KASKAY PROPERTIES (PVT) LTD
versus
MINISTER OF LANDS AND RURAL RESETTLEMENT
and
A GAVA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 26 September 2017 & 13 November 2017

Opposed Application

Mr *B Tokwe*, for the applicant
Ms S Chihuri, for the 1st respondent
Mr *G Nyamupanedengu*, for the 2nd respondent

MANGOTA J: A litigant who makes a conscious decision to sue through motion, as opposed to action, proceedings is enjoined to anticipate the respondent's defence. Having anticipated such, he must include in his founding affidavit all the evidence which supports his case including such evidence as will rebut the respondent's defence. Where he adopts the stated line of reasoning, the court will not find him wanting when he restates his position in the answering affidavit as he will merely be confirming what he has already told the court. A litigant in other words, should not leave material facts which support his case or rebuts the respondent's case to the answering affidavit. Where he does so, he runs the risk of the court not taking into account new evidence which he places in the answering affidavit as the respondent would not have had an opportunity to make any comments on the new evidence which he includes in the answering affidavit.

The above words describe what the applicant *in casu* tried to do. It made a bare and unsubstantiated statement in its founding affidavit. The statement related to the definition of the farm which is the subject of this application. When it realised the inadequacy of the evidence which defines the farm as falling under the Land Acquisition Act, [*Chapter 20:10*] ("the Act") or the Constitution of Zimbabwe Amendment [No 20] Act 2013 ("the constitution") it included, in its answering affidavit, new and very material evidence which it had not included in its founding affidavit. It also attached to the same two maps the authenticity of which the respondents questioned.

The respondents not unnaturally raised serious concerns as regards the manner in which the application had been handled. Their concerns which were justified centered on the fact that the matters which the applicant had brought into the case through what they termed an unorthodox way of pleading remained prejudicial to their respective cases. So intense was the respondents' criticism of the adopted procedure that the applicant had to, and did actually, withdraw the answering affidavit together with its annexures.

In acting as it did, the applicant offended the principle which states that an application stands or falls on its founding affidavit. That law is settled. I can do no better in the mentioned regard than to refer it to such case law authorities as *Sergeant Chibaya* v *The President*, HH 46/16 and *Austerland (Pvt) Ltd* v *Investment Bank & 2 others*, SC 92/05. The cases place emphasis on the point that the respondent must know the case which he is enjoined to meet. He should not, in other words, be allowed to fall into the applicant's ambush.

The application was one for a declaratur. Its facts were that, on 27 June 2014, the first respondent compulsorily acquired the remaining extent of Wick ["Wick"]. Wick is situated in the District of Kadoma formerly Gatooma. It is 123.2973 hectares in extent. The acquisition was in terms of s 293 (1) of the Constitution.

The applicant objected to the compulsory acquisition of Wick. It did so on 16 July, 2014 and in terms of s 5 (1) (iii) of the Act. It also applied to the Administrative Court for review of the acquisition of Wick. The application which it filed on 14 August, 2014 was in terms of s 3A of the Act as read with s 27 of the High Court Act.

The applicant's position was that Wick fell outside the ambit of agricultural land. It insisted that the first respondent did not comply with s 7 of the Act.

On 19 May, 2015 the Administrative Court entered default judgment against the first respondent. It ordered him to withdraw the preliminary notice of acquisition.

In June, 2016 the first respondent applied for rescission of the default judgment. He withdrew that application on 18 June, 2016. He, on 3 August, 2016 and through the Government Gazette General Notice 206 of 2016, compulsorily acquired Wick. He issued an offer letter for a portion of Wick to the second respondent. The offer letter precipitated the present application.

The applicant submitted that the letter should be declared null and void. Wick, it insisted, should be declared as falling outside the definition of agricultural land as defined in s 288 as read with s 72 of the constitution. It moved the court to cancel all endorsements on the titled deed of Wick and restore to it its unfettered rights of Wick.

The first and second respondents opposed the application. The third respondent did not. The assumption is that he would abide by the decision of the court.

The first respondent submitted that Wick was properly acquired by him. He said he acquired it in the terms of s 72 of the constitution. He insisted that Wick was rural agricultural land which fell within the definition of s 72 of the constitution. He conceded that he withdrew the first notice through which he had acquired Wick. He said he replaced the notice which he had erroneously issued under the wrong section of the constitution with the current notice which he issued under s 72 (2) of the same. He insisted that his compulsory acquisition of Wick was proper as he corrected the same with the new acquisition notice of 3 August, 2016. He stated that the Administrative Court order did not prohibit him from acquiring Wick as he did in his second acquisition notice. The second respondent supported the first respondent's averments.

The first acquisition of Wick was invalid and, therefore, a nullity. The acquisition was premised on s 293 (1) of the constitution. The section does not deal with compulsory acquisition of rural agricultural land. It deals with alienation of agricultural hand which is vested in the State. It reads:

> "(1) The State may alienate for value any agricultural land vested in it, whether through the transfer of ownership to any other person or through the grant of a lease or other right of occupation or use, but any such alienation must be in accordance with the principles specified in s 289" [emphasis added].

The first respondent's first notice of compulsory acquisition, it is evident, rested on the wrong law. The land which he was dealing with, at the time, did not vest in the State. It belonged

to the applicant. The notice of acquisition was, therefore, null and void. No rights flowed from it to the State. The endorsements which the first respondent made pursuant to the invalid notice of compulsory acquisition of Wick were, as well, a nullity. They flowed from nothing. Nothing flows from nothing. No endorsements of the title deed of Wick ever came into existence.

The order of the Administrative Court which the applicant made reference to served no purpose. It ordered the first respondent to withdraw the preliminary notice of acquisition of property which was held under Deed of Transfer 8441/96 registered in the name of the applicant. The court order was superfluous because the first respondent had not, as at the time of the order, acquired Wick. His conduct in the purported acquisition of Wick was as good as nothing had happened. It was probably for the observed reasons that the first respondent refrained from applying for rescission of the default judgment which purportedly had been entered against him. The court order was not binding upon him.

The second notice of compulsory acquisition of Wick was properly issued in terms of the law which relates to acquisition by Government of agricultural land. It was issued in terms of s 72 of the Constitution. It was, therefore, lawfully as well as validly issued.

It was within the rights of the applicant to approach the administrative court following the first respondent's issuance of the second notice of acquisition of Wick. The notice complied with the law to the letter and spirit. The endorsements which the first respondent made to the title deed of Wick after he issued the second acquisition notice were and are valid.

The applicant did not, for reasons known to itself, challenge the second acquisition of Wick. It did not raise any objections to that process. It cannot, under the observed set of circumstances, successfully move the court to declare void what it knows to have been lawfully and validly acquired.

At the centre of the applicant's dispute with the first respondent is the use to which Wick is put. Its position was that Wick falls outside the definition of rural agricultural land. Wick, it said, is peri-urban land.

The first respondent's statement on the point was to the contrary. He submitted that Wick falls within the meaning and scope of agricultural land as defined in s 72 of the Constitution.

The parties' diametrically opposed positions left me with a clear doubt as to the proper category of land under which Wick falls. The applicant realised the shortcomings of its founding

affidavit. It was for the mentioned reason that it sought to introduce new and very material evidence through its answering affidavit. That evidence could not, unfortunately for it, become part of the record as the respondents opposed its introduction through the back door. The applicant later abandoned that evidence much to its disappointment as well as embarrassment.

The applicant left the matter which related to the position and condition of Wick hanging in the air, so to speak. The court could not resolve that matter on the papers which the applicant placed before it. It should have anticipated the first respondent's position when it decided to apply as it did. It should, therefore, have included, in the founding affidavit, all the evidence which it sought to produce through its answering affidavit. It should have shown, as part of its founding affidavit, that Wick does not qualify to fall under s 72 of the Constitution. It dismally failed to show that important aspect of its case.

The alternative route which the applicant could have taken was for it to proceed by way of action. That course would have allowed it to lead evidence which showed that Wick is not agricultural land as is stated in s 72 of the Constitution but is per-urban land which falls outside s 72 of the Constitution.

The other alternative which the applicant could have meaningfully made use of was to refer its dispute with the first respondent to the Zimbabwe Land Commission for dealing. The commission which Government established does have the capacity as well as authority to visit Wick and assess, on the spot, if Wick is or is not agricultural land as defined in s 72 of the constitution. Section 297 (1) (a) of the constitution confers authority and jurisdiction on the commission to investigate and determine complaints of the nature of the applicant's complaint.

The applicant's persistence with the application in the face of the first respondent's stiff opposition to the same as read with the shortcomings of its founding affidavit dealt a total blow to its case. It should have known that its application would suffer a very serious material dispute of fact and that such dispute could not be resolved on the papers which it had filed. It, therefore, should have been wiser than what it did *in casu*.

It is trite that a matter which suffers from a serious dispute of fact can never be resolved on the papers. The law permits the court which is seized with such a matter to either dismiss the application or allow the same to go to evidence. The discretion remains that of the court [see

Magurenje v *Maphosa & Ors*, 2005 (2) 44 and also *Masukusa* v *National Foods Ltd & Anor* 1983 (1) ZLR 232 (H)].

It is my considered view that, if the applicant had anticipated the first respondent's response, it would not have applied as it did. The fact that it persisted with the application after it had read the first respondent's opposing affidavit coupled with the defects which existed in its founding affidavit, which defects it acknowledged and sought to correct through the impermissible way, satisfies me that I dismiss the application.

The applicant was not able to prove its case on a balance of probabilities. The application cannot stand. It is, accordingly, dismissed with costs.

Messrs Bruce Tokwe Commercial Law Chambers, applicant's legal practitioners
Attorney General's Office, 1st respondent legal practitioners
Mageza & Nyamwanza, 2nd respondent's legal practitioners