

HORTBAC t/a LITTLE FLOWER ENTERPRISES
versus
THE CHIEF LANDS OFFICER N.O. MASHONALAND EAST PROVINCE
and
THE MINISTER OF LANDS AND LAND RESETTLEMENT N.O.
and
JAMES CHIYANGWA
and
RONALD KATULI
and
TENDAI BONGA

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 29 November & 6 December 2017

Opposed Application – Summary Judgment

N. Mugiya, for the applicant
K. Mukanganwi, for the 1st -2nd respondents
K. Maeresera, for the 3rd – 5th respondents

CHAREWA J: The applicant issued summons against the respondents seeking an order that

1. 3rd to 5th respondents be ordered to vacate the remaining extent of “The Glebe” measuring 142.38 hectares which was allocated to the applicant;
2. The respondents be ordered to comply with and respect the order of the Administrative Court in case number LA2898/02;
3. The respondents be interdicted from harassing and interfering with the plaintiff and its affairs at “The Glebe” farm;
4. Any other document or authority in relation to the piece of land allocated to the plaintiff and captured in the order of the Administrative Court in case number LA2898/02 which is adverse to the plaintiff’s interest is declared null and void;
5. The respondents should pay costs on an attorney client scale.

The respondents entered appearance to defend and the matter is now at the pre-trial stage. Applicant has now applied for summary judgment on the grounds that the respondents have no bona fide defence to its claim given that:

- a. it was the successful litigant in LA2898/02, in which the acquisition proceedings in respect of the remaining portion of GLEBE measuring 142.38 hectares situated in the District of Goromonzi held under Deed of Transfer No. 224/96 were ordered to be withdrawn and further,
- b. it was the successful litigant in HC 7006/15 wherein the offer letters to 3rd -5th respondents were declared null and void and set aside with the 1st and 2nd respondents being ordered to issue the applicant with an offer letter;

More so since these court orders are still extant and have not been set aside by any competent court.

The respondents have opposed summary judgment on the grounds that the order in LA2898/02 was set aside by operation of law, in particular by Constitutional Amendment number 17/2005 which vested all agricultural land in the state, thereby extinguishing any rights which the applicant may have acquired by virtue of that Court Order.

Respondents did not address the issue of the order in HC 7006/15 which was made in the aftermath of Constitutional Amendment number 17 and which declared the offer letters to 3rd -5th respondents null and void, and which order has not been set aside.

In limine

3rd to 5th respondents raised the preliminary issue, which the applicant conceded as being well taken, that applicant's answering affidavit to their notice of opposition and opposing affidavit was unprocedural. The applicant's answering affidavit is thus expunged from the record.

The 1st and 2nd respondents raised the further preliminary point that 2nd respondent was improperly cited and for that reason, applicant's founding affidavit was a nullity and the application should be dismissed.

Applicant argued that the mis-citation was a minor error which does not change the complexion of the office or the identity of 2nd respondent.

The court was of the view that 2nd respondent is sufficiently identified as the minister responsible for land resettlement, and this being a dispute over resettlement land, was willing

to overlook and condone the error in naming 2nd respondent. The parties were therefore directed to address the court on the merits of the application.

The Law

The law on summary judgment is trite and was ably restated by both parties. I will therefore not belabour it except to stress that the role of a judge in summary judgment matters is to decide whether or not a *bona fide* and plausible defence which could possibly succeed and thus lead to injustice if summary judgment is granted has been raised. If the answer is yes, then the judge is obliged to deny summary judgment and refer the matter to trial. If not, the converse is true: summary judgment will be entered where an applicant has an unassailable cause.

Analysis

The judgment of the Administrative Court in LA2898/02, which was by consent, confirmed the acquisition of portion of GLEBE measuring 526.81 hectares and ordered the withdrawal of the acquisition of the remaining portion of GLEBE measuring 142.38 hectares. Constitutional Amendment number 17 of 2005 then vested all rights in agricultural land in the state. Consequently, 2nd respondent further subdivided the remaining portion of GLEBE measuring 142.38 hectares and issued offer letters to 3rd to 5th respondents. As a result of this, the matter came back to court in HC7006/15 wherein the 3-5th respondents were declared not to be legitimate occupiers of the land in question, and had their offer letters set aside and declared null and void by the court.

The question that then arises is whether respondents can rely on Constitutional Amendment number 17 as a defence to summary judgment in this court in the face of the existence of the subsequent order in HC7006/15 which is extant and which this court has no power to overrule.

I think not. The law with regard to extant orders of court is clear. Unless and until an order by a court of competent jurisdiction is set aside, however erroneous it might be considered to be, it must be abided by.¹ The courts jealously guard the sanctity of their orders from perverse interference. Respondents' argument that court orders may be set aside by administrative acts such as offer letters is certainly bad in law.

In the instant case, I might have been persuaded that it is an arguable and valid defence that Constitutional Amendment number 17 expunged rights granted to the applicant in

¹ See *Isaacs v Robertson* [1984] 3 All ER 140 at 143c. See also *Manning v Manning* 1986 (2) ZLR (1) SC at 3F–G

LA2898/02 where it not for the existence of the order in HC7006/15. The difficulty that respondents face therefore is that subsequent to Constitutional Amendment number 17, this court was seized with this matter and made an order in direct contradiction to the defences being raised. That judgment creates a hurdle against 1st and 2nd respondents doing anything contrary to it by insisting on the validity of those offer letters.

In my view, unless due process is followed, it does not matter that such conduct by 1st and 2nd respondents is predicated on s16B of Constitutional Amendment number 17 (which vests agricultural land in the state), as read with s290 of the current constitution (which validates acquisition made prior to 2013). Such due process must of necessity entail the setting aside of the order in HC7006/15. This is because that judgment is effectively a bar against 1st and 2nd respondent issuing further offer letters or insisting on the validity of 3rd – 5th respondents' original offer letters until and unless that judgment is set aside. Otherwise whatever the respondents may do while that order remains extant will be regarded as being in contempt of court.

In that regard therefore, it would appear that the defendants do not have a valid and bona fide defence to the applicant's claim. Failure by 1st and 2nd respondent to give applicant an offer letter, or insistence by 3rd to 5th respondents to occupy the remaining extent of "the Glebe" measuring 142.38 hectares, or any consequent interference with applicant's occupation and operations on the remaining extent is thus indefensible.

Further, 3rd to 5th respondents' defence that summary judgment cannot be entered against them as they hold offer letters does not hold sway. This is because they do not have any valid offer letters: their offer letters were declared null and void by the court in HC 7006/15.

That the order was granted in default as argued by 2nd respondent is immaterial, as it simply begs the question why no attempt was made to set it aside.

In the final analysis, it seems to me that applicant's submissions are essentially to say: "I have a court order post Constitutional Amendment number 17, effectively confirming my rights as encapsulated in the Administrative Court order pre the constitutional amendment, and these rights have not been challenged by seeking the discharge of the post Constitutional Amendment number 17 order in HC 7006/15. Ergo, my rights and thus my claim is unassailable"

I cannot but agree with this position, particularly since respondents made no meaningful submissions to the questions I posed whether or not the vesting of all agricultural land in the

state amounts to cancellation of pre-existing rights, including rights accruing from court orders, without due process?

The Campbell² case quoted by the respondents does not resolve this conundrum since I am not sitting as an appellate court against an existing order of this court.

I will not dignify the defence to summary judgment raised by respondents that Little Flower Enterprises is hiding behind Hortbac (Pvt) Ltd to obtain the benefits of occupancy of the land in dispute or that it is not clear which part of “the Glebe” the applicant is laying claim to, as the law is clear that not every defence will succeed to defeat summary judgment. This is more so in this case as no proof has been provided in the opposing papers to substantiate that Little Flower Enterprises is not a trading arm of Hortbac. Nothing in law stops a principal company from registering a subsidiary and operating though it as its trading arm.

Neither has any proof been proffered that applicant is laying claim to land other than the 142.38 hectares that has been subject of litigation since 2002. Nor has 3rd to 5th respondents supplied any proof that the deponent to applicant’s papers is not a director of Hortbac. That 1st to 2nd respondent may have gone on to subdivide that 142.38 hectares and offered it to other people does not make their conduct legitimate in the face of a court order to the contrary.

Consequently, I am of the view that an unassailable case for summary judgment has been made and the defences raised are not adequate to defeat such application.

Costs

The applicant sought costs on the higher scale. However, no justification for this was made in the heads of argument or in the oral submissions by the applicant. On that basis I find that no case for punitive costs was made.

Disposition

In the premises, it is ordered that

1. The application for summary judgment be and is hereby granted.
2. The 3rd to 5th respondent be and are hereby ordered to vacate the remaining extent of The Glebe measuring 142.38 hectares
3. The 3rd to 5th respondent be and are hereby ordered to comply and respect the order granted by the Administrative Court in Case number LA2898/02

² *Mike Campbell (Pvt) Ltd & Anor v The Minister of National Security Responsible for Land, Land Reform and Resettlement & Anor* SC49/07

4. The 1st and 2nd respondent be and are hereby ordered to comply with the order of the court in HC 7006/15 by issuing the applicant with an offer letter in relation to 142.38 hectares referred to in the Court Order in LA2898/02
5. The 3rd to 5th respondent be and are hereby interdicted from harassing and interfering with the applicant and its affairs on the remaining extent of The Glebe measuring 142.38 hectares
6. Any other document, authority or offer letters in relation to the remaining extent of The Glebe measuring 142.38 hectares which is contrary to the orders in LA 2898/02 and HC 7006/15 and which is adverse to the applicant's interest be and hereby is declared null and void.
7. The respondent shall, jointly and severally, pay costs of suit on the ordinary scale.

Mugiya and Macharaga Law Chambers, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st and 2nd respondent's legal practitioners
Maeresera & Partners, 3rd to 5th respondent's legal practitioners