

**INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES**

BERNHARD VON PEZOLD AND OTHERS (CLAIMANTS)

V.

**REPUBLIC OF ZIMBABWE (RESPONDENT)
(ICSID CASE NO. ARB/10/15)**

- AND -

**BORDER TIMBERS LIMITED, BORDER TIMBERS INTERNATIONAL (PRIVATE)
LIMITED, AND HANGANI DEVELOPMENT CO. (PRIVATE) LIMITED
(CLAIMANTS)**

V.

**REPUBLIC OF ZIMBABWE (RESPONDENT)
(ICSID CASE NO. ARB/10/25)**

PROCEDURAL ORDER NO. 4

Members of the Arbitral Tribunals

Mr. L. Yves Fortier, C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Professor An Chen, Arbitrator

Secretary of the Tribunals
Frauke Nitschke

Assistant to the Tribunals
Alison G. FitzGerald

Representing the Claimants

Mr. Matthew Coleman
Mr. Anthony Rapa
Mr. Kevin Williams
Ms. Helen Aldridge
Steptoe & Johnson, London, United Kingdom

Mr. Charles O. Verril, Jr.
Wiley Rein LLP, Washington, D.C., U.S.A.

Representing the Respondent

The Honorable Johannes Tomana
Advocate Prince Machaya
Ms. Sophia Christina Tsvakwi
Ms. Fatima Chakupamambo Maxwell
Ms. Elizabeth Sumowah
Attorney General's Office
Harrare, Republic of Zimbabwe

Mr. Phillip Kimbrough
Mr. Tristan Moreau
Kimbrough & Associés, Paris, France

I. INTRODUCTION

1. On 6 March 2013, the Claimants brought an urgent application for an order for provisional measures pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules (the “**Application**”).
2. The Application relates to the appearance of a number of persons on one of the Claimants’ properties (“**Smalldeel**”, which is a property located within the Claimants’ Makandi Estate). The Claimants request that the Arbitral Tribunals “order the Respondent to instruct its police force to prevent people from coming onto the Makandi Estate, and to the extent that those people have already arrived on the Makandi Estate, to remove them, unless those people are authorised by the Claimants.” (see Application, para. 1.1).
3. The Arbitral Tribunals have considered the Application and have decided unanimously as follows.

II. PROCEDURAL HISTORY

4. On 6 March 2013, the Tribunal Secretary wrote to the Parties on behalf of the Arbitral Tribunals inviting the Respondent to file any observations it may have on the Application by 8 March 2013.
5. On 8 March 2013, the Respondent filed its observations on the Application, requesting that the Tribunals dismiss the Application (“**Respondent’s Observations**”).
6. On 8 March 2013, the Tribunal Secretary wrote to the Parties on behalf of the Arbitral Tribunals inviting the Claimants to file any response it may have to the Respondent’s Observations by 11 March 2013.

7. On 11 March 2013, the Claimants filed their response to the Respondent's Observations, reiterating their request that the relief set out in the Application be granted ("**Claimants' Response**").

III. DISCUSSION

A. The Application

8. The Claimants submit that on 26 February 2013, a group of approximately ten persons (referred to by the Claimants as "**the Muzite Party**") entered the Claimants' Smalldeel property without the Claimants' authorisation. The Claimants assert that the group included, *inter alia*:
 - (a) Superintendent Chitondwe, who is a member of the Respondent's police force and according to the Claimants purported to be acting in his official capacity as a member of the Zimbabwean police; and
 - (b) Mr. Muzite, who is known to the Claimants, in particular from a 2010 incident during which Mr. Muzite is alleged to have threatened and assaulted the Claimants' staff and to have stolen a large amount of crops from the Makandi Estate (with one of his supporters carrying a high calibre firearm at the time).
9. According to the Application, the Muzite Party informed the Claimants' farm staff that they arrived "to identify Mr Muzite's 100ha of land on Smalldeel" (see Application, para. 2.4). The Claimants dispute that the Respondent has in fact allocated land on Smalldeel to Mr. Muzite by way of an Offer Letter Process or otherwise.
10. The Claimants further submit that on 1 March 2013, several members of the Muzite Party returned to Smalldeel, threatened the keeper of the farm's store, took possession of the store and placed a sign over the store: "Muzite Farm". The Claimants further allege that on the following day, a larger group of approximately 15 persons returned to Smalldeel, and threatened and chased the harvesting staff from the fields.
11. The Claimants also assert that on 6 March 2013, the Muzite Party commenced harvesting macadamia nuts on Smalldeel and have since physically removed some of the harvested nuts from Smalldeel.

12. In the Claimants' view, the actions outlined above indicate that:
 - (a) the Muzite Party plans to permanently occupy Smalldeel and profit from the macadamia and wheat crops (see Application, para. 2.8);
 - (b) a risk exists that the Muzite Party will damage existing infrastructure on Smalldeel (see Application, para. 2.8); and
 - (c) the Muzite Party will likely continue to physically intimidate and threaten the Claimants' staff, particularly in light of the 2010 events referred to at paragraph 8 above (see Application, para. 2.9).
13. The Claimants state that they have unsuccessfully sought assistance from the local police, who "appear to be intimidated by the involvement of Superintendent Chitondwe" (see Application, para. 2.10). The Claimants attach to their Application a communication dated 4 March 2013 addressed to counsel for the Respondent, advising the Respondent of their position that the Superintendent's conduct is attributable to the Government of Zimbabwe.
14. Relying on Article 40 and 41 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, the Claimants submit that they seek to have the following rights preserved through the present Application (see Application, paras. 4.8 and 4.9):
 - (a) "rights under the BITs and customary international law not to have their property expropriated on grounds of discrimination, in serious breach of an obligation arising under a peremptory norm of general international law"; and
 - (b) the "right to participate in these proceedings without threats of intimidation from members of the Respondent's police force, or other persons."
15. In their Application, the Claimants seek specifically that the Tribunals order the Respondent (see Application, para. 7.1):
 - (a) to instruct its police force that only those persons who have been granted permission by the Claimants to enter the Makandi Estate may do so ("**Authorised Persons**");
 - (b) to instruct its police force to remove all persons from the Makandi Estate who are not Authorised Persons; and

- (c) not to take any further action to aggravate the dispute between it and the Claimants.

B. The Respondent's Observations

16. In its Observations on the Application, the Respondent submits that Mr. Muzite was legally allocated subdivision 1 (a 100-ha plot) of Smalldeel farm on 10 February 2009 and that the apparent cause of the current disturbances relates to the exact boundaries of this plot (see Respondent's Observations, p. 1).
17. The Respondent rejects the Claimants' characterisation of the events and avers that there is no collective "Muzite Party", stating rather that the "facts on the ground are that Mr Muzite considered it reasonable to harvest what was on the portion of land allocated to him in 2009" (see Respondent's Observations, p. 2).
18. The Respondent notes that there was also an incident involving Mr. Muzite in 2010 and that the "problem" about which the Claimants complain is not new and therefore not urgent (see Respondent's Observations, p. 2).
19. Notwithstanding the foregoing, the Respondent confirms the following (see Respondent's Observations, p. 2-3):

"Respondent has emphasised to the police that they should ensure that the status quo at the time of the filing of Claimants' case in 2010 prevails. Respondent confirms that police are under instructions to ensure that Mr Muzite does not interfere with the Claimants' operations.

Respondent invites the Arbitral Tribunal to advise Claimants that they have the option to approach the provincial police in Mutare, in the event that the district police are not acting on their reports. The provincial police have undertaken to act in the event of any such a report.

Claimants' application does not indicate any attempt to engage the provincial police in the issue at hand. In the event that the provincial police were also to fail to act, the Claimants can approach the Police General Headquarters in Harare, which is aware of the ICSID proceedings."

20. In an affidavit filed in support of the Respondent's Observations, Superintendent Chitondwe also confirmed receipt of the following directions from the Government of Zimbabwe (see Respondent's Observations, Affidavit of Superintendent Chitondwe, para. 29):

“The Attorney General's Office advised us that the status quo as at the time proceedings were instituted in ICSID should be maintained. We have advised Mr Muzite to stay off the land in question until the ICSID matter is finalized.”

21. The Respondent submits that, in any event, the criteria for ordering provisional measures are not met.

C. The Claimants' Response

22. The Claimants note in their Response that “the Respondent appears to have accepted the substance of the Claimants' application of 6 March 2013”, based on the fact that “the Police appear to have been instructed to act against the Muzite Party, which they have done” (see Claimants' Response, para. 1.2). Nevertheless, the Claimants state that they continue to feel intimidated by the fact that threats were made against their staff and because the police were allegedly a party to those threats. As a result, the Claimants maintain their Application and request that they be granted the relief set out at paragraph 15 above.

23. The Claimants record the following events since the filing of their Application, supported by the witness statement of Nicholas Shaxson, a senior manager of the Makandi Estate (see Claimants' Response, paras. 2.2 to 2.8):

“2.2 One matter that was not mentioned in the background facts to the application of 6 March 2013 is that one of the Makandi Estate's tractor drivers, together with a security officer, confronted the Muzite Party on Smalldeed. As a consequence both were questioned by the Police, and the tractor driver was taken into Police custody. The Police released the tractor driver without charge after this application was made. The security officer was also questioned for allegedly defaming President Mugabe. The defamation matter has not been dropped (Shaxson, para 5, tab 1).

- 2.3 On 6 March 2013, two local Policemen were placed on the Smalldeel Estate. However, they merely observed matters, and did not intervene in the subsequent removal of crops from Smalldeel (Shaxson, para 6, tab 1).
- 2.4 On the morning of Thursday, 7 March 2013, members of the Muzite Party removed five pickup loads of macadamia nuts from Smalldeel, which is equivalent to approximately two tonnes. These macadamia nuts were transported to another farm, Rosalie, which is now run by a member of the ZANU-PF political party. This theft was reported to the local Police. In response, the local Police informed the Claimants that they were awaiting instructions from District Police Headquarters as to how they should deal with this matter (Shaxson, para 7, tab 1).
- 2.5 Later on in the morning of Thursday, 7 March 2013, members of the Muzite Party began to steal the staff's maize stocks. Approximately one tonne of maize was taken from the staff. This caused a great deal of concern because it was thought very unlikely that the Makandi staff would tolerate the theft of their own food. Later on that day the Police attended Smalldeel and ordered the Muzite party to return the maize and to stop harvesting the macadamia nuts. However, the Muzite Party continued to harvest macadamia nuts on Thursday night (Shaxson, para 8, tab 1).
- 2.6 On Friday 8 March 2013, Mr Shaxson was informed by the local Police that the Attorney-General's office had become involved in this matter, and had made comments to the effect that "they were not risking 128 million dollars for the sake on one individuals" (Shaxson, para 9, tab 1).
- 2.7 By Saturday morning, 9 March 2013, the Muzite Party's harvesting gang left Smalldeel. However, Mr Muzite and members of the Muzite Party remained in the store near the Smalldeel fields. On Saturday morning Mr Shaxson was informed by the local Police that they were on their way to evict Mr Muzite. The local Police asked Mr Shaxson to intercept a truck that the Muzite party had loaded with three tonnes of macadamia nuts that were harvested from Smalldeel on Friday. These are the same nuts that the local Police had previously watched Mr Muzite take from Smalldeel. Mr Shaxson did not intercept the truck, but the Police did (Shaxson, para 10, tab 1).

2.8 In the evening of Saturday 9 March 2013, Mr Shaxson was informed by the local Police that the Muzite Party had been given until Sunday morning to leave the store. During Saturday night the Muzite party departed Smalldeel (Shaxson, para 11, tab 1).”

24. The Claimants insist that the police will only act if applications for provisional measures are made to the Arbitral Tribunals, and that it is not good enough for the Respondent to suggest that they simply “keep climbing the Police ladder to Provincial level until someone will respond to them” (see Claimants’ Response, paras. 4.1 and 5.7). As a result, the Claimants maintain their Application.

IV. ANALYSIS

25. The Arbitral Tribunals wish to record the fact that the Application has been considered on a without prejudice basis insofar as the Respondent’s objections to jurisdiction are concerned. Additionally, while neither Party has addressed the question of *prima facie* jurisdiction in its submissions, the Tribunals are satisfied, based on the reasoning set out below, that the absence of any such submissions is not fatal to their disposing of the Application in the present Procedural Order.

26. The Arbitral Tribunals note the Respondent’s statement that it has instructed its police to maintain the status quo as of the date on which the Claimants initiated ICSID proceedings and, in particular, to ensure that Mr. Muzite does not interfere with the Claimants’ operations at Smalldeel. The Tribunals also note the Respondent’s statement that the provincial police have undertaken to act on any reports they receive in relation to this matter.

27. In their Response, the Claimants confirm that the police have progressively taken steps since the date of filing of the Application (i.e., 6 March 2013) to ensure the removal of Mr. Muzite and his party and that certain food stocks and harvested crops, if not all, have been restored to Smalldeel farm with the assistance of the police.

28. The Arbitral Tribunals note that the Claimants continue to “feel intimidated” by the threats made against their staff and that this intimidation is “heightened by the fact that the Police will not act”. However, in light of the Respondent’s undertakings to ensure that the status quo is maintained and that the police will act on any reports received in relation to Smalldeed farm, as well as the Claimants’ confirmation that since the date of filing their Application the police have in fact ensured the departure of Mr. Muzite and the return of certain food stocks and harvested crops, the Tribunals see no basis at this time to order the relief requested and therefore the Application is dismissed.
29. The Arbitral Tribunals expressly do not take a view on the merits of the Application. The Tribunals’ decision is also predicated on the current factual matrix presented by the Parties in their submissions in relation to the Application and is without prejudice to any further application that either Party may seek to bring should that factual matrix change.
30. The Claimants have notified an additional event which took place on 6 March 2013, involving a confrontation between a security officer and tractor driver on the Makandi Estate, on the one hand, and Mr. Muzite and/or his party, on the other hand, following which the tractor driver and the security officer were questioned by the police. According to the Claimants, the security officer was questioned in particular for allegedly defaming President Mugabe and this matter has not been dropped, although no charges appear to have been brought and he has not been detained by the police. Whilst the Tribunals are sensitive to the tension that appears to exist between the Parties to these proceedings as manifested in this Application and the substantive submissions filed by both Parties in these proceedings, it is unclear what, if any, direct relation this latter event has to the specific matters before the Tribunals. As the matter presently appears to stand, the Tribunals are not persuaded that their intervention is warranted.
31. The Arbitral Tribunals, however, strongly encourage both Parties to conduct themselves in a manner so as to avoid further aggravation of the dispute between them in order to ensure the orderly progress of these proceedings.

V. THE ARBITRAL TRIBUNALS' DECISIONS

32. Based on the foregoing, the Members of the Arbitral Tribunals have deliberated and decided unanimously to dismiss the Application.
33. There shall be no order as to costs.

Dated as of 16 March 2013

Signed on behalf of the Arbitral Tribunals

A handwritten signature in black ink, appearing to read "L. Yves Fortier", written over a horizontal line.

L. Yves Fortier, C.C., Q.C.
President