ARISTON MANAGEMENT SERVICES (PVT) LTD
t/a CLAREMONT ORCHARDS
versus
SHEPHERD GURURE
and
RICHARD SAKUBENDE
and
RANGARIRAI CHIKOHOMERO
and
MINISTER OF LANDS & RESETTLEMENT

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 11 October 2017 & 6 December 2017

Opposed Application

Mr *P Nyakureba,* for the applicant
Mr *T.G Nenzou*, for the 1st – 3rd respondents
No appearance, for the 4th respondent

MANGOTA J: I heard this application on 11 October 2017. At the close of submissions, I delivered an *ex tempore* judgment in which I dismissed the application with costs.

On 17 October 2017 the applicant's legal practitioners addressed a letter to the registrar of this court. The letter reads, in part, as follows:

"We have been instructed to request as we hereby do the full judgment and reasons thereof."

I set out hereunder the full judgment and the reasons for the same.

The applicant is a legal entity. It claims that it owns and operates a farm which is best described as Claremont Estate ("the farm"). The farm is situated in Juliasdale area under the province of Manicaland. It is 2751 hectares in extent. Its main activities are fruit, trout fish and potato farming. Part of the farm was compulsorily acquired by Government.

At the centre of the parties' dispute are three cottages which the first, second and third respondents are in occupation of. The cottages are on the farm.

The first respondent is a beneficiary of Government's land reform programme and so are the second and third respondents' late fathers. The date on which the first respondent and the other two respondents' late fathers took occupation of their respective pieces of land remains in dispute. The respondents said they took occupation of their pieces of land in March 2002. The applicant said they did so in 2004.

The application was filed under the *rei vindicatio* principle. The applicant applied for the eviction of the first, second and third respondents from the cottages. It stated that it owned these. It submitted that the respondents were in unlawful occupation of the same. It moved the court to evict them.

All the respondents opposed the application. The first, second and third respondents raised three preliminary matters after which they dealt with the substance of the application. Their *in limine* matters which carried no weight will only be mentioned for the sake of completeness. These were that:

(a) the applicant's misjoinder of the estates of the second and third respondents' late fathers rendered the application fatally defective;
(b) the applicant's claim had prescribed – and
(c) the court did not have jurisdiction to hear and determine the application.

They stated, on the merits, that they took occupation of the cottages in their respective capacities as beneficiaries of Government's land reform programme. They submitted that the applicant lost its rights over the cottages when the land on which these stand was compulsorily acquired. They insisted that the cottages were on the land which was allocated to each one of them. They averred that the occupier of the land occupies what is on it. They urged the applicant to approach Government for compensation for the cottages which they took occupation of.

The fourth respondent did not object to the applicant being granted the order which it sought. Its concern related to it paying costs of the application. It moved the court not to order it to pay costs.

The applicant's assertions were that it was the owner of the farm and the structures which were on the same. Among the structures are the three cottages which relate to this application. It

said it owned those. The resolution which it passed authorising its general manager, one Edward Makandwa, to depose to its founding affidavit confirms its position in the mentioned regard. The resolution reads, in part, as follows:

> "EXTRACT FROM THE MINUTES OF A MEETING OF DIRECTORS OF ARISTON MANAGEMENT SERVICES (PRIVATE) LIMITED HELD AT NYANGA ON THE …… DAY OF JANUARY 2017. IT WAS RESOLVED
> That Mr Edward Makandwa in his capacity (sic) General Manager of Claremont Estate be and is hereby authorised to act on behalf of the company in the prosecution of the matter involving the eviction of Major Shepherd Gurure and two others from the company owned cottages to its logical conclusion.
> …….
> Certified a true extract of the original minutes
> Company secretary ….. (Signature)
> Date 31/01/2017" [emphasis added]

It is evident that, as late as 31 January 2017, the applicant made deliberations about the cottages. It did not mince its words or dilute its position about the issue. The cottages were, as at the mentioned date, its property. They were, therefore, to be wrestled away, legally though, from the first, second and third respondents. These, according to it, were occupying the same wrongfully and unlawfully. They occupied them against its will.

The application, it was not difficult to see, was one of *rei vindicatio*. All the applicant needed to show was stated *in McCay & Anor* v *Nondo & Anor* HH 209/17 in which it was held that:

> "*Rei vindication* relates to the enforcement of the right of ownership by recovering possession. It is a remedy available to the owner of some property to recover it from whoever is unlawfully holding it. The remedy is founded on the *nemo* plus *iuris* rule. The remedy is available to the owner in the form of eviction. For a party to be successful in a claim for *rei vindication*, he must prove the following:
>
> 1. ownership of the property to be vindicated;
> 2. existence of the property in question;
> 3. possession of the property must be with the respondent. See *Induim Investment (Pvt) Ltd* v *Kingshaven (Pvt) Ltd & Ors*, SC 40/15. *Getty* v *Naidoo*, 10734 (3) SA 3, *Airport Game Park (Pvt) Ltd & Anor* v *Kennedy Kuridza & Anor*, SC 18/04, *Steenkemp* v *Meinies En Andere*, 1987 (4) SA 186" [emphasis added]

The remedy of *rei vindicatio* allows the owner of a thing to recover it from whoever is holding it against his will. As was stated in *Oakland Nominees Ltd* v *Gelria Mining & Investment Co. Ltd*, 1976 (1) SA 441 at 452 (A) our law jealously protects the rights of the owner in regard to his property, unless of course the possessor has some enforceable right against the owner. See also

Tendai Savanhu v *Hwange Colliery Company* SC 8/15 at p 21 wherein ZIYAMBI JA made incisive pronunciations and said:

> "the *actio rei vindicatio* is an action brought by an owner of the property to recover it from any person who retains possession of it without his consent. It derives from the principle that an owner cannot be deprived of his property without his consent."

Whilst the applicant claimed ownership of the cottages, it produced no evidence which substantiated its claim. What the court remained with was its statement on the same. The statement remained not only shallow but also hollow and empty.

The applicant's statement offended the long established as well as accepted maxim which states that he who alleges must prove. It, in effect, failed to prove ownership of the three cottages. Its failure, as stated above, placed into question its *locus standi* vis-a-vis the application.

The position of the first, second and third respondents was that the cottages did not belong to the applicant. They belonged to the Government of Zimbabwe, according to them. Government, they said, acquired and settled them on the same as beneficiaries of its land reform programme. They urged the applicant to approach and request Government to pay compensation to it for the cottages which they took occupation of following government's allocation to them of the pieces of land on which the cottages stand.

The fourth respondent who is the Minister of Lands and Resettlement confirmed the respondent's assertions. He stated in paragraph 10 of his opposing affidavit that:

> "The fourth respondent would hasten to state that the intended sale of the cottages between the applicant and the first – third respondent was illegal as Claremont Estate is state land having been constitutionally acquired. The land together <u>with the cottages</u> do not belong to the <u>applicant but to the state</u>. It follows therefore that applicant cannot sell the <u>cottages that belong to the state</u> [emphasis added]."

The fourth respondent is the land acquiring and allocating authority. He exercised his functions in terms of s 72 of the constitution of Zimbabwe. He said he acquired the applicant's farm. He acknowledged that the first, second and third respondents were settled on a portion of the land which he acquired in terms of the law. He stated in clear and categorical terms that he acquired the land and the cottages which stand on the same. The cottages, he said, belong to the state.

The applicant did not controvert the statement of the fourth respondent. It, in fact, agreed with him on the matter which related to the cottages. It said these belonged to Government.

In abandoning the *rei vindicatio* principle upon which it anchored its application, the applicant showed that it had no leg on which it stood when it applied as it did. Its sudden change of goal posts pushed it more out of, than into, the application. Its assertion which was to the effect that the fourth respondent did not object to the order which it was moving the court to grant to it was neither here nor there. It did not support its cause at all. A *fortiori* when it based its second line of submissions on *Commercial Farmers Union & Ors* v *Minister of Lands and Rural Resettlement & Ors*, SC 31/10. The cited case did not support the position which it took of the matter. It, if anything, strengthened the case of the three respondents.

The remarks which CHIDYAUSIKU CJ made in the *Commercial Farmers Union* case are pertinent. They read as follows:

> "The holders of offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants, as former owners or occupiers of the acquired land lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holders of offer letters, permits or land resettlement leases. Given this legal position, it is the holders of offer letters, permits and land resettlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights." (emphasis added).

The applicant took an armchair approach when it suggested that the abovementioned case authority supported its cause. It did not. It, in fact, supported the cause of the first, second and third respondents. These are the beneficiaries of Government's land reform programme and, as such, they should be assisted by the courts to assert their rights in the land which Government allocated to them. The court, in terms of the case authority, does not assist former owners and/or occupiers of land as these lost all rights to the acquired land by operation of the law.

The applicant did not say it has a permit, an offer letter or a land settlement lease for the land on which the cottages stand. It, in fact, produced nothing which supported the new position which it adopted. Its *locus standi* in the application, therefore, remains open to question.

The applicant's initial statement was that it owned the cottages. It was for the mentioned reason, if for no other, that it employed the *rei vindicatio* principle. Its second statement was that the cottages belonged to the fourth respondent. Its position vis-a-vis the cottages remains without any definition. The applicant did not state that the fourth respondent conferred it with the authority to evict the respondents from the cottages. It sought to ride on the assertion that the fourth

respondent did not object to the order which it was moving the court to grant to it. It, however, could not state the capacity by means of which it could evict the respondents.

The fact that the applicant is not a lessee / offeree / permit holder / agent or assignee of the fourth respondent places its case into a very difficult position. It does not have any recognized legal relationship with the fourth respondent. It filed the application on its own accord as owner of the cottages. It changed goal posts in the middle of the application. Its application stands on nothing. It produced nothing which showed that it has the right to evict the three respondents from the cottages.

The fourth respondent, and not the applicant, has the legal capacity to evict the respondents from the cottages. The *rei vindicatio* remedy is available to him and not to the applicant. The application cannot, therefore, hold.

The speed with which the applicant adopted the fourth respondent's position and proceeded to run with it was quite telling. It showed the applicant as a party which knew that its case stood on nothing and was, therefore, prepared to go along with anything which it believed would assist it to evict the respondents from the cottages which it said do not belong to it.

The difficulty which the applicant's second option presented to it was not far to see. The applicant had no legal relationship with the fourth respondent. It could not, in short, state the capacity or status in terms of which it could lawfully evict the respondents. It was not the fourth respondent's lessee, offeree, permit holder, agent or assignee. It sued as owner of the cottages. When that position fell to pieces, it changed the goal posts much to its embarrassment.

The contrary was, in fact, the case. The first, second and third respondents had a clearly defined legal relationship with the fourth respondent. They are his offerees. He, therefore, is the only one who could lawfully evict them. The applicant had no leg on which it stood to evict the respondents as was its intention.

I state, for the avoidance of doubt, that a man who builds his house on shaky ground or on sand in the hope that when sunshine is at hand it will firm up risks the house crushing upon him much to the peril of his family and him. An intelligent man makes up his mind to construct his house on firm ground so that when the vagaries of weather are upon his family and him all of them will remain safe, secure and sound as what he built will be able to withstand such bad weather.

The applicant, in my view, borrowed all the characteristic of the first constructor who has a poor vision of what would befall his family and him. It showed that it had no principles. It was prepared to hunt with the hounds and run with the hares and it ended up the looser as it could not perform both acts.

The further difficulty which the court remained confronted with was the position, or location of the cottages vis-a-vis the pieces of land which Government allocated to the first, second and third respondents. The applicant stated that, save for the cottage which the second respondent was in occupation of, the remaining two cottages were divorced from the pieces of land which Government allocated to the first and third respondents. The respondents' contention was that all the three cottages were on their respective pieces of land.

The above stated position made it hard, if not impossible, for me to ascertain the correct position of the matter. A map which showed the position of the respondents' pieces of land and the location of the cottages would have offered me a clearly defined picture of the matter. I cannot, without it, separate the sheep from the goats, as it were.

The application cannot, in other words, be resolved on the basis of the papers which the parties placed before me. A visit to the farm is a *sine qua non* aspect which would enable the matter to be conclusively resolved.

The applicant claimed ownership of the cottages. The fourth respondent claimed ownership of the same. Neither the applicant nor the fourth respondent produced evidence to substantiate its or his claim. The matter could not, once again, be resolved on the papers. The applicant's midstream change of goal posts did not assist its case at all.

The application was badly prepared and hopelessly presented. It lacked credence. It was a complete waste of the court's time and a clear abuse of its process. It could not stand.

The application is, in the premise, dismissed with costs.

Maunga Maanda & Associates, applicant's legal practitioners
Chibaya & Partners, 1st – 3rd respondent's legal practitioners
Civil Division of the AG's Office, 4th respondent's legal practitioners