CHIDO MATEWA
versus
MAKONI RURAL DISTRICT COUNCIL
and
INTERNATIONAL ORGANISATION FOR MIGRATION

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 18 September 2014, and 14 January 2015, 25 August 2015 and 14 December 2016

Civil Trial

Ray H. Goba, for the applicant
C. Warara, for the respondents

NDEWERE J: The plaintiff has been leasing Dagbreek farm from the State since 6 February, 2004. The first defendant is Makoni Rural District Council, a local authority in the area that Dagbreek farm is situated. The second defendant is the International Organisation for Migration, a non-governmental organisation. The plaintiff has conceded that the second defendant is indemnified and is not seeking any order against it.

On 16 April, 2012, the plaintiff issued summons for the payment of:-

(a) US$100 000-00 being damages for loss of property and vandalism.

(b) US$150 000-00 being damages for unlawful interference with farming activities at Dagbreek Farm and loss of crops.

(c) Payment of interest on the aforesaid sum at the prescribed rate from date of demand to date of full and final payment.

(d) Costs of suit at attorney and client scale.

On 28 May 2012, the first defendant filed its plea. It denied authorising use of the farm, but said it authorised use of a 20 metre servitude which passes through the plaintiff's farm. It also said the Civil Protection Act allows it to use any land to save lives of the public when they are in danger. It denied inviting people to steal or destroy. It said the plaintiff acquiesced by her silence and is therefore estopped from complaining over the issue.

The second defendant did not defend the action.

The agreed issues for the trial were as follows:

1. Whether or not the claim has prescribed?
2. Whether or not the first defendant was authorised to use the land leased to the plaintiff, expressly or impliedly.
3. Whether such authorisation by the plaintiff expressly or impliedly would estoppe her from claiming losses she may have suffered?
4. Whether or not the first and second defendant owed a duty of care to the plaintiff in using the plaintiff's farm as a distribution centre?
5. Whether or not the loss of property due to vandalism and interference with farming activities at Dagbreek farm is attributable to first and second defendant jointly and severally.

The background is that between 2006 and 2009, the first defendant authorised the second defendant to use Dagbreek Farm, Nyazura, as a Distribution Centre for food to needy villagers in the area.

The plaintiff's evidence was that she was neither informed nor consulted about the decision of the first defendant. She saw the second defendant when it was already on the farm distributing food. She said people from surrounding farms and villagers converged on her farm to receive the food. Her evidence was that throughout this period she moved from office to office to get help on this issue because her property was being vandalised by people who came to the farm during the food distribution; with some of them remaining on the farm thereafter. She said she sought intervention from the Councillor in her area and from Government Ministers who were her neighbours, without success. She said she also approached the second defendant in Harare and Mutare, and even sent a letter to the second defendant's headquarters in Geneva, but nothing was done to alleviate the problems she had encountered on the farm because of the many people coming there. She said eventually, after narrating the degree of her losses to the Ministry of Lands she was advised to go to court.

She then wrote a letter to the second defendant, as the Distributor at her farm, holding it accountable for the destruction of her property on the farm and demanding compensation. She received a reply not from the second defendant, but from the first defendant, on 14 December, 2011. That letter absolved the second defendant from any wrongdoing and the letter confirmed that Dagbreek Farm was a Distribution Centre and that the first defendant had authorised the second defendant to use Dagbreek as a Distribution Centre.

The plaintiff said that was the first time that she got to know that the first defendant was involved. Although she had engaged the Councillor of her area, that Councillor never told her that in fact the designation of her farm as a Distribution Centre was a Council decision.

She gave evidence on the damage she sustained on the property which included thefts of cattle, and interference with ZESA equipment and failed crops caused by a failure to irrigate owing to the vandalisation of ZESA equipment. She said at one point she lost 35 herd of cattle on one day and they were never recovered. Her evidence of the missing cattle was corroborated by Lovemore Ngwenya, a neighbour, who was questioned by the police on the issue.

She said the first defendant should not have authorised the use of her farm because there were other public areas suitable for the purpose like Folkington Primary School which has been used as a polling station previously. The evidence that Folkington Primary School could have been used instead of her farm was corroborated by Lovemore Ngwenya who was the School Development Association Chairperson since 2007.

Her evidence was that by using her farm, the first defendant opened it up to thefts and vandalism which continued up to the present day because the very act of designating the farm as a Distribution Centre made people believe that the farm had been repossessed by the State and was now "no man's land" and people could do as they pleased on the farm. She produced a bundle of documents full of invoices and receipts explaining the actual damage she suffered as a result of the vandalism and said what she claimed in the summons was actually less than the loss. She narrated each loss claimed in detail, explaining the documents from p 22 of the plaintiff's bundle of documents.

Two witnesses were called to corroborate her evidence on the distribution point in the farm, the missing cattle and failed crops. At the close of the plaintiff's case, the first defendant applied for absolution from the instance. The application was dismissed and the defendant was put on its defence.

On the first defendant's case:- the key witness for the first defendant was the Chief Executive Officer of the first defendant. He said he was the Chief Executive Officer of the first defendant since 1994 and he joined the first defendant in 1990. His evidence was that the Distribution Point which first defendant pointed out was a 20 metre servitude area, 70 meters from the road. He said the first defendant is a Road Authority in terms of the Roads Act and is allowed to use servitude areas for the public interest. He said the Distribution was once a

month. He confirmed that after pointing out the Distribution Point there was no follow up to see how second defendant was conducting the distribution. He confirmed not consulting nor informing the plaintiff about designation of her farm.

On the plaintiff's losses, he said he could not dispute anything as he was not aware of what was going on at the farm. He said losing 35 herd of cattle in one day was possible. He said the $60 000 borrowed by the plaintiff was not enough for 30 ha of tobacco and 25 ha of sugar beans, unless she had other funds.

He confirmed writing the letter of 14 December 2011 which absolved the second defendant and confirmed that the first defendant had authorised the second defendant to use Dagbreek as a food distribution centre.

The issues which were canvassed during the trial were whether the defendants owed a duty of care to the plaintiff in using the plaintiff's farm as a Distribution Centre and whether the loss of property due to vandalism and interference with farming activities at Dagbreek Farm is attributable to the first and second defendant jointly and severally. The other initial issues listed in the joint PTC Minute were not followed up by both parties during the trial. The parties focused on the last two issues. However the first defendant tried to resuscitate its prescription claim through its closing submission. Suffice it to say that till 14 December, 2011, the plaintiff did not know who the real defendant was. When she got to know, she issued summons. Secondly, if the delict was a continuing delict from 2006 to 2009, the plaintiff was still within the three year period when she issued summons in and 2012.

Given the facts outlined above of the first defendant turning Dagbreek Farm into a Distribution Centre without the plaintiff's prior knowledge or consent, I am of the view that the first defendant created a duty of care towards the plaintiff. It was reasonably foreseeable that huge numbers of hungry and needy villagers of between 200 to 400 getting into the farm using scotch carts and hired cars to carry donated goods would compromise the security of the plaintiff's property on the farm; leading to vandalism and theft of the plaintiff's property during the food distribution or afterwards. This duty of care is even more when a party is a public entity like the first defendant and when regard is had to the provisions of s 23 of the Civil Protection Act [*Chapter 10:06*] which requires the occupier of land to be informed and allows him or her to raise objections. Section 23 (6) requires the land to be returned in the condition it was and s 23 (7) provides for compensation.

The defence that they pointed out a servitude area does not exonerate the first defendant at all. The court conducted an inspection in loco of the site and it was apparent that

the 20 metre servitude area could not have contained the trucks of food, the distributors and the recipients. The facts ascertained at the site were that all the recipients, the 200 to 400 people, would come from all directions through the plaintiff's farm, park their vehicles, or scotch carts on the plaintiff's farm and wait for the distribution on the plaintiff's farm land; not on the servitude area. The first defendant did not dispute the plaintiff's indications at the distribution point. In fact the first defendant sent an officer who was not in the area during the period of the distribution. So it was not possible for him to assist the court any further during the inspection in loco; neither could he dispute the plaintiff's assertions and those of her witnesses.

The first defendant created a situation where it designated Dagbreek Farm as a distribution centre, without notifying the plaintiff as required by s 23 of the Civil Protection Act which it relied on and without her consent or even her knowledge. This situation created great risk to the plaintiff through vandalism and theft of her property. The situation the first defendant created behoved it to act with a high degree of care to ensure the protection of the plaintiff's property from harm from the hungry villagers getting in and out of the farm. It chose not to involve the plaintiff in the management of this situation by not even informing her of its decision, thus assuming responsibility for the goings on at the farm. In *Goode* v *SA Mutual Fire and General Insurance Co*. 1979 (4) SA 301 (W) the court said:-

> "If the conduct of a person who owes a duty of care falls, even in the slightest degree, below the standard of a reasonably prudent man, he is guilty of negligence."

In my view, the first defendant, did not do anything to adequately protect the farm's infrastructure and property against vandalism occasioned by the uncontrolled movement of hungry people in and out of the farm and was thus negligent. The first defendant must have known that the second defendant was indemnified and could not have expected the second defendant to do anything about the situation; yet it admitted that it did not follow up the distribution at Dagbreek whatsoever. The first defendant is the one which created this risky situation by pointing out the servitude as a distribution point when the servitude did not have the capacity to contain all the transportation and people coming for the distribution.

The first defendant is therefore liable for the loss of property and vandalism at the plaintiff's farm.

As regard the quantum of the damages, the court noted that the plaintiff's evidence of her loss largely went unchallenged. The first defendant's major thrust was that it was not responsible for the loss and damage so it did very little to challenge the quantum of her

claims. She herself took the trouble to explain in detail her loses and every document in support thereof from p 22 of the plaintiff's bundle. She remained unshaken during cross-examination. The defence case did nothing to upset her evidence of the loss. The only point to note from her evidence was the revelation that her loss was actually more than what she claimed. Be that as it may, she can only be awarded what she claimed in the summons.

The court is therefore satisfied that the plaintiff proved her case against the first defendant, on a balance of probabilities.

However, in her relief, the plaintiff prayed for costs on her a higher scale. No justification was given during the trial why costs should be paid on the higher scale. So costs will be granted on the ordinary scale. The plaintiff also prayed for interest at the prescribed rate from the date of demand to date final payment. No justification was given during the trial for payment of interest from the date of demand. The usual practice is to grant interest from the date of judgment. Interest at the prescribed rate will therefore be granted from the date of judgment. Accordingly, the first defendant is ordered to pay;

(a) US$100 000.00 damages for loss of property and vandalism.
(b) US150 000.00 damages for unlawful interference with Dagbreek farming activities and loss of crops.
(c) Interest at the prescribed rate on the above amounts from the date of judgment to date of final payment
(d) Costs of suit on the ordinary scale.

Venturas & Samkange, plaintiff's legal practitioners
Warara & Associates, defendant's legal practitioners