

ANDREW JOHN PASCOE
versus
MINISTER OF LANDS & RURAL RESETTLEMENT
and
W. BUNGU
and
THE ATTORNEY GENERAL N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 18 July, 2017 and 26 October, 2017

Opposed Application

F. Mahere, for the applicant
T Mutomba, for the 1st & 3rd respondents
A. Borerwe, for the 2nd respondent

MANGOTA J: The applicant is former owner of Ivordale Farm (“the farm”). It is 1059.167 hectares in extent. It is situated in the district of Goromonzi under Mashonaland East Province.

In about 2009, the farm fell victim to Government’s land reform programme. The State acquired all of it under its compulsory land acquisition policy. However, because of the intensive and extensive activities which were on the farm, Government allocated the whole of it to the applicant. It issued him with an offer letter to the mentioned effect on 27 March, 2009.

At the time that the offer letter was issued to the applicant, the latter carried the following activities on the farm: dairy and beef cattle farming, a piggery unit, growing of cash crops and other crops, maintaining a primary school and an orphanage for the aids victims.

In the course of passage of time Government, with the agreement of the applicant, reduced the hectarage which it re-allocated to the applicant so that it remained in compliance with what the applicant said was the maximum size of the farm which was applicable in the region wherein the farm was, or is, situated. A second offer letter was issued to the applicant on 16 July, 2014. He took occupation of subdivision 2 of the farm. This measured 449.792 hectares in extent.

Subsequent to the issuance of the second offer letter, the first respondent, who is the land acquiring and allocating authority, addressed a letter to the applicant. He did so on 2 September, 2016. The letter was a notice to the applicant of the first respondent's intention to withdraw the offer letter which he issued to him on 16 July, 2014. He gave the applicant seven (7) days within which he was to make his representations. The reasons for the withdrawal of land offer were given in one word- replan. The applicant wrote, on 8 September 2016, objecting to the notice of intention to withdraw the land offer which had been allocated to him on 16 July, 2014. His objections notwithstanding, the first respondent withdrew the offer of land in respect of subdivision 2 of the farm, issued the applicant with a new offer of land in terms of the offer letter dated 16 November, 2016. He allocated subdivision 4 of the farm to the applicant and subdivision 3 of the same to the second respondent. Subdivision 4 of the farm is 247.09 hectares in extent.

The conduct of the first respondent, as stated in the foregoing paragraph, precipitated the current application. The applicant contended that the first respondent's decision of downsizing his portion of the farm was procedurally improper, irrational, grossly unreasonable and biased. He, therefore, applied for a review of the first respondent's decision. He submitted that the land which the first respondent allocated to him on 16 November, 2016 did not meet the requirements of his farming needs. The first respondent, according to him, left him only fifty-six (56) hectares of arable land. The remainder of the land, he said, was unusable in that it was taken up by a very large granite "extrusion", vlei/wetland and a steep mountain. He insisted that the first respondent did not consider the objections which he raised in his letter of 8 September, 2016. He took issue with the fact that he was not involved in the planning which brought about subdivision 4 of the farm which was allocated to him. He, in fact, remained of the view that the first respondent took the decision to downsize his piece of land without having heard him. He moved the court to review the decision of the first respondent of 8 November 2016, set it aside and have him reinstated to the land which relates to the offer letter of 16 July, 2014.

Both respondents opposed the application. The first respondent denied that he acted in an arbitrary manner. He said he took the applicant's objections into consideration when he allocated subdivision 4 of the farm to him. He insisted that the applicant was left with enough land to conduct his farming activities. He submitted that the applicant exaggerated the nature of the physical features which were on his portion of the farm. He said the exaggeration aimed at convincing the court that subdivision 4 of the farm was totally unusable except for the 56

hectares which the applicant referred to. He stated that subdivision 4 of the farm had usable land even for grazing. He submitted that the ever growing demand for land – a finite resource – accounted for the decision which he took. He denied that what he did was procedurally improper. He said the applicant was advised of the need to downsize his subdivision and was given an opportunity to make representations. His representations, he said, did not outweigh the reasons for downsizing and the farm was, therefore, downsized. The second respondent raised one *in limine* matter and proceeded to address the court on the merits. His preliminary issue was that the court did not have the jurisdiction to hear or determine the application. On the merits, he, like the first respondent, submitted that the applicant remained with sufficient land for his farming needs. He, in the main, placed reliance on the first respondent's opposing affidavit.

The second respondent's *in limine* matter was misplaced. He made a realization of that fact and did not persist with it. His non-persistence puts that matter to rest.

As a preliminary comment, I take judicial notice of the fact that land is a very emotive issue. Serious wars have been fought from as far back as man became aware of the importance of land and the resources which are on or under it. Such wars continue to be fought today. Those who own or occupy land, more often than not, resist with all what is at their disposal any form of dispossession of the land which they hold. It was for the mentioned reason, if for no other, that Government took a deliberate position to compulsorily acquire land from those who possess, own or occupy it to allocate the same to those who require it. If the acquisition was not compulsory, no land would have changed hands between the haves and have nots. In that compulsory acquisition of land, however, the first respondent who is charged with the responsibility of acquiring and allocating land is, at all times, expected to weigh the competing interests of land-owners/occupiers and land-seekers. He is, in short, enjoined to act in a fair, reasonable, and unbiased manner.

Whether or not the first respondent acted fairly and reasonably *in casu* does, in a large measure, depend on the reasons which compelled him to act as he did as well as the manner in which he executed his duties. The applicant said he did not act in a fair and/or reasonable manner. He, on the other hand, stated to the contrary.

One of the major complaints of the applicant was that the first respondent did not consult, or request, him to take part in the downsizing of subdivision 2, into subdivisions 3 and 4, of the farm. That argument, in my view, rested on moral, as opposed to legal, grounds. The applicant did not point at any law or regulation which compels the first respondent to consult,

or request, the participation of, an owner or occupier of land which he targets for compulsory acquisition. It is commendable that the first respondent consulted and even invited the applicant to take part in the downsizing which resulted in subdivision 2 of the farm. However, the first respondent's conduct in the mentioned regard was not compelled by any law or regulation. There is, in fact, no law or regulation which stipulates that he should consult, or request participation of, the owner or occupier of land which he is acquiring.

The applicant made a mis-statement when he asserted that the first respondent did not consult him prior to his allocation to him of subdivision 4 of the farm. He stated, in the body of his application that, the first respondent:

- (i) wrote advising him of his intention to withdraw the offer of land which was in respect of subdivision 2 of the farm;
- (ii) accorded him seven (7) days within which he was to make representations – and when those were furnished to him;
- (iii) wrote advising that his representations did not outweigh the reasons which pertained to the downsizing of subdivision 2 of the farm.

With the above stated process which the applicant said the first respondent adopted, one wonders what more consultation the latter person should have pursued. What the first respondent did, under the stated circumstances, resonates well with what the written or unwritten policy of Government enjoins him to do. In my considered view, the applicant's complaint on the matter at hand would have carried more weight than it does if the first respondent had proceeded to downsize subdivision 2 of the farm without any communication with the applicant. He communicated and his communication was, as he stated, standard procedure on matters of this nature.

The fact that subdivision 3 of the farm was allocated to the second respondent is in consonant with Government's land reform programme. The policy of the programme places a duty on the first respondent, in his capacity as the land acquiring and allocating authority, to take land from those who own or occupy it and allocate the same to those who do not have it and, therefore, require it.

The applicant submitted that the second respondent who is a beneficiary of subdivision 2 of the farm does have another piece of land in Chikwaka communal lands. He, in support of that allegation, attached to his answering affidavit the supporting affidavit of one Marcus Hale. Mr Hale said his acquaintance with the second respondent dated back to the 2012/2013 period.

He alleged that the land which the second respondent holds in Chikwaka communal area is about 100 hectares.

The second respondent was not given the opportunity to confirm or deny Mr Hale's claims. The allegation, therefore, carries little, if any, weight. That is so because the affidavit was not made part of the applicant's founding affidavit – a situation which would have allowed the second respondent to make comments in respect of it.

The applicant's statement which was to the effect that the second respondent benefited from Government's land reform programme when he holds other land in Chikwaka communal areas was self-defeating. He stated in the letter which he addressed to the first respondent on 8 September 2016 that he occupies Woodford Farm. That, therefore, is in addition to subdivision 4 which Government allocated to him. Reference is made in this regard to paragraph 4 of the letter which he attached to his application as Annexure D. The relevant portion of the annexure makes reference to the irrigation systems which the applicant said he installed at Ivordale Farm. It reads, in part, as follows: (page 20 of the record)

“... It was designed to irrigate the arable land that is on subdivisions 1 and 2 of Ivordale and also some of the arable land on Woodford Farm. All the Zesa points, power lines, pumps and all major underground pipelines are on subdivision 2 and are managed and maintained by myself for the benefit of subdivisions 1 and 2 of Ivordale Farm and Woodford Farm. ---

Currently a total of 313 hectares of wheat is being grown on the farms, with 52 ha on subdivision 1 of Ivordale, 190 hectares on subdivision 2 of Ivordale and 71 ha on Woodford Farm” (emphasis added).

The applicant did not state the owner of Woodford Farm. What he stated, however, is that he uses Woodford Farm for his farming needs. It is probably for the mentioned reasons that the respondents insisted on the point that the land which the applicant is in possession of is adequate for his farming requirements.

The applicant cannot have his cake and eat it. He sought to convey the impression that the conduct of the first respondent severely prejudiced him. He, in his desire to achieve his purpose, withheld information which related to his farming activities at Woodford Farm. He did not ever refer to his use of Woodford Farm in his founding affidavit nor in his answering affidavit. All what he sought to do was to convince the court that the conduct of the first respondent adversely affected his farming activities. The court made a discovery of that matter out of its own unaided effort and when it read the contents of Annexure D which the applicant addressed to the first respondent for the sole reason of convincing the latter person not to downsize subdivision 2 of the farm.

Whether or not the applicant owns Woodford Farm is not the issue. The fact which remains is that he makes use of other land in addition to subdivision 4 which Government allocated to him in November 2016.

The applicant realised that he had touched a very live issue when he stated that the first respondent left him only 56 hectares of arable land on subdivision 4 of the farm. He made an effort to correct that statement. He attached to his answering affidavit the supporting affidavits of one ALAN Royston, one Farai Zvavamwe and Mr Hale. He gave no explanation as to why those were not attached to his founding affidavit to allow the respondents to make comments upon them. Because he deprived the respondents the opportunity to confirm or deny the contents of the affidavits, the supporting affidavits carry very little, if any, weight.

It is trite that an application stands or falls on the strength of its founding, and not on supporting affidavits which the applicant attaches to his answering affidavit. The applicant cannot be allowed to bring into his case new issues which he did not raise in the founding affidavit. The founding affidavit informs the respondent of the case which he must meet. Where he is not informed, as *in casu*, he has nothing to meet. (See *Sergeant Chibaya v The Board President* HH 46/16 and also *Austerlands (Pvt) Ltd v Investment Bank & 2 others* SC 92/05).

The supporting affidavits aimed at persuading me to take the view that subdivision 4 of the farm did not have adequate arable land for the applicant's requirements. Critical in the mentioned regard was the affidavit of Mr Royston. He said he was a qualified Farm Planner and Geographic Information Systems (GIS) and Remote Sensing Consultant. He gave his academic qualifications as having been a Bachelor of Agricultural Management (Honours) degree, a Master of Science (MSc) in GIS and Remote Sensing (First Class Honours). He said he had experience in farm planning, geospatial analysis, mapping and cartography under local conditions, with consulting interventions which included, but were not limited to, the Satellite based near infrared crop monitoring for winter irrigated crops in Zimbabwe, the World Bank's Water Sector Infrastructure Analysis for Zimbabwe, the Zambia Farmers Union Cereal Crop inventory and yield analysis and a comprehensive water resource analysis for the Mkushi Farm Block ... in Zambia. He stated that, at the request of the applicant and using satellite imagery by digital mapping techniques and his expertise in the farm planning, he produced maps and satellite imagery, verified land areas and the different types of use that the land is suited to and gave expert opinion on the averments which the applicant gave in his founding affidavit as measured against what the first and second respondents stated in their respective opposing affidavits. He submitted that the information which was contained in his affidavit would assist

the court to appreciate the fact that the respondents were not being candid when they stated that the applicant had been left with sufficient land for his farming needs. He, using what he termed his tools of trade, made an analysis of the arable land which the first respondent, according to the applicant, left for the latter person. His unmistakable conclusion was that it was not possible to downsize subdivision 2 of the farm without drastically reducing the productivity of the land and rendering the bulk of the infrastructure on the same useless.

Mr Royston produced nothing which substantiated his qualifications. He produced nothing which related to his work in the field of farm planning. All the court has on that is what he stated in his affidavit and nothing more than that.

The amount of information which Mr Royston included in his affidavit aimed at supporting the applicant's assertion which was to the effect that only 56 hectares of arable land remained in subdivision 4 of the farm for his use.

The respondents, on the other hand, remained unmoved on the point that subdivision 4 did contain sufficient land for the applicant's farming requirements.

The two opposing positions of the parties made it hard, if not impossible, for me to resolve the present application on the papers. *A fortiori* when Mr Royston's affidavit could not, for the reasons I stated in the foregoing paragraphs, be accorded any weight.

The applicant should have known, from his reading of the respondents' affidavits, that he needed to do more than what he did to rebut the statements of the respondents. He, in fact, became aware of that matter and sought to counteract the same through the affidavit of Mr Royston. He, unfortunately for him, put the cart before the horse, as it were. What he did rendered the dispute which related to the amount of arable land which was on subdivision 4 unresolvable. Short of the court having to go for an inspection *in loco*, therefore, that dispute which is real cannot ever be wished away. It remains unresolved.

The applicant persisted with this application even after he had read the respondents' affidavits and appreciated the import of the same. He, for his own reasons, did not see it appropriate to withdraw the application with a view to proceeding by way of action. This would have enabled the court which is seized with the matter to have every piece of evidence which is placed before it tested, with findings being made on either side of the legal divide. Alternatively, he could, after he had withdrawn the application, have taken advantage of the existence of the Zimbabwe Land Commission which Government established for the resolution of such matters as the present one.

The Zimbabwe Land Commission which was established in terms of s 296 of the country's constitution comprises members who are chosen for their integrity and competence in, and knowledge and understanding of, the best practices in land management and administration. They reflect the diversity of Zimbabwe's population, in particular, its regional interests and gender balance. Reference is made in this regard to s 296 (2) (a) and (b) of the constitution. They are empowered by s 297 (1) (d) of the constitution to investigate and determine complaints and disputes which relate to the supervision, administration and allocation of agricultural land. The independence of members of the commission is guaranteed in s 297 (4) as read with s 289 of the Constitution of Zimbabwe.

The fact that the commission has the power to investigate and determine complaints and disputes in respect of such issues as relate to the allocation of agricultural land should have worked to the total advantage of the applicant. That is so as the commission is a less expensive but most effective way of resolving such a disputes as the present one.

The first respondent suggested to the applicant the route of the commission. He raised that issue in his heads of argument. He insisted that the applicant should have exhausted domestic remedies before he approached the court as he did.

It is salutary for a party who becomes aware of efficient, effective and inexpensive, remedies to take advantage of those before he approaches the court. A party may, however, not do so where the commission lacks jurisdiction or where there are good reasons for not doing so, or where its procedures and powers are not suited to redress the wrong which the applicant complains of [see *Lawson v Capetown Municipality*, 1982 (4) SA 1 (c) at 6-7, *Tutuui v Minister of Labour*, 1987 (2) ZLR 88 at 94 B-C, *Girjac Services (Pvt) Ltd v Mudzingwa*, 1999)1) ZLR 243 (s) and L Baxter's *Administrative Law* pages 720-721].

The cited case authorities as read with the remarks of the learned author encourage parties to take advantage of domestic remedies where such are available. They, in fact, discourage courts from entertaining matters of parties who approach them before they have exhausted the remedies which are in place for them to take.

In casu, the applicant did not refer his case to the Zimbabwe Land Commission. He did not say that it lacked jurisdiction. Nor did he advance any reason for not taking his matter to persons who would have visited the farm to ascertain the situation which was on the ground and determine the matter in a most efficient, effective and inexpensive way.

In stating as I am doing, I am not, in any way, suggesting that I withheld my jurisdiction to hear and determine the application which the applicant placed before me. All I am saying is

that the dispute which cannot be resolved on the papers could easily have been resolved at the time that the Zimbabwe Land Commission commenced to investigate the applicant's complaint as measured against the respondents' statements. The commission would have paid a visit to the farm, seen what was on the ground and made an informed decision of the matter.

The material dispute of fact which the parties raised cannot be resolved at this stage. The existence of Woodford Farm which the applicant makes use of negates his allegation that he does not have adequate land for his farming requirements. The first respondent followed the law when he downsized subdivision 2 of the farm and allocated subdivision 3 of the same to the second respondent. His conduct remains above reproach. The application is devoid of merit. It is, therefore, dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners
National Prosecuting Authority, 1st & 3rd respondents' legal practitioners
Venturas & Samukange, 2nd respondent's legal practitioners