

PATRICK JOHN NYE SUMMER STOOKS
versus
MINISTER OF LANDS AND RURAL SETTLEMENT

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 5 May 2015

Urgent Chamber Application

D. Drury, for the applicant
Ms R. Hove, for the respondent

MATHONSI J: The applicant is a commercial farmer whose Logie Farm in the District of Lomagundi in Mashonaland West Province was acquired under the government's agrarian reform programme by the respondent, who is the acquiring authority, and given to a new farmer, one Frank Dzimbiri by offer letter. Dzimbiri is not a party to this application.

When the applicant remained in occupation of the farm after its acquisition, Dzimbiri instituted proceedings against him in the magistrates court for Chinhoyi seeking his eviction together with all those claiming occupation through him in case number 902/14. By judgment delivered on 26 March 2015 the provincial magistrate for Chinhoyi issued an order, to wit,

- “1. That respondent together with any other persons claiming right of occupation through him of subdivision 11 of Logie Farm in Banket be and are hereby ordered to vacate the farm by the 25th April 2015 failure of which the messenger of court is empowered and directed to evict them.
2. Applicant to go on the land soon after the 25th April 2015 and occupy it in accordance to (sic) the offer letter issued to him by the Ministry of Lands and Rural Resettlement.
3. 1st respondent to pay costs of this case”.

The applicant says that he set about to comply with the eviction order but encountered obstacles as he tried to remove his movable property. In the first instance, Dzimbiri moved in too early for comfort before the expiration of the time given to him to relocate by the court. He has been unable to remove the curtains and carpets from the farm house he used to occupy.

Secondly, as he moved to dismantle what he regards as movable items a Torr shed and 2 600 tonne silos which are detachable on the weekend of 18 and 19 April 2015, local land officers under the employ of the respondent stepped in and prevented him. Although the officers allowed him to dismantle and cart away his center pivot designed and structured the same way as the Torr shed and silos which are also fitted in a similar way to separate concrete blocks by nuts and bolts to make them easily removable, land officers would have none of it. In their view the Torr shed and silos could not be removed from the farm by reason that they are permanent improvements.

Distraught and without solution, the applicant has filed this urgent application seeking the following relief:-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable court why a final order should not be made in the following terms:

1. That applicant’s Torr Shed Two (32) X 600 tonne metal silos; four (4) grain augers situated on Logie Farm Banket and all household items in the main homestead on the said farm be and are hereby declared to be movable assets owned by the applicant.
2. That applicant be and is hereby permitted to hold, use and dispose of the aforementioned property as he deems appropriate.
3. That respondent pay costs.

INTERIM RELIEF (GRANTED)

Pending determination of this matter the applicant is granted the following relief:

- (a) That applicant, his representatives and/or agents be and are hereby permitted forthwith upon the grant of this order to enter upon Logie Farm Banket for purposes of dismantling and loading for removal and use elsewhere applicant’s Torr Shed; Two (32) X 600 tonne metal silos and four (4) grain augers situated on Logie Farm Banket as well (as) being allowed to access the main homestead on the said farm and attend to the removal of all movable household contents and personal possessions (the property).

- (b) That the respondent, his officers and agents and any other person claiming use and occupation of Logie Farm Banket through the respondent be and are hereby interdicted from interfering with or impeding applicant's right to dismantle and remove the property mentioned in the proceeding paragraph.
- (c) That applicant be and is hereby ordered forthwith upon the removal and relocation of the aforesaid property disclose and account for the whereabouts of the said property to the respondent in writing at respondents Head Office at Block 2, Makombe Complex, Off Herbert Chitepo/Harare Street, Harare and pending final determination to the status and ownership of the same that applicant does not dispose of, destroy, adversely alter or damage the said property".

Helpfully the applicant has attached photographs of the items in question clearly showing that they are all bolted to concrete blocks which no doubt can be untied without any difficulty. The items have not permanently attached or accrued to the land. They are clearly movable from point to point. Ms *Hove* for the respondent conceded that the photographs attached to the application represent the correct situation on the ground.

In his opposing affidavit deposed to by Teerera Matimba, the Acting Director Acquisition, Valuation and Estates Management, the respondent conceded that the grain auger is movable and can be taken away. In respect of the Torr Shed and silos, the respondent submitted that they "are deemed to be immovable as they are attached to the ground".

The question to be decided therefore is whether the Torr Shed and the grain silos are movable or immovable. If they are movable then the applicant should be allowed to take them away. If immovable, they have, accrued to the land which has been acquired and therefore cannot be removed.

According to the learned author H. Silberberg, *Law of Property*, Butterworths & Co, 1977, at pp 19 – 20:

"A further distinction is made between movables and immovables which applies to corporeal and incorporeal things. It is self-explanatory to the extent that a thing is movable if its condition is such that it can be readily removed from one place to another, having regard to its size, nature and composition; it is immovable if it cannot be so removed. No hard and fast rule can be laid down and no single factor is necessarily decisive, and obviously a thing which is immovable today may become movable tomorrow: e.g. stone before and after it has been quarried. Conversely, a movable may be affixed to an immovable in such a manner that it loses its identity and becomes an integral part of the immovable thing. In these cases the decision whether or not a movable has lost its identity depends *prima facie* on three factors, *viz* objectively, the nature of the thing and the manner of its annexation and, subjectively on the intention of the owner of the movable at the time of its annexation. As regards the nature of the movable and the manner in which it has been affixed, their importance has been said to be 'self-evident from the very nature of the inquiry'. This means that the nature of the thing may determine whether it is at all possible to affix it to an

immovable in such a manner as to preserve, or in due course restore, its separate identity, whilst the manner of its attachment will often determine whether the separate identity of the movable has in fact been preserved or restored. In other words, the intention of the person who purports to determine whether a particular movable should become a permanent or only a temporary fixture or part of an immovable thing must be reasonably capable of being realised.”

See also *MacDonald v Radin NO and the Potchefstroom Dairies & Industries Co. Ltd* 1915 AD 454, 467

In the present case the immovable thing is the land which has been acquired by the respondent. On that land the applicant affixed structures which are now the subject of this dispute. The nature, size and composition of the items must be considered together with the intention of the person who constructed them in order to determine whether they qualify as movable or immovable.

The manner of their annexation or attachment to the ground or land is useful in determining under which category they fall. In constructing them the applicant could have dug them to the ground and poured concrete to make them permanently fixed to the ground. He did not. Instead he used bolts and nuts.

I have stated that the pictures of the Torr shed, which are not disputed, show that it was built with an intention not to make it permanently fixed to the ground. The contractor dropped rough concrete slabs and then used nuts and bolts to tie the steel pillars to the slabs. Obviously one can easily untie the bolts to release the whole structure from the ground. The same applies to the metal silos. The pictures show that they are made of sheet metal which is tied to a slab by nuts and bolts. These again can be easily untied in order to release the superstructure without disturbing the ground upon which they are sitting. Clearly the intention of the contractor was to make them easily removable. They are therefore movable and will maintain their identity when moved from the present spots.

An item does not become immovable by virtue of a lands officer’s mere “say so.” Matimba has not advanced any legal basis for saying that the items are immovable content to only state at para 8 of the opposing affidavit that:

“For avoidance of doubt the Torr shed and silos are immovable property which the applicant is not allowed to dismantle or remove. Applicant is authorised to remove the grain auger, centre pivot and all of his household property.”

As to how items which can easily be removed by unbolting them and then moving them from point A to point B the same way as the centre pivot and the grain augers can be moved, can be said to be immovable, the respondent does not say. Ms *Hove* who appeared for the respondent did not advance the point further than para 8 of the opposing affidavit of Matimba.

I conclude therefore that the applicant has made out a good case for the relief that he seeks. The respondent's officers on the ground must assist him to return to the farm and collect the items that form the subject of this application and in the process make a clean break with the past.

In the result, the provisional order is hereby granted in terms of the draft order as amended.

Honey & Blackenberg, applicant's legal practitioners
National Prosecuting Authority, respondents' legal practitioners