MUKUVISI TASHINGA HOUSING CO-OPERATIVE
(Represented by CATHERINE KUDAMBO
by virtue of being the Chairperson)
versus
DANNY MUSUKUMA
and
LAST MBIZVO
and
CHARLIE DENGA
and
MSASA PARK (PRIVATE) LIMITED
and
ZANU P.F

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 21 May 2015

Urgent Application

E. Samundombe, for the applicant
B. Ngwenya, for the 1st, 2nd, 3rd and 5th respondents
N. Ruzengwe, for the 4th respondent

MATHONSI J: Honourable Zhou J must have been confronted by a problem similar to the one presented by this case when he decried the penchant by individuals in this country to want to reap where they did not sow. He stated in *Southmark Trading (Pvt) Ltd and Others* v *Karoi Properties (Pvt) Ltd and Others* HH 52/13:

> "The biblical aphorism: 'whatever a man sows, that he will reap' has lost its meaning in our society. This matter presents a sordid picture of a culture of wanting to reap where persons did not sow."

He proceeded later in that cyclostyled judgment:

> "The fourth respondent was aware that he could not just wake up to find himself as the holder of all the shares in a company for free. He would know too that the indigenous legislation does not operate in the manner that he sought to portray to justify his claim to a 100% shareholding in the first respondent."

The applicant in this matter, especially with the benefit of legal counsel, should know that it is standing on sinking sand, it having no legal right that it can possibly enforce at law.

It invaded land belonging to the fourth respondent in Msasa Park, Harare, parcelled it out to land seekers and then approached the owner seeking to legitimise an illegal occupation of that land.

It has now been favoured with a taste of its own medicine by the first, second and third respondents whom the applicant claims invaded its offices, changed the locks and barred the applicant from there with the help of party youths. The applicant claims that on 13 May 2015 those respondents began parcelling out stands to their sympathisers and selling others to the public even though the stands had already been allocated by the applicant to its own members.

There can be no better way of demonstrating that the applicant has no right to protect in a court of law than to cite the very documents it relies upon in making this application, the letters from F.G. Gijima and Associates, legal practitioners representing the fourth respondent dated 3 December 2014 and 23 April 2015. In the former letter they were inquiring from the applicant in response to a proposal it had made, how much hectrage it had occupied, how many stands it had marked, how much it was proposing to pay among other pertinent issues.

It would appear that the negotiations came to nothing because on 23 April 2015 those legal practitioners wrote again in the following:

> "RE: MUKUVISI TASHINGA HOUSING CO-OPERATIVE
>
> We write to you in the above matter and in reference to previous correspondence and conferences. Our client instructs us to advise you that it would seem that an amicable agreement cannot be reached in the matter as the parties remain polarised on the price per square metre. By way of final compromise, our client insists on $25 per square meter. The other material terms remain unchanged and that is:
>
> (a) That the extend of the vacant land in issue to be measured and pegged by a professional surveyor.
> (b) An agreed deposit to be paid within seven (7) days of the parties entering into the agreement.
> (c) The balance to be paid as monthly instalments over an agreed period but not more than one year.
> (d) An approved plan to be procured within thirty (30) days of the parties entering into the agreement.
> (e) Transfer of individual title only to commence upon payment of the full purchase price.
>
> Any other terms and conditions to be agreed shall be negotiated once the parties agree on the above material terms and conditions.
>
> We are instructed to advise you that unless an agreement is reached by 30 April 2015, our client shall not be amenable to any further negotiations and shall proceed to act upon the court order to evict your clients and demolish any structures that would have been built.

We advise you accordingly

Yours faithfully

F.G Gijima
F.G. GIJIMA AND ASSOCIATES."
(The underlining is mine)

What is clear therefore is that there has been no agreement between the owner of the land and the applicant. The purchase price has not been agreed. The land being parcelled out has not been surveyed. No deposit has been paid. No approved plan exists. Terms and conditions of any intended sale have not been negotiated. The deadline of 30 April 2015 has come and gone with no agreement in sight.

Notwithstanding that, the applicant has come to court seeking to enforce "a settlement whose contents are indicated in the letters" I have referred to above. The applicant seeks the following relief:

"TERMS OF THE FINAL ORDER SOUGHT

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

1. The 1st to 3rd (respondents) and all those acting through them be and are hereby barred from interfering in any way with the applicant's operations in Msasa park.

2. The 1st to 3rd respondents to pay costs of suit.

INTERIM RELIEF (GRANTED)

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

(i) That the 1st to 3rd respondents are hereby ordered to vacate the offices of the applicant in Msasa Park and all those acting through them.

(ii) The 1st to 3rd respondents are hereby ordered not to interfere in any way with the operations and activities of the applicant

(iii) That the Zimbabwe Republic Police be and are hereby directed to arrest the respondents and all those acting through them and bring them before the court for contempt of court in the event that they do not comply with this court order."

Section 39 (1) of the Regional Town and Country Planning Act [*Chapter 29:12*] provides:

"Subject to subsection (2), no person shall-

(a) subdivide any property; or

(b) enter into any agreement –

(i) for the change of ownership of any portion of a property; or
(ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
(iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
(iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more, or

(c) consolidate two or more properties into one property except in accordance with a permit granted in terms of section forty."

In *X-trend-a home (Pvt) Ltd* v *Hose Law Investments (Pvt) Ltd* 2 000(2) ZLR 348(S) 355 B-C McNally JA said:

> "The agreement with which we are concerned is clearly 'an agreement for the change of ownership of the undivided portion of a stand. What else could it be for? Whether the change of ownership is to take place on the signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited. The evil which the statute is designed to prevent is clear. Development planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say 'but I have already entered into conditional agreement, major developments have taken place, large sums of money have been spent. You cannot possibly now refuse to confirm my unofficial subdivision or development'"

It is therefore settled law that you cannot sell or subdivide land without a permit. I have said that the applicant did not purchase the land from the fourth respondent and therefore has acquired no rights which it can protect in a court of law. What is shown by the papers before me is an attempt at legalising what the applicant did illegally. It has engaged the fourth respondent with a view to reach an agreement over land it has not only occupied already but has also gone ahead to parcel out to individuals. No agreement has been reached and the owner of the property is in fact threatening eviction against the applicant.

Even if an agreement had been reached with the fourth respondent, such would be unlawful for want of a survey which has not been commissioned and a subdivision permit. The applicants' only saving grace is that I have not been requested to determine the right of ownership. What I am required to do is to determine whether an act of spoliation has been committed and if it has, to restore the *statu aquo ante* until such time that the respective rights of the parties shall have been determined. In a spoliation application all the applicant is

required to do is to prove possession and that he was unlawfully dispossessed. The lawfulness or otherwise of such possession does not come into it.

I associate myself fully with the remarks of Reynolds J in *Chesveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 240 (H) 250 A-D that:

> "It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing – that *spoliatus ante omnia restituendus est (Beukes* v *Crous & Another* 1975 (4) SA 215 (NC)). Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time that a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all."

See also *Moyo* v *Chinhamo* HB 111/11. Ordinarily I would have been inclined to restore the *status quo* as lawfulness and ownership are not required but for two factors raised by Mr *Ngwenya* for the first, the second, the third and the fifth respondents. He submitted that in HC 10561/13 this court, per MatandaMoyo J, granted an order on 25 June 2013 in favour of the fourth respondent for the eviction of the applicant from the property. Although the order had not been executed, the applicant's continued stay at that property was in violation of the court order requiring it to vacate.

In addition, the same applicant approached this court in HC 4050/15 in which it cited the first, the second and the third respondents and sought the same relief, as in the present application. The matter was placed before Hungwe J on 6 May 2015 who refused to deal with it as urgent and removed it from the roll of urgent matters. The applicant can therefore not come back, having only added the fourth and the fifth respondents as parties but seeking no relief against them and expect to be heard on an urgent basis.

Mr *Ruzengwe*, for the fourth respondent confirmed that the property indeed belongs to the fourth respondent which does not have a development permit or approved survey diagram for the parcelling out of stands. He confirmed that the fourth respondent indeed has an order directing the applicant to vacate.

Although lawfulness of possession and ownership are not prerequisites for the grant of spoliation relief, in my view it would be taking the point too far to assist a party who has

long been ordered to vacate a piece of land, to return to that land in violation of a court order. While I cannot condone self-help by the respondents, I cannot grant relief which is in conflict with an order of this court.

On the issue of HC 4050/15, it is unfortunate that the applicant did not find it necessary to disclose the fact that it had unsuccessfully approached this court before. The utmost good faith must be observed by litigants who approached the court on an urgent basis or *ex parte*. In such application, the applicant is required as a matter of course to disclose all facts which are relevant to the matter and have a bearing on the outcome: *Moyo & Anor* v *Central Africa Building Society & Anor* HH 431/14.

An application in which the applicant withholds vital information in order to mislead the court in the hope of obtaining an undeserved relief cannot succeed. It will be dismissed: *Batore Import & Export (Pvt) Ltd* v *Bayswater (Pvt) Ltd &Anor* HH 614/14.

In the result the application is hereby dismissed with costs.

Antonio & Dzvetero, applicant's legal practitioners
Chinawa Law Chambers, 1st, 2nd, 3rd and 5th respondents' legal practitioners
FG Gijima & Associates, 4th respondent's legal practitioners