

JOHN NIGEL ORSBORNE
versus
H SHUMBAMHINI
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 10 February 2016 and 5 March, 2016

Urgent Chamber Application

Ms F Mahere, for the applicant
H Shumbamhini, for the 1st respondent, in person
J Mumbengegwi, for the 2nd respondent

MTSHIYA J: On 11 February 2016, in an urgent application, I granted the following order:

“PROVISIONAL ORDER
TO THE RESPONDENTS

TAKE NOTE that, on the 11th day of February 2016 the Honourable Mr Justice Mtshiya sitting at Harare issued a provisional order.

The annexed chamber application, affidavit/s and documents were issued in support of the application for this provisional order.

If you intend to oppose the confirmation of this provisional order, you will have to file a notice of Opposition in Form No. 29B, together with one or more opposing affidavit/s, with the Registrar, of the High Court at Harare within ten (10) days after the date of which this provisional order was served upon you. You will also have to serve a copy of the Notice of Opposition and affidavit/s on the applicant at the address for service specified in the application.

If you do not file an opposing affidavit within the period specified above, this matter will be set down for hearing in the High Court at Harare without further notice to you and will be dealt with as an unopposed application for confirmation of the provisional order.

If you wish to have the provisional order changes or set aside sooner than the rules of Court normally allow and can show good cause for this, you should approach the applicant/applicant's legal practitioner to agree, in consultation with the Registrar, on a suitable hearing date. If this cannot be agreed or there is a great urgency, you make a Chamber application, on notice to the applicant, for directions from a judge as to when the matter can be argued.

TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made I on the following terms:-

1. It be and is hereby declared that first respondent's summary entry along with other persons acting in common purpose or in association with him onto the Remaining Extent of Lot 1 of Maryland in the District of Murehwa (hereinafter called "the property") on the 3rd February, 2016 and on subsequent days with concomitant introduced movables and livestock was unlawful on account that this was done without the consent of the applicant and without due process.
2. It be and is hereby declared that the applicant, his agents, representatives, employees and invitees are entitled to peaceful and undisturbed possession of the property until such time as the respondents apply for and obtain an order of ejectment having final effect from a competent court.
3. Respondents jointly and severally pay the costs of this application.

INTERIM RELIEF

That pending the determination of this matter, the applicants are granted the following relief:-

- a. Applicant's possession of Remaining Extent of Lot 1 of Maryland in the District of Murehwa measuring approximately 409.90 ha (hereinafter called "the property") be restored; and
- b. First respondent and all other person acting through or in common purpose with him remove all and any impediments on the property so as to permit free and unimpeded access by the applicant, his agents, employees and invitees in and to the property and all improvements on it; and
- c. The first respondent and all person acting through or in common purpose with first respondent forthwith upon the grant of this order vacate the property and in so doing ensure that all movable assets and property including livestock introduced by them onto the property also be removed and failing vacation and removal that the Sheriff or his Deputy be and is hereby authorized and empowered to attend to the ejectment of the first respondent and all other persons claiming occupation and use of the property through him.

SERVICE OF ORDER

The leave be and is hereby granted to applicant/s legal practitioners or the Sheriff or his Deputy to attend to the service of this order forthwith upon the respondents in accordance with Rules of the High Court.”

On 29 February 2016, I received a note from the Registrar informing me that the first respondent had appealed and therefore wanted reasons for my decision. These are they.

On 24 October 2012, the applicant was, under The Land Reform and Resettlement Programme (Model A2 Phase II), offered, by the second respondent, subdivision R/E of Lot 1 of Maryland East Province, measuring approximately 407.90 hectares, for agricultural purposes.

On 6 December 2012, the applicant formally accepted the offer of the said land.

However on 17 December 2015, the second respondent gave the following notice to the applicant:

“RE: NOTICE OF INTENTION TO WITHDRAW LAND OFFER UNDER THE LANDREFORM AND RESETTLEMENT PROGRAMME (MODEL A2, PHASE 11)

Notice is hereby given that the Ministry of Lands and Rural Resettlement intends to withdraw the offer of land made to you in respect of Subdivision R/E measuring 409.90has of Lot 1 of Maryland farm in the District of Murehwa in Mashonaland East Province

The reasons for the withdrawal are as follows:

1. Farm being re – allocated to others.

You are invited to make any representations you may have on this matter in writing within 7 days of receipt of this notification. All correspondence in this regard should be directed to the Minister.”

On 19 December 2012, the applicant responded to the above notice in the following terms:

“With reference of your above notice to withdraw land offer to J. N. Osborne Lot 1 Maryland we request that you reconsider your withdrawal notice on the following grounds:

- 1) In 2002 we were downsized to our current 407.9 ha. We were visited by a delegation including the 2 Deputy Ministers of Agriculture Hon P Zhanda and Hon D Marupira in Sept 2013 who assessed our production levels and assured us we were not to be downsized any further. We have since adjusted to this hectarage and become more efficient because of it.

- 2) We are one of only 2 registered pedigree Mashona cattle breeders in Zimbabwe. The herd is currently at 230 animals in total of which 90 are breeding females. This is the best Mashona genetic material available in the country. In the last 3 years our top bull has won 2 runner up Grand Champion awards at the Harare Agricultural Show and best commercial breed award at the Marondera Provincial show.
- 3). Mrs Maree Osborne has been instrumental in reviving the Mashona Cattle Society to the stage of where it is now a fully functioning breed society promoting the values of the indigenous Mashona Breed. Recent achievements include the holding of field days, donation of 800 straws of semen from our bull, sponsored by the Harare Agricultural Show Society to be made available to interested parties.
- 4). We are one of only 2 registered Dorper Studs in Zimbabwe, with a flock of 220 animals of which 120 are breeding females. In addition to supplying quality animals to the livestock industry, we regularly hold week long shepherds training courses on farm. We exhibit and sell animals on the Harare Agricultural Show, the National Bull sale, and Marondera Provincial show.
- 5). Our cropping program is an integral part of our livestock program, with crop residues being used to supplement the livestock. We currently produce 60ha of Wheat, 20ha of maize, 1 ha foundation Seed maize, 45 ha of Tobacco and 40 ha. Of Soya beans, and 30 ha of Reclaimer Katombora grass for livestock purposes.
- 6). Any further downsizing will result in the closure of our livestock section. The loss of these truly Zimbabwean cattle breed genetics will be permanent and disastrous for the Mashona cattle. It will set back the strategic program for the livestock industry in the country.

Attached please find copies of correspondence:

- 1) Zimbabwe Herd Book Dr. L. M. Beffa
- 2) Mashona Breeders Society of Zimbabwe Dr D. M. Bruce
- 3) Mukushi Seeds Dr. J. Macroberts
- 4) Mashona Breeders Society Flier and Business Card

Yours faithfully

J. N. Osborne”

The record shows that prior to the above Notice of intention to withdraw the offer of land, the second respondent had already, on 4 November 2015, written the following letter to the applicant:

“RE: WITHDRAWAL OF LAND OFFER UNDER THE LAND REFORM AND
RESETTLEMENT PROGRAMME (MODEL A2, PHASE 11)

Following the Notice to withdraw your offer letter and the representations which you made to that effect, please be advised that the Minister of Lands and Rural Resettlement is withdrawing the offer of land made to you in respect of Subdivision **R/E**

Measuring **409.90** hectares of

Lot 1 OF MARYLAND Farm in the

MUREHWA District of **MASHONALAND EAST PROVINCE**

The Acquiring Authority has concluded that the purpose for withdrawal outweighs the representations Subdivision which you made.

You are therefore notified of the immediate withdrawal of the offer of subdivision.

R/E of **LOT 1 OF MARYLAND**

Measuring **409.90** HECTARES.

You are required to cease all or any operations that you may have commenced thereon and vacate the said piece of land immediately / within _____ days.

Hon. Dr. D. T. Mombeshora (MP)
Minister of Lands and Rural Resettlement”

It is important to note that the above withdrawal letter was written on November 2015 i.e. before the notice of intention to withdraw dated 17 December 2015. The withdrawal letter was not preceded by a notice of intention to withdraw as alleged.

Another letter of withdrawal, from the second respondent, dated 7 January 2016, was again dispatched to the applicant. There is no explanation as to why two withdrawal letters were necessary and why the letter of 4 November 2015 preceded the notice of intention to withdraw the offer of land.

After the notice of intention to withdraw the offer of land, dated 17 December, 2015, the applicant explains subsequent developments as follows:-

“31. On Boxing Day (26 December, 2015) first respondent summarily arrived at my residence together with a neighboring farmer. The respondent through my gate guard demanded an entitlement to inspect my residence and the surrounds.

I declined to entertain his requests since he had not had the courtesy to phone me in advance of his visit which would have been the polite way to do things. Also no Ministry official was in attendance and at that stage my representations had not been responded to.

32. I did not speak to the first respondent in person or his associates as I did not want to cause an incident. The first respondent and his followers left apparently in a bad mood.
33. On a date that I no longer recall but in the first week or so of January 2016 – at around the opening of the school term – a letter dated 4 November 2015 was delivered up to me. A copy of that letter is marked as **Annexure '7'**.
34. The letter mentions that my offer letter has been withdrawn. When I read it I was perplexed given that it was apparently drawn and signed by the Minister on 4 November 2015. That date precedes the Notice of intent to Withdraw letter dated 17 December! As at 4 November, 2015 I had not received a notice of an intent to withdraw my offer letter, had not received an invitation to make representations, was not advised why the letter was to be withdrawn and I had not made any representations to the Minister.”

The above events, as per para 34 above, speak to some unforgiveable procedural confusion. However, the final straw, as per the applicant’s narration of events, came on 3 February 2016.

The applicant says :

- “39. On that date land officers arrived at the property and handed me a “notice” of withdrawal from the Minister which was dated 7 January, 2016. A copy of this withdrawal [the second withdrawal] is marked **Annexure '8'**.
40. That withdrawal mirrored the earlier withdrawal letter the only difference being the typed date.

There was no substantive indication as to what representations the Minister might have taken in to consideration and from whom and when he applied his mind to the same.

There was no attempt to explain why the first letter authored by him had been drawn and then served up to me.

There was no indication to suggest that the first withdrawal had been issued in error or that it was to be replaced by a second withdrawal.

There was no indication as to what individual or cumulative reasons were relied upon for the dismissal of my written representations.

There was no discernible basis as to why and on what basis the Minister arrived at his conclusion that the **‘withdrawal outweighs representations which you made.’**

There was no date provided for to vacate and give up possession and control of my crops – some of which had been reaped; and/or as to whether I would be permitted to complete my cropping; and/or when I should vacate my residence and the outbuildings; and/or whether and on what date a handover – takeover exercise was to take place; and/or whether a valuation or compensation exercise was to take place; and/or what I was expected to do with all my movable farm equipment and materials; and/or whether I would be given an opportunity to sensibly wind up my operations.

The land officers who acted as messengers were unable to assist and left.

54. During the course of Thursday 4th, Friday 5th and Saturday 6th February, 2016 much movement and activity took place on the property with more youths introduced and perniciously sixty or so herd of mixed cattle were driven onto the farm at the first respondent's instance. Those cattle have been taken over grazing areas hitherto utilized for my pedigree Mashona registered cattle and registered Dorper sheep.
56. In consequence of the conduct of the first respondent who has resorted to self-help conduct and inserted his cattle, movables and personnel on the property which is set to continue I am effectively unlawfully dispossessed of my property being Remaining Extent of Lot 1 of Maryland measuring approximately 409.90 hectares. The dispossession has been occasioned without my consent and without due legal process in violation of the common law, statute and our Constitution.”

The above passages clearly indicate that the applicant was being wrongfully despoiled. There was therefore need for urgent intervention by the court. The second respondent was not coming clean with the applicant.

Having received the application on 10 February 2016, in the morning, I directed that it be set down for 11 February 2016 at 2:30pm. The parties duly appeared at the appointed time to argue the matter.

Convinced, upon reading the papers, that the dictates of due process had been ignored, resulting in the applicant being despoiled, and that there was clear confusion in the process, as depicted by the correspondence from the second respondent, I found it compelling and urgent to grant the relief sought. Administrative action must be taken in terms of the law and self-help has no place in a country that follows the rule of law.

Recently, in *Gladwell Holdings (Pvt) Limited v Minister of Mines & Mining Development & 25 Ors*, HH 193/16 Mafusire J, had this to say :

“Spoliation is a quick remedy. Its rationale is to prevent anarchy in society: see *Muller v Muller*¹. People must not resort to self-help each time they want to recover things they feel belong to them and which may be in the possession of another. In *Shoprite Checkers Ltd v Pangbourne Properties Ltd*², the rationale was expressed this way³:

“All of this of course is based upon the fundamental principle that no man is allowed to take the law into his own hands and that no one is permitted to dispossess another forcibly or wrongfully and against his consent ‘of the possession of property, whether movable or immovable’ **and that if he does so ‘the Court will summarily restore the *status quo ante* and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.** [emphasis added]”

Notwithstanding the fact that the first respondent might be the holder of the latest offer letter from the second respondent, administrative justice requires that the withdrawal process should be done in terms of the law. The applicant, deserved a proper hearing before being dispossessed of the land which had been legally offered to him.

In *Florence Sigudu v Minister of land and Rural Resettlement N.O & Pheneas Chihota*, Patel J, as he then was, after analyzing the law relating to the withdrawal of an offer letter said:

“It follows from all of the foregoing that there is no proper statutory basis for the creation or termination of rights granted by offer letters in general. Their basis is essentially administrative and their existence or otherwise is consequently subject to purely administrative rules and discretion – which must, of course, be exercised lawfully, reasonably and fairly, but which are unavoidably open to the possibility of abuse and malpractice”. (This is precisely what appears to have happened in this case).

It is clear to me that, *in casu*, the actions of both the first and second respondents lack the support or backing of law. The said actions infringe on the existing rights of the applicant. It is therefore imperative that the court should intervene urgently in order to ensure that the applicant’s rights are protected. If need be, the applicant’s rights can only be interfered with in terms of the law. As already stated, there is clear absence of lawfulness, reasonableness and fairness in the manner the applicant has been treated. There is therefore merit in the relief sought.

It is for the above reasons that I granted the order appearing here in at pages 1, 2 & 3 of this judgment.

¹ 1915 TPD 29, at p 31

² 1994 [1] SA 616 [W]

³ At p 619H, per ZULMAN J

Messers Honey & Blackenberg, applicant's legal practitioners
The Attorney General – Civil Division Of The Attorney General's Office