

**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. 6

Members of the Arbitral Tribunals

Mr. L. Yves Fortier, C.C., Q.C., President
Professor David A.R. Williams, Q.C., Arbitrator
Mr. Michael Hwang, S.C., 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. Fortune Chimbaru
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 5 July 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 arrival of a group of people referred to as the “Thornton Party” onto Thornton Farm, a part of the Border Estate allegedly expropriated in 2005, and the Respondent’s alleged refusal of the Claimants’ requests to remove them. According to the Claimants, some of the members of the Thornton Party appear to have been displaced from a neighboring community as a result of a diamond mining operation in which the Respondent is involved. The Claimants further state that the Thornton Party has shown an intention to permanently occupy Thornton Farm, has caused extensive damage to property and has attacked the workers’ village on Thornton Farm.
3. The Claimants seek an order directing the Respondent to instruct its police force to prevent all persons from coming onto the Forrester Estate, the Border Estate and the Makandi Estate (the “Estates”), and to the extent that those people have already arrived on the Estates, to remove them, unless they are authorized by the Claimants.
4. The Arbitral Tribunals have considered the Application and have decided unanimously as follows:

II. PROCEDURAL HISTORY

5. On 5 July 2013, the Tribunals’ 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 9 July 2013.
6. On 9 July 2013, the Respondent filed its observations on the Application, requesting that the Tribunals dismiss the Application (the “Respondent’s Observations”).

A. The Application

7. The Claimants submit that if the requested order is not made there is a serious risk of catastrophic forest fires on the Border Estate during the forthcoming dry season in Zimbabwe, which “will destroy one of the very investments that are the subject of these proceedings (the forest plantations on Thornton Farm)” (see Application, para. 1.4). The Claimants also submit that if the order is not granted, they will be unable to participate in these proceedings without being intimidated and the dispute will be aggravated.
8. The Claimants state that the Thornton Party moved onto the Thornton Farm in December 2012 and, since that time, has cleared 75 ha of pine plantation through manual means and by lighting fires. According to the Claimants, members of the Party have built homesteads and planted crops on this cleared land, and continue to clear pine plantation by lighting fires. The Claimants place significance on the lighting of fires by the Thornton Party, noting that the risk of forest fires is particularly high going into the dry season. The risk of a catastrophic forest fire is stated to be heightened because the Thornton Party has blocked access roads, rendering a timely response by fire crews difficult if not impossible. The Claimants explain that between 2002 and 2010, 13,778 ha of plantation on the Border Estate were damaged by fires, including fires lit by settlers (see Application, paras. 3.3 and 3.5).
9. On 14 January 2013, one of the Claimants, Border Timbers Limited, successfully obtained a provisional order from the local court for the eviction of the Thornton Party. This order provides as follows (see Exh. C-000860, paras. 1-4):

“The Respondents jointly, and all those acting through them are interdicted forthwith from carrying out any farming or any other activities and operations and erecting illegal structure in applicant’s property namely Thornton Farm situated in Chimanimani District for which applicant has a right of occupation referred to in Applicant’s Affidavit hereto.

The Respondents and all those through then [sic] are interdicted from going to applicant’s property on Thornton Farm, without the applicant’s express authority and consent thereby interfering with the applicant’s operations in anyway in the property.

The Respondents and all those through then [sic] are ordered to give applicant and its employees undisturbed right of use to its property namely Thornton Farm, Chimanimani.

The Respondents to remove all illegal structures on Applicant's property forthwith."

The order was made final on 30 January 2013 and appears to remain in place to date (see Application, para. 3.10).

10. On 22 and 23 January 2013, pursuant to the provisional order, a court official and the police evicted some members of the Thornton Party from Thornton Farm. However, the Claimants state that other members of the Thornton Party evaded eviction and therefore further evictions were carried out on 9 May 2013 (see Application, para. 3.11). The Claimants further state that the situation in recent weeks has escalated, allegedly due to the political activities of Mr. Robert Sacco and his son, Mr. Joshua Sacco, whereby they have encouraged more people to join the Thornton Party and support Joshua Sacco's bid to win the ZANU-PF primaries in the electorate of Chimanimani East, in which Thornton Farm is located. The Claimants estimate that the ranks of the Thornton Party have now swelled to at least 100 people (see Application, para. 3.15).
11. According to the Claimants, on the evening of 2 July 2013, members of the Thornton Party attacked the workers' village on Thornton Farm, returning the following morning wielding machetes and knobkerries. The Claimants state that later that day, 3 July 2013, the police attended Thornton Farm with Joshua Sacco and asked the Thornton Party to "co-exist" with the Border Estate's employees. The Claimants submit that whatever the reason for the swelling in size of the Thornton Party, the Respondent has changed its attitude and now refuses to remove the Thornton Party (see Application, paras. 3.17-3.18).
12. The Claimants note that they have corresponded with the Respondent's counsel on the matter and requested that the Respondent remove the Thornton Party from Thornton Farm. According to the Claimants, the Respondent stated in the course of the parties' exchanges that it cannot act without an order from the local courts and, moreover, that the

order obtained on 14 January 2013 is invalid because it was obtained *ex parte*. The Claimants note that *ex parte* orders may validly be obtained in cases of urgency and that, in any event, the order was confirmed and made final. The Claimants submit that the real issue is the Respondent's refusal to act against the Thornton Party for which the Claimants speculate are political reasons relating to tensions within ZANU-PF (see Application, para. 4.1).

13. The Claimants submit that although they are not required to exhaust local remedies before seeking relief from the Tribunals, there is in any event nothing further that the Claimants can do locally to evict the Thornton Party from Thornton Farm (see Application, para. 4.2). They further submit that all of the prerequisites for an order granting provisional measures are satisfied as follows:

- (a) The Tribunals have *prima facie* jurisdiction over the merits of the disputes, as pleaded in their Requests for Arbitration and in their Memorial, and as confirmed by the Tribunal in PO No. 5 (see Application, paras. 5.1-5.2);
- (b) The Claimants seek the preservation of three existing rights, being (i) their entitlement to the return of Thornton Farm, including the plantations thereon; (ii) their right to participate in these proceedings without being intimidated directly or indirectly by the Respondent or other persons; and (iii) their right that the dispute between the parties is not aggravated by the Respondent (see Application, paras. 6.3-6.6);
- (c) The Claimants submit that the presence of the Thornton Party is highly prejudicial - and therefore meets the criterion of urgency - given the nature of the investment in question (i.e., the plantations), as their presence presents a serious risk of catastrophic forest fire that could destroy the plantations and Thornton Farm's value. The Claimants submit that their right not to be intimidated and their right to the non-aggravation of the dispute is also prejudiced by the presence of the Thornton Party, noting the attack on the workers' village (see Application, paras. 8.1-8.4); and
- (d) The Claimants submit that irreparable harm or damage will occur – thereby satisfying the criterion of necessity – if provisional measures are not ordered because the matters engaged by the rights the preservation of which is sought in this Application cannot be fully remedied by compensation (see Application, paras. 9.1-9.4).

14. The Claimants justify the scope of the order being requested, that is an order which would apply in respect of any unauthorized person entering onto any one of the three Estates, as opposed to an order applicable solely to the Thornton Party and Thornton Farm, as follows (see Application, paras. 10.2-10.6):

“The general assumption in Zimbabwe is that between now and 14 August 2013 there will be a national election. The last national election (in 2008) was marked by political violence. Human Rights Watch has warned that the forthcoming elections will also be violent. The Claimants are very concerned that if large numbers of Settlers are allowed onto the Estates it greatly increases the chances of political violence occurring on the Estates, whether between Settlers or between Settlers and the Claimants’ 6.500 employees.

The chance of such violence is increased because it is reasonable to assume that the Settlers have political views that are opposed to those of the Claimants’ employees (note the attack on the workers’ village on 2 July 2013 – see para. 3.17 above). This divergence in political opinion arises out of a number of matters, including the fact that the ruling party, ZANU-PF, initiated the expropriation [sic: of] the Claimants’ land in 2005, which the Settlers wish to occupy, but which could destroy the livelihood of the Claimants’ employees.

Further, the chance of violence is increased by the fact that the congregation of large numbers of people in one place acts as magnet for political activists seeking to promote political violence.

There is also an air of despondency among some rural people partly arising out of the fact that food security is on the rise as a result of the expropriation of the large scale farming sector.

Finally, there have been a number of Invasions on the Estates that have been brought to the attention of the tribunals to date. As a result of the correspondence that the Respondent had submitted to the Tribunals in regard to an earlier application for provisional measures (that concerned the Muzite Party) the Claimants had understood that the Respondent intended to instruct its Police force to stop Settlers invading the Estates. However, the Respondent appears to be no longer willing to do so, or at least to be inconsistent as to whether or not it will act in such circumstances. If the Tribunals accept the grounds of this application in regard to Thornton Farm, then those grounds are equally applicable to all properties within the three Estates. In such circumstances it would be far more efficient to have one order in regard to all of the Estates as opposed to the Claimants having to make an application each time there is an Invasion of a particular property.” [citations omitted]

B. The Respondent’s Observations

15. The Respondent submits that the Border Estate is not the only forestry estate in Zimbabwe facing threats of unlawful entry or settlement. The normal route, according to the Respondent, is for owners of plantations to have recourse to civil court proceedings in order to evict any unauthorised persons on their properties. The Respondent submits that this is what the Claimants have done in the past and should do now (see Respondent’s Observations, p. 1.).
16. The Respondent states that the Thornton Party is a group of persons totally independent from the Respondent’s control and not associated with the Land Reform Programme, and it is therefore incorrect to allege that the Respondent is violating any of the Claimants’ rights. The Respondent avers, however, that it will act if this or any other group of people engage in any criminal activity (see Respondent’s Observations, p. 2).
17. The Respondent explains the process engaged by the Claimants through the local courts as follows (see Respondent’s Observations, p. 2):

“Under domestic law, execution of the Provisional Order granted to Claimants on 14th January 2013, C-000860, meant that the court official designated to execute such orders, being the messenger of court, became *functus officio* together with the police who were empowered to arrest the Thornton Party after the successful execution of the order.

In terms of domestic procedure, any defiance of the court order after its successful execution can only be cured by an order of contempt made by the same court that granted the defied order. Such contempt order does not involve the police, as it is a civil matter where the applicant must approach the civil court on application and the concerned party is given an opportunity to respond.

In such proceedings the domestic court will issue further orders designed to stop/mitigate the contempt. In the event that such an order involves the police or any arm of the State to assist in diminishing the contempt, then the Respondent will be obliged to act.”

18. As an alternative, the Respondent states that the Claimants could institute fresh eviction proceedings and seek an order that would require the Respondent to assist the court official charged with execution of court orders (see Respondent’s Observations, p. 2).
19. The Respondent observes that as primary elections have already come and gone, they are no longer an issue among the Thornton Party. Additionally, the Respondent avers that it cannot be stated with any certainty that there will be any violence in the forthcoming elections. As regards to the threat of fires, the Respondent dismisses the Claimants’ reliance on destruction caused to timber plantations over the period from 2002 to 2010 in support of an alleged issue arising in 2012, submitting that this is not a new issue (see Respondent’s Observations, p. 3).
20. Finally, the Respondent states that even if the Arbitral Tribunals were minded to grant provisional measures with regard to Thornton Farm, there would be no justification for extending the relief to the other Estates, as provisional measures are extraordinary and should be limited to exceptional situations and circumstances that require such measures to be issued (see Respondent’s Observations, p. 3).

III. ANALYSIS

21. The Arbitral Tribunals recall that Procedural Order No. 4, dated 16 March 2013 (“PO No. 4”), and Procedural Order No. 5, dated 3 April 2013 (“PO No. 5”), both dealt with applications for provisional measures brought by the Claimants pursuant to Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules. The legal framework for the grant of provisional measures under the ICSID Convention is set out in those provisional orders and shall not, therefore, be repeated here. It is useful, however, to recall briefly the applications which were the subject of PO No. 4 and PO No. 5, including their disposition.
22. In PO No. 4, the Arbitral Tribunals considered the Claimants’ application for an order instructing the police to prevent persons from entering onto Smalldeel farm, a property located on the Makandi Estate and, as the case may be, to remove any unauthorised persons already on the property (i.e., the “Muzite Party”). The Tribunals dismissed the application without prejudice to any further application that either Party might wish to bring on the basis that the Respondent had voluntarily provided undertakings to ensure that the *status quo* was maintained and directed the police to remove the offending persons, and that the provincial police had undertaken to act on any reports they received in relation to the matter (see PO No. 4, paras. 26-28). The Tribunals nevertheless strongly encouraged the Parties to conduct themselves in a manner so as to avoid the aggravation of the dispute.
23. In PO No. 5, the Arbitral Tribunals considered a second application by the Claimants for an order, *inter alia*, that the Respondent instruct its Central Intelligence Organisation, police and all other Security Services in Zimbabwe not to harm Heinrich von Pezold or any of the other Claimants, their families and staff. The Tribunals granted the requested relief in part, ordering the Respondent to “immediately take all necessary measures to protect the life and safety of the Claimants, and in particular Mr. Heinrich von Pezold and his family, from any harm by any member, organ or agent of the Respondent or any person or entity instructed by the Respondent” (the “Protection Measures”) and to report on the Protection Measures adopted at regular intervals. The Respondent’s reporting

obligations were also addressed during the 21 May 2013 telephone conference held between the President of the Tribunals and the parties, and later summarized in a letter from the Tribunals' Secretary to the Parties, dated 23 May 2013, as follows:

“While the proceedings are suspended, the Respondent’s reporting obligations pursuant to Procedural order No. 5 remain in place: the Respondent is to continue to provide an update to the Members of the Tribunals on the 15th of each month until the commencement of the hearing on jurisdiction and the merits.”

24. The Tribunals were satisfied on the evidence presented in support of the application the subject of PO No. 5 that the criteria for the grant of provisional measures were met and therefore the Tribunals issued an order that they considered to be proportionate to the concerns raised in the Claimants’ application.
25. In the present Application, however, the Tribunals are not satisfied on the evidence that the criteria for the grant of provisional measures, and in particular those of urgency and necessity, are met. The Claimants essentially seek an order directing the Respondent to instruct its police force (i) to prevent any and all unauthorized persons from coming onto any one of the three Estates and, (ii) with respect to any unauthorized persons presently on any one of the Estates (since 8 July 2010), to remove such persons. Such an order is extremely broad in scope and, in the Tribunals’ view, disproportionate to the matters raised in the Application.
26. The matters raised in the Application primarily relate to the recent unauthorised entry onto Thornton Farm, property located within the Border Estate, of the Thornton Party and activities in which the members of the Thornton Party have engaged which allegedly jeopardize the value of Thornton Farm and intimidate the Claimants’ and/or their employees on Thornton Farm. The Claimants acknowledge that the factual background to their Application “largely concerns the Thornton Farm”, yet submit that an order covering the whole of all three of the Estates would nonetheless be appropriate for the reasons articulated at paragraph 14 above. These reasons appear to be inspired primarily by fears of political violence that may occur in connection with upcoming national

elections in Zimbabwe and on the Estates in particular, and concern that the Respondent may no longer be willing to instruct its police force to ensure the *status quo* during the pendency of these proceedings, as it had committed to do in response to the application the subject of PO No. 4. The Claimants reason that the most efficient course in the circumstances would therefore be to secure a single order applicable to all of the Estates rather than make an application each and every time there is an invasion of a particular property.

27. Whilst the Tribunals are sensitive to the concerns raised by the Claimants in respect of unauthorised persons entering onto the Estates and, in particular, concerns relating to the aggravation of the disputes, efficiency is not a sufficiently compelling reason for granting the breadth of relief requested by the Claimants, nor is a general concern regarding the “chance” for increased or future political violence. It is nigh impossible to assess whether the circumstances require the Tribunals to recommend that provisional measures be taken to preserve the Claimants rights, as is the Tribunals’ mandate under Article 47 of the ICSID Convention and Rule 39 of the Arbitration Rules, in the absence of a specific factual matrix against which criteria of necessity and urgency, for example, may be considered. The Tribunals are not persuaded on the basis of the Application with which they are presently seized that the broad relief requested by the Claimants is required.
28. Even were the Tribunals to consider a narrower scope of relief pertaining exclusively to the unauthorized presence of the Thornton Party on Thornton Farm, the Tribunals are still not persuaded that the criteria for the grant of provisional measures are satisfied. In considering the necessity of provisional relief, the Tribunals note, in particular, that the Claimants successfully obtained an order from a local court in January 2013, which remains in force, ordering the eviction of the Thornton Party from Thornton Farm, the removal of any structures built on the property, and the exclusion of the Thornton Party from re-entering the property without the Claimants’ authorization. The Claimants themselves state that evictions have been successfully carried out pursuant to the order twice since its issuance (see Application, paras. 3.11 and 3.12).

29. Although it appears that there may have developed some reluctance more recently by local law enforcement to assist in carrying out the order, there is, as described above, a process in place for the Claimants to challenge any non-compliance with the order through contempt proceedings. Notwithstanding the Claimants' submission that they are not required to exhaust local remedies before seeking provisional relief, there is no evidence before the Tribunals that seeking the assistance of the local court through contempt proceedings is likely to be futile. On the contrary, the local court appears to have responded swiftly in response to the Claimants' previous request for assistance.
30. Similarly, with respect to the urgency criterion, the Tribunals note that the primary elections which were alleged to have been the reason for a swelling in the ranks of the Thornton Party following issuance of the eviction order have, according to the Respondent, "come and gone" (see Respondent's Observation, p. 3). The stated impetus for an escalation of events at Thornton Farm in disregard of the eviction order therefore appears to have passed.
31. Based on the foregoing, the Tribunals dismiss the Claimants' application without prejudice to any future application that they may wish to bring should circumstances in relation to Thornton Farm or any other property located on the Estates change.
32. The Tribunals also record their concern over the matters raised in the Application. The Respondent's failure to address the Claimants' assertion that the police attended at Thornton Farm following the events of 2 July 2013 and asked the Thornton Party to "co-exist" with the Border Estate's employees (see Application, para. 3.17) is troubling in view of the eviction order, issued by the local court, in force at the time. The Respondent acknowledged in its Observations that, under Zimbabwean law, the "messenger of court, became *functus officio* together with the police who were empowered to arrest the Thornton Party after the successful execution of the order." (see Respondent's Observation, p. 2; emphasis added). It is therefore somewhat disingenuous for the Respondent to state that "it is up to the Claimants to obtain court orders for the eviction of the group using the normal court process", given that such an order was in place when the police allegedly attended at Thornton Farm on 3 July 2013.

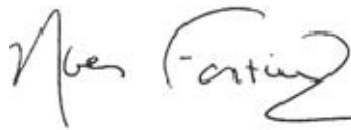
33. The Tribunals reiterate their strong encouragement of the Parties to conduct themselves in a manner so as to avoid further aggravation of the disputes between them. In this connection, the Tribunals consider that the undertakings provided by the Respondent in response to the application disposed of in PO No. 4 are continuing insofar as they reflect the Respondent's general obligation to ensure that its organs, such as the police, maintain the *status quo* as at the time of the filing of the Claimants' cases in 2010 and carry out their official duties in good faith (see Respondent's letter of 8 March 2013, p. 2).

IV. THE ARBITRAL TRIBUNALS' DECISIONS

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

Dated as of 22 July 2013

Signed on behalf of the Arbitral Tribunals

A handwritten signature in black ink, appearing to read "L. Yves Fortier". The signature is written in a cursive, flowing style.

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