KILLIOT MUKANYA
and
ROBERT MAKWANYA
and
PATIENCE TSVAKWI
and
TAWANDA MUNGWARI
and
SIMBARASHE MUREHWA
versus
TRIANGLE LIMITED
and
TONGAAT HULLET LIMITED
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 October & 20 November, 2015

Opposed application

T Mpofu, for applicants
F Rudolph, for 1st & 2nd respondents

MANGOTA J: The applicants are beneficiaries of the Government's land reform programme. They were each allocated a certain hectarage in the sugar-cane growing area of Triangle. They were settled at Lot 3A of Triangle Ranch which is in the District of Chiredzi.

The third applicant concluded a Lease Agreement with the third respondent. She was offered, and she accepted, lease of farmhouse number 18 Hysringa, Triangle of Lot 3A of Triangle Ranch. The lease was signed by the parties on 30 September, 2013. Its lifespan is five (5) consecutive years from 1 September, 2013.

Government acquired Lot 3A of Triangle Ranch through a gazette extraordinary of 2 January, 2002. Lot 3A fell under Deed of Transfer number 662/64. It was registered in the name of High Syringa (Private) Limited. It is 458.59 acres [i.e. approximately 183 hectares) in extent.

Prior to the applicants being settled on Lot 3A of Triangle Ranch, the first respondent was growing sugar-cane in the area. The first respondent is a member of the second respondent.

The first respondent stated that the farm which is the subject of this application was/ is a wholly owned subsidiary entity of itself. It insisted that the house which the third respondent leased to the third applicant and the compound were outside the property which was allocated to the applicants. The house and the compound, it said, were vital to the operations of the respondents. It stated that any lease which described the farmhouse and the compound as having been within the property which was allocated to the applicants was erroneous.

It is common cause that the first respondent had grown sugar-cane on the disputed farm when the applicants took occupation of the same. The applicants took over the sugar-cane which the first respondent planted. The first respondent sought to, and did actually, recover from the applicants what it said were expenses which it incurred when it planted and nurtured the cane crop which the applicants took over when it vacated the farm. It also appeared to have offered some resistance to the applicants' desire to take possession of the piece of land which the third respondent allocated to them on the farm.

The resistance which the respondents made and the apparently unilateral deductions of what the respondents considered to be costs which they incurred on the sugar-cane crop prompted the applicants to file the present application. They moved the court to:

(a) declare that deductions which the respondents were making on the sugar-cane deliveries made by them to the respondents were unlawful and should, therefore, cease with immediate effect;

(b) order that the respondents reimburse them the sums which had been deducted from deliveries which the applicants made to the respondents [such sums being as set out in annexure K attached to the affidavit];

(c) order that the respondents vacate Lot 3A of Triangle Ranch and, in particular, portions of the farm which the third respondent allocated to the applicants including the farm-house failing which the Sheriff of Zimbabwe or his lawful Deputy be authorized to evict the respondents without notice.

Annexure K which the applicants attached to their application showed that the respondents were claiming from the applicants a total sum of $93 139.18 as compensation for the

sugar-cane crop which they planted on the acquired farm before its acquisition by Government. The respondents' position was that they were *bona fide* possessors of the land and, as such, they were entitled to compensation for the improvements which they made on the farm. They submitted that the expenses which they made were necessary. They said, without those expenses, there would have been no sugar-cane on the farm.

The respondents stated that the calculation on input costs and the deductions which they were making from the applicants' delivered crop of sugar-cane was the same as they had done with all newly resettled farmers. They made an effort to justify the deductions by stating that such a process was standard procedure within the sugar farming and milling industry.

The applicants resisted the issue of deductions. They insisted that compensation for improvements of the land did not lie with them but with the acquiring authority. They submitted that they did not enter into any agreement with the respondents allowing the latter to deduct from them part of the proceeds of the sale of the cane to the respondents.

The respondents' position in the abovementioned regard was misplaced. They knew and do know as much as the court does that the issue of compensation for improvements of acquired land lies with the Government of Zimbabwe and not with the applicants. Reference is made in this regard to s 4 of the Gazetted Land [Consequential Provisions] Act [*Chapter 20:28*]. The section reads:

> "Compensation for improvements effected on Gazetted Land before acquisition.
>
> For the avoidance of doubt, it is declared that the compensation which is payable for improvements to Gazetted Land effected before it is acquired shall be dealt with in accordance with the provisions of the Land Acquisition Act [*Chapter 20:10*] concerning specially Gazetted Land as defined in that Act".

The above section should be read together with s 16 of the Land Acquisition Act which provides as follows:

> "Duty to pay compensation.
>
> Subject to this Part and Part VA, an acquiring authority shall pay fair compensation within a reasonable time-
> (a) to the owner of any land which is not specially Gazetted Land and to any other person who suffers loss or deprivation of rights as a result of any action taken by the acquiring authority in respect of the acquisition of that land in terms of this Act;
> (b) to any owner of any specially Gazetted Land and to any other person whose rights or interest in the land has been acquired in terms of this Act".

The interpretation section of the Act defines acquiring authority to mean-

> "(a) the President or any Minister duly authorized by the President acting in terms of subsection (1) or (2) of *section three*; or
> (b) the President or any person acting in terms of *section four*; or
> (c) the person empowered by any enactment to acquire land, take materials from land or pay compensation therefor, where the enactment applies any provision of this Act to such acquisition, taking of materials or payment of compensation; or
> (d) in relation to anything required or permitted to be done by an acquiring authority in terms of this Act or enactment referred to in paragraph (c) including the capacity to institute proceedings in terms of this Act and to sue and be sued either in his own official capacity or in the name of the acquiring authority, any person duly authorized by the acquiring authority for that purpose".

The law as stipulated in the foregoing paragraphs in *in sinc* with the third respondent's position of the matter which pertains to compensation for improvements of the land. The first and second respondents are referred to the third respondent's affidavit which reads, in part, as follows:

> "3. Applicants are lawful occupants of the respective subdivision allocated to them on Lot 3A Triangle Ranch as shown on the attached offer letters.
> 4. The piece of land in issue is acquired state land and accordingly the 1st and 2nd respondents no longer have *locus standi* to claim any rights in the said farm since they will be compensated for the acquisition of the said farm by the state.
> 5. In that regard the applicants should be assisted by the honourable court to ascertain (*sic*) their rights to the use, occupation and possession of their allocated subdivisions and further be assisted by the court to be paid their full cane payment without any deductions be the 1st and 2nd respondents since the said respondents will be compensated by the state for the improvements that were on the piece of land at the time of its acquisition by the state". (emphasis added)

The respondents acted in error when they made the deductions. Their error emanated from the fact that they applied common law principles to a position which legislation had altered. If they had followed the law as stipulated in the relevant statutes of the country, the probabilities are that they would not have had the misunderstanding which they had with the applicants on this issue. The fact that they reimbursed the applicants the sum of $39 080.29 out of the total sum of $93 139.18 which they claimed as deductions due to them from the applicants spells in clear terms their realization of the error into which they had fallen. It is, accordingly, pertinent that they will have to clear the outstanding balance of $54 058.89 as that sum is not due to them at all but to the applicants.

The applicants' second issue requires little, if any, comment. They want the respondents to be evicted from the land which they took occupation of. The respondents said they vacated

the land in or about December, 2013. They said they did so as soon as the acquiring authority communicated to them that the applicants' offer letters were genuine and the applicants were, therefore, properly settled on the farm.

The parties are *ad idem* on the position that the respondents' had to, and did actually, make way for the applicants' settlement on the farm. The court will, for the avoidance of doubt, order the eviction of the respondents. It will do so in the spirit of ensuring that the parties should be allowed to live side-by-side without any interference-real or perceived- by one party in the affairs and/or operations of the other. The order is necessary only for the stated purpose. It is, in the court's view, not a miscarriage of justice to order eviction of a party which has already evicted itself from the other party's property.

The issue which the respondents contested in a fairly serious manner is that of the farm-house which the third respondent leased to the third applicant. The first and second respondents stated that the house fell outside the farm which was allocated to the applicants.

In support of their claim to the farm-house, the respondents attached to their opposing papers an affidavit which one Craig Felix Charles Kuttner deposed to on 12 January, 2015. Mr Kuttner stated that he was a qualified and state registered land surveyor who held registration certificate number 241 dated 2 January 2002. He said he stayed at 12 CA Gibbs Avenue, Triangle. He stated that he was registered with the Surveyor-General's Office and he was, therefore, authorized to carry out surveying operations in Masvingo, Triangle and Chiredzi areas through to Beitbridge and Chipinge. His evidence was that he was familiar with Lot 3A Triangle Ranch. He stated that the farm-house was outside the boundary of High Syringa, Lot 3A Triangle.

The applicants' position, on the same matter, was that the farm-house [Number 18 High Syringa, Lot 3A Triangle] which the third respondent leased to the third applicant was within the boundary of the farm which was allocated to them. They referred the court to the contents of the lease as well as to the report which the Acting Chief Lands Officer for Masvingo Province prepared on 21 November, 2013. They attached to their application the Lease and the report. These were marked Annexures F and E respectively.

The Lease, Annexure F, reads, in part, as follows:

"Memorandum of an Agreement of Lease

made and entered into by and between:

The Minister of Lands and Rural Resettlement
[hereinafter referred to as the Lessor] of the one part,

and

Tsvakwi Mavune Taurai Patience
I.D. 63-1110543 V-12

Whereas the Lessor has, in terms of section 6 of the Rural Land Act [*Chapter 20:18*] agreed to let and the Lessee agreed to take on hire a HOMESTEAD [Farm-house] on Lot 3A of TRIANGLE FARM RANCH situated on approximately ± 1250m^2 in extent being house number 18 Hysringa, Triangle in the Districy of Chiredzi in Masvingo Province. The site with the buildings and improvements in the hereinafter referred to as ["the leased premises"]

Now therefore these presents witness:

That the parties have entered into and concluded the following agreement that is to say:-

PERIOD

1. The Lessor hereby lets and the Lessee hereby takes on hire the leased premises for a period of FIVE (5) YEARS which notwithstanding the date of signature hereof, shall be deemed to have commenced on the 1st day of September 2013 and shall continue until the 31st August 2018 unless sooner terminated in the manner hereinafter provided….
2. RENEWAL
……"

The report, Annexure E, reads in part as follows:

"MASVINGO PROVINCE
REPORT ON LOT 3A OF TRIANGLE RANCH, CHIREDZI.

Background

Lot 3A of Triangle Ranch is situated 2km form Triangle Town along Triangle- Ngundu Road. This farm is 458. 5884 acres [183 hectares]. Tongaat Hullets-Triangle has been operating on this piece of land since the onset of the land reform. The piece of land was subsequently demarcated and allocated to 8 beneficiaries by the Provincial Land Committee on realizing that this piece of land used to belong to Highsyringa (Pvt) Ltd before it was acquired by the state. It did not constitute part of the 29 000 hectares that Tongaat Hullets farms at the pleasure of government. All land under 29 0000 hectares being farmed by Tongaat Hullets used to be on their title before acquisition by the state [emphasis added].

Infrastructure

- There is a compound area housing casual labour on the farm. Also there is a main house adjacent to the compound where the section manager presently resides.
- Muonde Lodges run by Tongaat Hullets are on the boundary of the property to the South of the farm". [emphasis added]

Each party to these proceedings supported its claim to the house through some paper or other. That fact alone placed the court into some invidious position which, on the face of it, appeared hard, if not, impossible to resolve. The court had to, and did actually, proceed by way of deductive logic to establish the authenticity or otherwise of the documents which had been placed before it.

The court takes judicial notice of fact that the third respondent does not act on its own. It acts through structures which are answerable to it at the provincial and the district levels. These structures, particularly the one at the district level, know(s) the correct situation which is on the ground. It makes recommendations to the provincial structure which in turn adopts the recommendations made by the district lands officer working hand –in- glove with the district administrator of the area. The Provincial Land Committee plans with its said subordinates what should be done with each area which Government would have acquired. It, in line with the recommendations of the district administrator and the district lands officer, recommends to the third respondent a most effective way of utilizing land which is in any given area of the country as acquired by government. The district administrator and the district lands officer are, if a comparison may be favoured, the third respondent's foot solders. They know and are supposed to know, from the title deed of the acquired farm and from the farm area's map which is, more often than not, attached to the title deed what structures, rivers, hills and/or mountains are on the acquired land.

It was on the basis of the recommendations of these foot solders as filtered to it through the Provincial Lands Committee that the third respondent offered the Lease of the farm-house to the third applicant.

The affidavit of Mr Kuttner leaves a lot to be desired. He said he was a specialist in the surveying of land. He said he was registered as such. He, however, did not state his qualifications as a specialist in the stated regard. He did not produce any certificate which showed that he was a state registered land surveyor. His were bold statements which lacked substantiation.

Francis Chifombo who deposed to the first and second respondents' affidavit at Triangle on 15 December 2015 said he was the agricultural operations manager of Triangle Limited. He did not state, in his affidavit, that he was a qualified land surveyor. There was no evidence to

suggest that he was such. That fact notwithstanding, he in the body of his affidavit, made statements which were on all fours with what Mr Kuttner who claimed to be a qualified land surveyor stated in his affidavit.

Reference is made in this regard to paras 7.4 and 7.5 of Mr Chifombo's affidavit as read with paras 4 and 5 of Mr Kuttner's affidavit. The court will, for the avoidance of doubt, reproduce the four paragraphs as follows:

Mr Chifombo

"7.4 I am familiar with Lot 3A Triangle Ranch, have had sight of the Title Deeds and have examined the topocadastral 1:50 000 series mapping relating to this area, specifically Triangle map reference 2131 A2. It depicts that the referred No 18 homestead which is alleged to be within the boundaries of High Syringa, Lot 3A Triangle Ranch is in fact outside of the boundary of the said High Syringa, Lot 3A Triangle Ranch.
7.5 In addition, the agricultural village on the South-South-Eastern boundary of High Syringa, Lot 3A Triangle Ranch, is likewise outside of the mapped boundaries of the said High Syringa, Lot 3A Triangle Ranch, and likewise reflected on Triangle map reference 2131 A2".

Mr Kuttner

"4. I am familiar with Lot 3A Triangle Ranch, have had sight of the Title Deeds and have examined the topocadastral 1:50 000 series mapping relating to this area, specifically Triangle map reference 2131 A2. It depicts that the referred No 18 homestead which is alleged to be within the boundaries of High Syringa, Lot 3A Triangle ranch is in fact outside of the boundary of the said High Syringa, Lot 3A Triangle Ranch.

5. In addition, the agricultural village on the South-South-Eastern boundary of High Syringa, Lot 3A Triangle Ranch, is likewise outside of the mapped boundaries of the said High Syringa, Lot 3A Triangle Ranch, and likewise reflected on Triangle map reference 2131 A2".

The wording of the cited portions are identical in form, substance and content. They give the distinct impression that the one was copied and pasted onto the other in a typical misinformation fashion. The logical conclusion which the court comes to is that either Mr Chifombo or Mr Kuttner was not being candid with the court at all. The alternative is that one deponent influenced the other to state as he did in an effort to strengthen the respondents' case on the matter which pertained to the ownership of the farmhouse. The two deponents could not, in the court's view, have shared a common position as well as thinking in both form and substance. This is all the more so given the fact that the two affidavits were attested to on two different dates.

The third respondent and the third applicant signed the lease in their respective capacities as Lessor and Lessee on 30 September, 2013. Neither the first, nor the second, respondent nor both of them took issue with the signed lease from the date that the lease was signed to 16 December, 2014. The lease endured for two consecutive years without the respondents raising any concern about its existence. None of them sued the Lessor or the Lessee to recover what they claimed belonged to them. The probabilities are that they did not sue because they knew that the farm-house did not belong to them. If it did as they claimed, they would not have waited to assert their right only when they filed their opposing papers to the present application. They would, in all probability, have asserted their rights in the farm-house a lot earlier than the date that they filed their opposing papers with the court.

The court has considered all the circumstances of this case. It noted with a certain degree of disquiet that the first and the second respondents had made up their minds to trying their luck by opposing the application. They knew that their opposition lacked merit. They all the same persisted with it much to the displeasure of the court. They will, accordingly, be censured therefor.

The court is satisfied that the applicants proved their case on a balance of probabilities. Judgment is, in the premises, entered for the applicants with costs on a higher scale against the first and the second respondents.

Machokoto & Partners, applicants' legal practitioners
Scalen & Holderness, 1st & 2nd respondents' legal practitioners