GEORGE CHIKWAVA
versus
PHINEAS MAKOMBE
and
MINISTER OF LANDS AND RURAL RESETTLEMENT
and
ZIMBABWE LANDS COMMISSION

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 23, 27, 29 November 2017 and 8 December 2017

URGENT CHAMBER APPLICATION

H Marava, for the applicant
T Pfigu, for 1st respondent,

CHITAKUNYE J. In this urgent chamber application the applicant seeks an order in the following terms:

INTERIM RELIEF

Pending finalization of this matter, an interim order is hereby granted on the following terms:

1. The Respondents are prohibited from interfering with Applicant's farming activities or evicting him pending the outcome of Applicant's application for review filed at the Administrative Court under case number ACC 77/17.

TERMS OF FINAL ORDER

2. Respondents be and are hereby ordered not to interfere, obstruct through themselves or their agents with Applicant's possession of the land without a court order
3. The 1st respondent shall pay costs of the Applicant.

The applicant alleged that in 2015 he entered into an agreement of sale with the registered owner of Bonnyvale Farm, a Mr. Henry Daniel Jackson. In terms of that agreement the applicant was to pay a purchase price of US$90 000-00 for cattle and other farming equipment at the farm. He thereafter took occupation in 2015 and commenced farming

operations at the farm. He alleged that he invested a lot in the farming operations. He alluded to a number of the farming operations he undertook at the farm since taking occupation in 2015.

As he was in occupation, he was shocked when on 10 November 2017 the first respondent came to the farm with an offer letter and a Notice of eviction. The applicant gave the impression that he had not been aware of the government's acquisition of the farm and the redistribution of that land. When he inquired with the second respondent, the second respondent's officers confirmed that the farm had been acquired by the government and the first respondent had been offered the farm.

It was in these circumstances that he sought to contest the respondents' actions in offering the farm to the first respondent. In this regard on 17 November 2017 he filed an application for Review at the Administrative Court seeking the review of the decision to offer the first respondent the farm and the setting aside of the offer letter. On 21 November 2017 applicant then filed this application. In this application the applicant seeks to interdict the respondents from interfering with his farming operations pending the determination of his application for review at the Administrative Court.

The first respondent opposed the application as not meeting the basic requirements for an interdict. The facts that emerge from an analysis of the founding affidavit and the opposing affidavit are that:

The applicant is in occupation of the Bonnyvale farm. Though he did not disclose it, he is a former employee of the former owner of the farm.

The farm in question was gazetted for acquisition in terms of the Land Acquisition Act, [*Chapter 20:10*] on 2 July 2004 as noted from an annexure attached to the first respondent's opposing papers.

The first respondent was issued with an offer letter for the farm in question by the second respondent on 2 November 2017. On 10 November 2017 applicant was served with a notice of eviction in terms of Land Acquisition Act (hereinafter referred to as the Act). That Notice read, inter alia, that:

> "The Minister of Lands has allocated Mr. P M Makombe on the above mentioned farm which you are occupying without lawful authority.
>
> You are being advised to stop all Agricultural activities on the farm and map out a plan to vacate Bonnyvale Farm in not more than 90 days from the receipt of this letter. ….."

It was upon being served with the above notice of eviction that the applicant filed the application for review of the second respondent's decision to offer the farm to the first respondent and seeking to have the offer letter set aside by the Administrative Court.

Upon perusal of the application and hearing counsel, I was reminded of the apt words of MAKARAU JP (as she then was) in *Chifamba* v *Mutasa & Ors* HH16/08 wherein she stated that:

> "Legal practitioners are urged to read on the law before putting pen to paper to draft pleadings in any matter so that what they plead is what the law requires their clients to prove to sustain the remedy they seek……. . Litigation in the High Court is serious business and the standard of pleadings in the court must reflect such."

In *casu*, had the applicant's legal practitioner taken time to acquaint himself with the relevant legislation that pertains to the problem faced by his client he would probably have attended to the client's case in a more diligent manner. Paragraphs 24 to 30 of the founding affidavit would probably have been different.

For instance, in paragraphs 24 and 25 of the affidavit the applicant stated that:

> "I am advised by my undersigned legal practitioners of record that, which advise I take as correct position of the law that acquisition of land can be done when the said acquisition is reasonably necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public.
>
> 25. I submit that it will not be in the interest of the public if I am evicted, considering the fact that I have been producing milk for public consumption, selling same to Dairy."

In advising in this manner counsel omitted the most pertinent aspect in s 3(1) (b) of the Land Acquisition Act pertaining to the acquisition of any rural land for settlement for agricultural or other purposes. It is under this subsection that the land in question was acquired. Thus the assertion that applicant was producing milk for public consumption would not be a defence in the circumstances.

The applicant also argued that the notice of 2004 expired after two years without the state being vested with real rights in the land. This was clearly wrong as s 5(4) of the Act provides that:

> "The notice shall remain in force for a period of 10 years from the date of publication of the notice in the Gazette."

The applicant also alluded to the fact that he had not been served with the notice of acquisition and so the acquisition was not proper hence his right to the land still stands. Unfortunately applicant was again ill informed. In terms of s 5 of the Act, the Notice to acquire

any land is required to be served on the owner of the land identified for acquisition at the time of the Gazetting and the publication. In *casu*, the notice was published in the Gazette dated 2nd July 2004 and, as per applicant's affidavit he had not yet taken occupation of the farm. According to his affidavit he only took occupation in 2015 after he had bought cattle and some movable property at the farm. If he was neither the owner nor the occupier in 2004, there is no way he would have been served with the Notice. His complaint of not being served with the notice is thus without merit. In 2015 when he took occupation the land already vested in the state and it has continued to be so vested to date.

In this regard s 290 of the Constitution states that:

"(1) All agricultural land which –

(a) was itemised in Schedule 7 to the former Constitution; or
(b) before the effective date, was identified in terms of section 16B(2)(a)(ii) or (iii) of the former Constitution; continues to be vested in the state."

It was not disputed that the applicant had no authority from the State to occupy the farm. His occupation was thus unlawful as aptly noted in the notice of eviction.

In order to succeed the applicant must establish a *prima facie* right, even though open to some doubt; establish a well-grounded apprehension of irreparable harm if the relief sought is not granted; show that the balance of convenience favours the granting of the interim relief; and establish that there is no other satisfactory relief.
See *Nando and Another* v *Prime Investments (Pvt) Ltd and Anor* HH 23/15.

In his submissions Mr *Marava* for the applicant argued that applicant has a *prima facie* right in that applicant is in possession of the land in dispute. He has his property on that land. He also has personal rights to use that land in terms of an agreement of sale of movable property he entered into with the registered holder of real rights in the property. He alluded to the case of *Dumbura* v *Chief Lands Officer and Anor* HH 213/15 wherein court held that though the applicant's offer letter had been withdrawn he still had the right to approach court on the land concerned over the withdrawal of the offer letter. That case is however distinguishable in that *in casu*, the applicant was never offered the land in question instead he has been in occupation in terms of a purported arrangement with the former owner. Also the issue in Dumbura's case was on *locus standi* which is not the issue in this case.

On the issues of irreparable harm applicant's counsel submitted that applicant will suffer irreparable harm if this relief is not granted as he has nowhere to go with his cattle and other movable property. He has been staying at the farm doing dairy farming.

Counsel also argued that the balance of convenience favoured the granting of the application as the first respondent has been renting somewhere and so he can continue renting there whilst the review is determined at the Administrative Court. The applicant on the other hand has nowhere to go.

Counsel further submitted that the failure to file opposing papers by the other respondents showed that the respondent conceded that there were irregularities in the acquisition of the farm.

Ms *Pfigu* for the first respondent contended that no prima facie right had been established. She alluded to the law pertaining to land acquisition and the fact that the farm in question was acquired by the State by virtue of the Gazetting of the farm on 2 July 2004. Once Gazetted the land became vested in the State. In this regard s 72(2) of the constitution provides, *inter alia*, that:

Where agricultural land, or any right or interest in such land, is required for a public purpose, including:

> "(a) settlement for agricultural or other purpose; ……the land ,right or interest may be compulsorily acquired by the State by notice published in the Gazette identifying the land, right or interest, whereupon the land, right or interest vests in the State with full title from the date of publication of the notice."

Counsel further contended that all agricultural land that was acquired prior to the Constitution Amendment no 20 of 2013, continued to vest in the State in terms of s 290 already cited above.

Ms *Pfigu* thus argued that as the land already vested in the state at the time applicant purported to have acquired personal rights to use the land, such acquisition was invalid.

It is pertinent to note that the premise for the applicants claim was that he had bought movable property from a registered owner and that such owner had then given him the right to occupy and use the land. Unfortunately for the applicant as at the time he alleges to have been given such rights, the land had been acquired by the state. In terms of the law the applicant required authority or permission from the State to continue occupying the land. This would be in the form of offer letter, or a permit or a land settlement lease see s 2 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*].

The purported arrangement with the seller was not such authority. It is my view that instead of seeking to rely on such an arrangement that was clearly in defiance of the law, the Applicant should have considered his options taking into account that the notice of eviction

was not an eviction order. The first respondent was still required to obtain an order from a competent court if he was to evict the applicant.

The applicant's position is that of an occupier whose occupation is without authority from the State. His occupation must nevertheless be terminated in terms of the law hence the service of the Notice of Eviction on him. The 90 day notice period given was in terms of the law and it is upon him to choose to comply or not, being alive to the consequences thereof. In this case he chose to apply for a review of the acquiring authority's offer of the farm to the first respondent, which is only a consequence of the unchallenged acquisition, in the Administrative Court.

The applicant must establish that he has a *prima facie* right that this court must protect. As already pointed out his interest was in movable property which he tried to relate to the land.

An examination of a plethora of cases on the rights applicant sought to enforce by seeking review proceedings shows that the main matter itself has no prospects of success. The issue of former owners or occupiers trying to cling onto acquired lands has been debated in these courts with the former owners or occupiers not succeeding in most cases. This is principally because they would be basing their cases not on lawful authority from the acquiring authority but some other arrangements as in this case.

In *Nyikadzino* v *J C Asher and Ors* HH 25/12 BHUNU J (as he then was) quoted with approval the words of CHIDYAUSIKU CJ in *CFU& Ors* v *The Minister of Lands and Rural Resettlement & Ors* SC 31/10 (at pp 21 and 23) that:

> "On the other hand, s 3 of the Act criminalises the continued occupation of acquired land by the owners or occupiers of land acquired in terms of s 16B of the Constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the language of s 3 of the Act that the individual applicants as former owners or occupiers of the acquired land have no legal rights of any description in respect of the acquired land once the prescribed period has expired.
>
> ……..
>
> The holders of offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants as former owners or occupiers of acquired land lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights."

See also *Guy Frank Dollar* v *William Satani Nyawaza* HH 515/15.

In a bid to establish a *prima facie* right the applicant alleged that he has applied for review at the Administrative Court in terms of s 4 of the Administrative Justice Act [*Chapter 20:28*]. That section provides that:

> "(1) Subject to this Act and any other law, any person who is aggrieved by the failure of an administrative authority to comply with section *three* may apply to the High Court for relief.
> (2) Upon an application being made to it in terms of subsection (1), the High Court may, as may be appropriate-
> (*a*) confirm or set aside the decision concerned;
> (*b*) refer the matter back to the administrative authority concerned for consideration or reconsideration;
> (*c*) direct the administrative authority to take administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
> (*d*) direct the administrative authority to supply reasons for its administrative action within the relevant period specified by law or, if no such period is specified, within a period fixed by the High Court;
> (*e*) give such directions as the High Court may consider necessary or desirable to achieve compliance by the administrative authority with section *three*.
> (3) Directions given in terms of subsection (2) may include directions as to the manner or procedure which
> the administrative authority should adopt in arriving at its decision and directions to ensure compliance by the Administrative authority with the relevant law or empowering provision.
> (4) The High Court may at any time vary or revoke any order or direction given in terms of subsection (2)".

Evidently the court to approach for review of Administrative decision under s 4 is the High Court. Whether the Administrative Court has jurisdiction to hear a compliant of contravening s 3 of the Administrative Justice Act brought in terms of s 4 thereof remains to be seen as neither party addressed me on that.

Further the jurisdiction of the Administrative Court as provided for in s 4 of the Administrative Court a Act is confined to that statute and any other specified enactment. In this regard s 4 provides that:

> "(1) The Court shall have such jurisdiction, powers and authority as may be conferred upon it by this Act or any other enactment.
> (2) The Court may, in relation to any matter referred to it in terms of this Act or any other enactment—
> (*a*) in relation to an appeal or review, confirm, vary, reverse or set aside the decision, order or action concerned or refer the matter back to the body, person or authority concerned for further consideration; or
> (b) make such determination or order or exercise such powers as may be provided for by any other enactment.

The applicant did not disclose in terms of which other enactment he filed the application for review other than section 4 of the Administrative Justice Act which refers to the High Court.

The above would point to the likely fate of the application for review.

I am of the view that the above further serves to confirm that the applicant has not established a *prima facie* right for the relief he seeks.

The other aspects of the application would not in my view save the applicant's case. It was argued by applicant's counsel that irreparable harm would be occasioned to the applicant as he would have nowhere to go with his cattle and other movable items. The land having been acquired by the State in 2004 the applicant ought to have realised he cannot be at the farm for ever unless he has lawful authority from the state. The purported sale he alluded to appears to have been a ruse to retain the land. Unfortunately by the time of the sale the land had already been acquired. It would appear the seller was alive to this hence the sale pertained to movable property only. The farm was to be donated at some time in the future after applicant would have paid the purchase price for the movables in full. There was thus no donation made and so applicant cannot claim to have acquired any real rights. He can thus not claim irreparable loss of the farm.

The applicant can surely move away with the movable property. The 90 days he was given to vacate was intended for him to seek alternative place to move to.

I am of the view that the balance of convenience favours the dismissal of the application as clearly the relief the applicant seeks is untenable. The legal provisions are heavily stacked against him as the application before me is not against the acquisition process. Equally the relief sought in the application for review is not against the acquisition but against the offer of the land to a beneficiary. The acquisition thus remains intact and the acquiring authority has the leeway to offer that land to a beneficiary of its choice.

Though the applicant alleged that the first respondent was threatening violence and that he had brought some people on the farm, the first respondent's response in this regard clearly showed that he had not attempted to forcibly evict the applicant. If anything, the applicant had not shown any resistance to the notice of eviction and their communication had been so cordial that he left some of his employees at the farm and that applicant had in fact offered the employees shelter in a garage. This is an aspect applicant could not deny.

In any case had the first respondent sought to forcefully evict the applicant, recourse to spoliation proceedings would have been the appropriate relief. The applicant is not seeking such relief because clearly no threats were made over his occupation.

After a careful analysis of the application before me, I am of the view that the applicant has not established that he has a *prima facie* right upon which I can grant the relief he seeks.

He also has not established that he will suffer irreparable harm if the relief is not granted. All that has been done was to give him notice to vacate in terms of the law on land acquisition.

For as long as the first respondent proceeds in terms of the law he should not be impended in that process. Serving a Notice of eviction cannot be said to be interfering with applicant's farming operations. If the first respondent or the acquiring authority obtains the necessary court order to effect the eviction that cannot be pre empted at this stage. Equally if the applicant chooses not to comply with the Notice within the stipulated period the consequences of such non compliance as stipulated in s 3 of the Gazetted Land (Consequential Provisions) Act, may have to be invoked. It will be up to the applicant to proffer a legal defence to such consequences.

Accordingly the application is hereby dismissed with costs.

Mtetwa Law Chambers, applicant's legal practitioners
T. Pfigu Legal Practitioners, 1st respondent's legal practitioners