

MAKANDI ESTATE (PRIVATE) LIMITED
versus
TEMBA SITHOLE
and
TAKASVIKWA SEVERE
and
JAMES GUMBO
and
ZANU (PF) PARTY PROJECTS
and
MINISTER OF LANDS, AGRICULTURE, WATER, FISHERIES
AND RURAL DEVELOPMENT
and
MINISTER OF STATE AND DEVOLUTION FOR MANICALAND
PROVINCE
and
THE PROVINCIAL LANDS OFFICER: MANICALAND
and
THE DISTRICT LANDS OFFICER: CHIPINGE
and
OFFICER IN CHARGE OF THE ZIMBABWE REPUBLIC
POLICE: CHIPINGE
and
THE OFFICER COMMANDING: ZIMBABWE REPUBLIC POLICE
MANICALAND PROVINCE
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 16 and 19 May 2022

Opposed Application

E. Mubaiwa, for the applicant

W. Muzenda, for the first, second, third and fourth respondents

No appearance, for the fifth, sixth, seventh, eighth, ninth and tenth respondents

No appearance, for the eleventh respondent

MUZENDA J: On Thursday 16 December 2021, at Mutare, CHAREWA J granted a provisional order in favour of the applicant by consent of fifth to tenth respondents, first to fourth respondents were in default. The provisional order was to the following effect:

“Pending finalisation of this matter, the applicant is granted the following relief:

1. The application is granted.

2. First to fourth respondents and all those claiming occupation through them be and are hereby directed to forthwith restore applicant to full, exclusive, peaceful and undisturbed possession of the Remaining Extent of Christina situate in Chipinge and to assets, plants, improvements, machinery, implements, utilities and amenities in the farm so as to restore the status *quo ante* prevailing thereon as at 2 December 2021.
3. The Sheriff and tenth and eleventh respondents, collaboratively and jointly and severally, and with the full, absolute and unconditional co-operation, assistance and involvement of each other, are directed to cause the immediate vacation of the first to fourth respondents and all those occupying through them from the Remaining Extent of Christina situate in Chipinge and simultaneously facilitate, ensure, cause or procure the release and surrender by them to applicant of assets, plants, improvements, machinery, implements, utilities and amenities on the farm so as to restore the status *quo ante* prevailing thereon as at 2 December 2021.
4. First to fourth respondent and all those occupying through them are ordered to not step foot within 2 000 metres of the precincts of or in any (way) disturb, disrupt, interfere with any of the activities of applicant in the Remaining Extent of Christina situate in Chipinge.
5. Fourth respondent and all those claiming through them shall not implement or act on the offer letter dated 19 May 2021 expect in terms of a court order as executed upon by the eleventh respondent.

SERVICE OF PROVISIONAL ORDER

The Sheriff is directed to serve this interim order on the respondent.”

On 31 December 2021, first to fourth respondents filed their opposing papers. On 22 February 2022, first to fourth respondents’ legal practitioners wrote a letter to the Deputy Registrar requesting him to set the application for set down and the matter was set for argument. The application is to have the provisional order confirmed or discharged. The final order sought by the applicant is crafted as follows:

“TERMS OF THE FINAL ORDER SOUGHT

1. The offer letter dated 19 May 2021 issued in favour of fourth respondent in respect of 100 hectares of the Remaining Extent of Christina situate in Chipinge be and is hereby declared invalid and set aside.
2. It is ordered that fifth respondent shall not alienate to a third party any right of use and occupation of the Remaining Extent of Christina situate in Chipinge or of any part or portion thereof unless he had first given applicant adequate notice at least 21 working days of his intention to do so providing full facts and reasons for wanting to do so and according applicant the right to make representations before such decision is made.
3. First to fourth respondents shall pay costs of suit on the legal practitioner and client scale.”

The applicant did not seek a date for the confirmation of the provisional order nor for the granting of the final order sought, first to fourth respondents caused the matter to be set down for argument presumable seeking the discharging of the interim order. First to fourth respondents apparently opposed the final order sought by the applicant.

First to fourth respondents in opposing the confirmation of the provisional order have raised points *in limine* to the following effect:

- (a) Material dispute of facts.

According to first to fourth respondents, there are material dispute of facts particularly on the size of land occupied by fourth respondent whether it is 100 hectares or 400 hectares.

(b) Procedural irregularity

First to fourth respondents contend that applicant adopted a wrong recourse by bringing to the court an urgent application for spoliation rather than applying for review of the decision of fifth respondent to allocate land to fourth respondent. That procedural irregularity, to the first and fourth respondent is fatal to the application. First to fourth respondents also attack the final order sought where applicant urges this court to declare the offer letter invalid and set it aside, yet the original application is for spoliation, by so doing, applicant obviously ignores the patent fact that the land in dispute was compulsorily acquired by the state.

Background

On 3 December 2021, first to third respondents went to the Remaining Extent of Christina Farm in Chipinge armed with an offer letter with a view of taking occupation of 100 hectares of land. Applicant's representative felt invaded by the conduct of first to third respondents. According to applicant, though admitting that the piece of land was long compulsorily acquired by the state, contend that it was in peaceful and undisturbed occupation of the farm for many decades. Applicant believes that first to fourth respondent's act are unlawful since they were not authorised by a court order to take occupation and evict applicant from the farm, in other words, applicant took the law into their hands. As such applicant sought spoliation.

Having obtained an interim order in its favour, applicant contends that the offer letter issued to fourth respondent, Zanu PF Party Projects, should be set aside on grounds of invalidity solely because, fourth respondent does not in fact exist and was at any rate issued in breach of provisions of the Administrative Justice Act. To the applicant, there is an agreement between itself and government to halt all proceedings until the matter is finalised by the International Centre Settlement in Investments Dispute (ICSID) that is allowing applicant to continue using the piece of land until applicant is fully compensated, no compensation no vacation of the land by the applicant.

Issues for determination

1. Whether the preliminary points raised by the first to fourth respondents are valid and dispositive of the matter?
2. Whether the final order sought can be granted?

The Law

In the case of *Commercial Farmers Union and 9 Others v Minister of Lands and Rural Resettlement and 6 Others* SC 31/10 CHIDYAUSSIKU CJ spelt out the law as follows on pp 25 to 29 of the cyclostyled judgment.

1. There is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance (*Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity and Others* SC 111/04)
2. Equally so, a former owner who is in occupation of acquired land in open defiance of the law cannot approach the courts for assistance.
3. In terms of the Gazetted lands (Consequential Provisions) Act, [*Chapter 20:28*], by operation of law, former owners or occupiers of acquired land, lose all rights to the acquired land upon the expiration of the prescribed period.
4. If the former owner or occupier continues in occupation in an open defiance of the law, no court of law has the jurisdiction to authorize the continued use or possession of the acquired land.
5. A holder of permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated to him or her in terms of the permit, offer letter or land settlement lease.
6. The legislature conferred on the holder of an offer letter, permit or land settlement lease, this *locus standi*, independent of the Minister, to sue for eviction of any illegal occupier of land allocated to him or her in terms of the offer letter, permit or land settlement lease.
7. The holders of offer letters, permits or land lease are not entitled as a matter of law to self-help. They should seek to enforce their right to occupation through the courts.

This is the law even as of today.

Application of the law to the facts

Applicant benefitted from an interim order of this court principally, because first to fourth respondents had taken occupation of the 100 hectares of land at applicant's place without a court order. That action was not in terms of the law and hence the granting of a provisional order in applicant's favour. Applicant is now not seeking confirmation of the provisional order, nor not at all, but wants a declaration urging the court to declare the offer letter granted to the fourth respondent a nullity. In order for the court to do so the applicant should prove that it is an interested party and further convince the court that this is a proper case for the exercise of the court's discretion. (*Johnson v Agricultural Finance Corporation S 17/95* per GUBBAY CJ as he then was).

As clearly clarified in the matter of *Commercial Farmers Union (supra)*, former owners or occupiers of acquired land lose all rights to the acquired land upon the expiration of the prescribed period, a minister nor a president cannot grant such a former owner such a right. Further, no court of law has the jurisdiction to authorize the confirmed use or possession of the acquired land. Applicant has fundamentally no business in the manner or identity of the person whom the minister chooses to allocate land. For all principal purposes applicant is an illegal occupier of the farm and the Minister has allocated 100 hectares to fourth respondent which happens to be the lawful beneficiary of the land. I see no basis where applicant would worry itself about the identity of the fourth respondent. The only problem on fourth respondent's part is that it took occupation of the land without a court order. In any case I am persuaded by the respondents that applicant is free to approach the administrative court for relief if any.

The prayer for a declaration as contained in the Final Order Sought is unsustainable. It has virtually no merit. The Minister has all the legislative blessing to issue offer letters, permit or land settlement lease in any form allowed by the legislature to whomsoever he chooses, individual or, universitas and applicant has no business in that. As such I am unable to grant the *declaratur*. Applicant is not seeking the confirmation of the provisional order as already pointed out herein above. The first and fourth respondents applied for a set down date and opposed the application, they pray that, the provisional order be discharged. I will grant the discharge on the grounds or reasons I have spelt out herein above.

As for costs, applicant is in illegal occupation of a gazetted land in total defiance of the law. It applies for a declaratory relief on a return day for unsustainable reasons. It did not succeed. On the other had the first to fourth respondents resorted to self-help of taking

occupation without a court order equally in defiance of the law. This is a case more apt for each party to bear its own costs and it is so ordered.

Consequently, the following order is granted.

1. Applicant is in unlawful occupation of the Remaining Extent of Christina situated in Chipinge.
2. The applicant's prayer to declare the offer letter dated 19 May 2021 issued in favour of Fourth Respondent in respect of 100 hectares of the Remaining Extent of Christina is dismissed.
3. The interim order granted by this court on the 16th December 2021 is discharged.
4. Each party to bear its own costs.

Wintertons Legal Practitioners, applicant's legal practitioners

Muzenda and Chitsama, first to fourth respondents' legal practitioners

Civil Division of Attorney General's Office, fifth to eleventh respondents' legal practitioners