidentifiable piece of land to the applicant with no cite plan or diagram at all. There is clearly some logic in the stance taken by the 1st respondent's representative that the applicant showed zeal to acquire land to build a lodge but that this process was never pursued to its logical conclusion. The request is still an open one hence the proposal by 1st respondent that the applicant considers some other land other than the one currently occupied and developed by the 3rd respondent.

The various annexures to the applicant's founding affidavit do not confirm the existence of either a sale or a lease agreement between the applicant and the 1st respondent. I read those to mean that there was serious engagement between the applicant and the respondent for the former's desire to have a land to build a lodge and nothing more.

1. Record pages 7 or 5

Mr *Nkomo* for the 1st respondent put up a brief, pointed and a persuasive argument that by vacillating between the existence of either a sale agreement or a lease agreement, the applicant was embarking on a fishing expedition. The applicant did not have the conviction of self. I entirely agree. The cause of action as crafted by the applicant was indeed bad in law and of course unsustainable.

The applicant further complicated its case by alleging that the controversial piece of land had been transferred to it by alleging as follows:

> "18. It is apparent that at the time the land in question was transferred to the applicant, the 3rd respondent had not yet acquired the land …"[2]

There was no documentary evidence tendered by the applicant to confirm transfer of this land to it by 1st respondent. The failure by the applicant to do so is understandable. It is clear that under normal circumstances, the 1st respondent would probably not be in a position to do so but perhaps to issue a lease agreement. The court can only conclude that failure by the applicant to tender the documents for such transfer meant that no such transfer took place.

Mr *Midzi* for the 3rd respondent put up a very simple argument as canvassed in the 3rd respondent's opposing affidavit. The 3rd respondent which should correctly be referred to as Makanaka Investments (Private) Limited t/a Christine Private College made a formal application through the 2nd respondent which had compulsorily acquired a hitherto privately owned farm called Woodlands farm, for a portion to build its college. According to Mr *Midzi*, the 3rd respondent's application was successful and indeed there are documentary exhibits to confirm this.[3] It is not accidental that the offer letter and the lease agreement properly define the land allocated to the 3rd respondent. The land is defined in both documents as Woodlands farm situated on approximately sixty comma two six (60,26) hectares in extent in the district of Zvishavane in Midlands Province.

2. Record page 8 or 6

3. See letter of acceptance of 11 march 2014 and the agreement of lease [record pp 70 and 71]

This indeed is how land should be described. Compare this with the applicant's averment that it purchased an unnamed piece of land. No wonder, 3rd respondent's argument that the applicant was presenting a limping and an unconvincing case to court. I agree that the applicant's case is decorated by *mala fides*.

It would be illogical and meaningless to say that of the two, that is, the applicant and the 3rd respondent, the former would have greater rights over the property. The 3rd respondent's claim is adequately supported by documentary exhibits whereas the applicant's case is underpinned on speculative assertions.

What one sees through the several annexures to the applicant's founding affidavit is its determination to acquire some land under the jurisdiction of the 1st respondent. As the applicant correctly points out in its founding papers, this land was never identified or named. This explains why the applicant refers to it as an unnamed piece of land. It baffles the mind how one would have either purchased or leased such a piece of land.

On the papers filed, the 3rd respondent followed all what was required of it in terms of the Land Acquisition Act once the 2nd respondent came into the picture. The 3rd respondent applied for land and was given a well defined land. There is no suggestion in this case that the applicant ever applied for and was also allocated this same piece of land. Consequently the applicant could not possibly have acquired this same land and cannot claim ownership over same.

The third respondent's position accords well with the Supreme Court's position in the much celebrated case of *Commercial Farmers Union and others*[4] which recognized that lawful or legitimate occupation of acquired land must be through an offer letter, or permit or land settlement or lease.

Comparatively, the 3rd respondent presents a far much better and persuasive case than the applicant.

4. Commercial Farmers Union & 9 Ors v The Minister of Lands & Rural Resettlement and 6 Ors Judgment No. SC-31-10 (A unanimous decision)

The court is concerned with the timing of the applicant's application. For quite some time now the applicant has been watching from a distance seeing the 3rd respondent gradually and painstakingly turning the bushy and virgin land into a fully fledged educational institution which has gobbled more than US$2 000 000,00 (two million United States dollars).[5] From the pictures annexed to 3rd respondent's notice of opposition, its college is ready to open its doors to aspiring students and it is clearly a modern institution. Applicant has done virtually nothing to try and halt the construction of the college, and has decided to turn up now and on the 12th hour to try and interfere with such an investment. The court is not impressed by the applicant's conduct. It appears to be actuated by malice or some other ill considerations.

Consequently, the applicant's case is dismissed with costs.

Mutedi Sumba Legal Practitioners, applicant's legal practitioners
Danziger & Partners, 1st respondent's legal practitioners
H. Tafa & Associates, 3rd respondent's legal practitioners

5. Record page 68