FORRESTER ESTATE (PRIVATE) LIMITED
versus
M.C.R. VENGESAYI
and
THE MINISTER OF LANDS IN THE OFFICE
OF THE PRESIDENT AND CABINET

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 26 January and 2 February 2010

Mr. J. Shekede, for the applicant
Mr. G.N. Mlotshwa, for the 1st respondent

PATEL J: On the 9th of September 2009, the applicant obtained a spoliation order against the 1st respondent, in Case No. HC 3989/09, evicting him from the property in question (Frogmore Farm). On the same day, the 1st respondent appealed against this order in Case No. SC 216/09. Relying on his offer letter from the 2nd respondent and the notice of appeal, he then reoccupied the property on the 15th of September 2009 without the applicant's consent. The applicant now seeks leave to execute the order in Case No. HC 3989/09 pending appeal. The 1st respondent resists the application on the ground that he has good prospects of success on appeal.

Leave to Execute Pending Appeal

The test to be applied in an application of this nature is essentially twofold. The Court is called upon to assess, firstly, the prospects of success on appeal and, secondly, the preponderance of equities as between the parties. See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545; *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H) at 154.

In the instant case, the prospects of success on appeal hinge upon two questions: (i) whether the property *in casu* has been duly acquired by the State and (ii) whether the 1st respondent's offer letter entitles him to occupy the property before the applicant has been lawfully evicted therefrom.

Acquisition of Property

The notice in the *Gazette* identifying the land *in casu* for acquisition was first published in GN No. 591/2001 on the 16th of November 2001. It was later listed as item 30 in Schedule 7 to the Constitution (as amended by Act N0. 5 of 2005).

The original acquisition of the property was set aside by default in Case No. HC 8592/02 through a provisional order which was granted on the 27th of November 2002 and later confirmed on the 6th of November 2002. Subsequent decisions of this Court (in Case Nos. HC 7030/06, HC 6116/07 and HC 6586/07, determined on the 27th of June 2006, 15th of February 2008 and 29th of July 2009, respectively) have all reaffirmed or recognised the decision in Case No. HC 8592/02. These later decisions were premised on the default judgment granted in the original case. Their overall effect was to confer upon the applicant rights *in rem* which are operative *erga omnes* and which can only be overridden by clear statutory provision to that effect.

Section 16B of the Constitution and Schedule 7 thereto were brought into operation in September 2005 through Act No. 5 of 2005. The clear object of section 16B as read with item 30 of Schedule 7 was to acquire Frogmore Farm in September 2005 and vest title therein in the State. Although section 16B does not explicitly override pre-existing court decisions, the specific and clear intention of the Legislature was to validate the acquisition of all the properties listed in Schedule 7 and to effectuate the vesting of title in the State. By necessary implication, this was intended notwithstanding any prior decisions of the courts to the contrary. This intention emerges fairly unequivocally not only from section 16B(2)(a), which acquires all the lands listed in Schedule 7, but also from the wording of section 16B(3)(a), which precludes any challenge to these acquisitions before the courts. It is abundantly clear, therefore, that Frogmore Farm was duly acquired by the State in terms of section 16B and continues to vest in the State.

Prospects of Success on Appeal

I now turn to consider the rights and status of the 1st respondent under the offer letter issued to him by the 2nd respondent. Despite the position taken in *Top Crop 1976 (Pvt) Ltd v Minister of Lands, Land Reform and Resettlement & Another* HH 74-2009, it seems to me that the preponderance of case authority supports and fortifies the contrary position. An offer letter does not entitle the holder to occupy the land allotted to him before the current occupier has been duly evicted by due process of the law. Consequently, the offeree cannot resort to self-help in order to dispossess or eject the occupier, no matter how intransigent the latter may be in his refusal to vacate the property. The offeree must wait until the State has taken steps to evict the occupier though a court order granted by a court of competent jurisdiction under the Gazetted Land (Consequential Provisions) Act (*Chapter 20:28*) or otherwise. In the absence of such court order or the consent of the current occupier, the offeree has no self-executing right to occupy the land. See *Forrester (Pvt) Ltd v Makununu* HC 6586/07 at p. 4; *Karori & Another v Brigadier Mujaji* HH 23-2007 at p. 5; *Pondoro v Taylor-Freeme & Others* HH 18-2008; *Bok Estates (Pvt) Ltd v Masara & Others* HH 148-09 at p. 3. See also my observations in *Route Toute BV & Others v Minister of National Security & Others* HH 128-2009 at p. 9.

It follows that in my view the 1st respondent has minimal prospects of success on appeal against the order in Case No. HC 3989/09. In this regard, I am cognisant of the view expressed by CHIDYAUSIKU CJ in *Chikafu v Dodhill (Pvt) Ltd & Others* SC 28/09 at P. 7, to the effect that because of the divergence of opinion in the decided cases of this Court "whichever party lost in the High Court had prospects of success" on appeal before the Supreme Court. This observation was made *obiter* in the context of an application for leave to appeal. With the greatest of respect, it cannot be relied upon to overrule the decision of the full bench of the Supreme Court in *Botha & Another v Barrett* 1996 (2) ZLR 73 (S) at 79, enunciating the traditional requirements for the grant of a spoliation order. This traditional approach has been adopted in the overwhelming majority of the decisions of this Court. I

have no hesitation in continuing to follow that approach for the fundamental reason that recognising any resort to self-help without a court order is the surest recipe for disorder, degenerating into possible violence and the abnegation of the rule of law.

Balance of Convenience

In any event, even if I am wrong as to the 1st respondent's prospects of success on appeal, it remains necessary to consider the balance of convenience and the potentiality of prejudice to the parties *in casu*. According to the papers before the Court, at the time of instituting this application the applicant had emplaced over 1000 head of cattle on the farm and planted various crops on *circa* 66 hectares of land. In contrast, the 1st respondent had only taken several preparatory steps, by securing a loan and purchasing seed, but had not as yet commenced farming operations.

Although both parties have demonstrated the potentiality for harm or inconvenience to themselves, the balance of hardship or convenience clearly favours the applicant. In my view, greater prejudice would be sustained by the applicant if leave to execute were to be refused than the prejudice that is likely to be suffered by the 1st respondent if leave to execute were to be granted.

Disposition

In the result, the applicant is entitled to the order sought granting leave to execute pending appeal, as follows:

1. Leave be and is hereby granted to the applicant to execute the judgment granted by this Honourable Court in Case No. HC 3989/09 pending the determination of the appeal noted by the 1st respondent in Case No. SC 216/09.
2. The 1st respondent shall pay the costs of this application.

Wintertons, applicant's legal practitioners
Antonio, Mlotshwa & Co., 1st respondent's legal practitioners