

MARGARET ZINYEMBA

v

(1) THE MINISTER OF LANDS AND RURAL RESETTLEMENT
(2) YAKUB MOHAMED

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATHSWAYO JCC, GUVAVA JCC & MAVANGIRA JCC
HARARE, JUNE 4, 2014 & JUNE 24, 2016

M H Chibanda with *P Mangwana*, for the applicant

T Mpfu, for the second respondent

MALABA DCJ: This is an application in terms of s 85(1)(a) of the Constitution of Zimbabwe Amendment (No. 20) 2013 (“the Constitution”) alleging that the applicant’s fundamental right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair enshrined in s 68(1) of the Constitution has been infringed. The cause of the alleged infringement is the decision by the first respondent to withdraw an offer letter given to the applicant to occupy a piece of agricultural land without giving her an opportunity to be heard on the proposed withdrawal of the offer letter.

The background facts are that on 30 August 2002 the Government compulsorily acquired Lot 1 of the whole of Manyewe Farm in Mazowe District of Mashonaland Central

Province which was then registered in the name of Ridwyn (Pvt) Ltd under Deed of Transfer No. 8426/2002.

On 10 July 2008 the acquiring authority offered the applicant the right to occupy, hold and use the whole of Lot 1 of Manyewe Farm measuring 464 hectares. The applicant accepted the allocation of the piece of land by signing the offer letter containing a number of terms and conditions. One of the terms of the offer letter was that the Minister of Lands and Rural Resettlement (“the Minister”) reserved the right to withdraw or change the offer if he deemed it necessary or if the holder of the offer letter was found to be in breach of any of the conditions of the offer letter.

In 2013 the Minister decided to subdivide the land allocated to the applicant into two portions measuring 210 and 254 hectares respectively. On 23 July 2013 the applicant was advised of the decision to withdraw the offer letter relating to Lot 1 of Manyewe Farm which had already been subdivided. On the same date an offer letter was sent to the applicant allocating to her the right to occupy, hold and use for agricultural settlement subdivision 2 of Lot 1 of Manyewe Farm measuring 210 hectares. Subdivision 1 of Lot 1 of Manyewe Farm measuring 254 hectares was allocated to the second respondent who accepted the offer. The applicant was served with the notice of withdrawal of the offer letter relating to Lot 1 and the offer letter relating to subdivision 2 of Lot 1 on 11 November 2013.

The applicant refused to accept the offer letter relating to subdivision 2 of Lot 1 of Manyewe Farm arguing that the land allocated to her was rocky and not arable land. She

subsequently applied to the High Court for review of the decision of the Minister to subdivide Lot 1 of Manyewe Farm. She also sought a review of the decision of the Minister to withdraw the offer letter in respect of Lot 1 without giving her notice of the administrative conduct. The applicant withdrew the application for review of the Minister's decision after the second respondent opposed it on the ground that the application should have been made to the Administrative Court.

Instead of lodging the application with the Administrative Court after its withdrawal from the High Court, the applicant approached the Constitutional Court. She made an application under s 85(1)(a) of the Constitution alleging that her rights under ss 68(1), 71(3) and 291 of the Constitution had been and were being infringed by the administrative conduct of the Minister. The administrative conduct alleged to have violated the applicant's rights was the decision to withdraw the offer letter relating to Lot 1 of Manyewe Farm without giving the applicant notice of the intended action and affording her a reasonable opportunity to make representation on the matter.

The application was opposed on four grounds. The first was that the application was in the wrong forum as it should have been made to the Administrative Court. The second ground was that s 291 of the Constitution is not part of Chapter 4 and did not enshrine a fundamental right. The contention was that s 291 did not guarantee to the applicant a fundamental right the infringement of which entitled her to approach the Constitutional Court for appropriate relief in terms of s 85(1)(a) of the Constitution.

The third ground on which the application was opposed was that s 71(3) of the Constitution had no bearing on the legality of the decision of the Minister because it was concerned with compulsory acquisition of property by the State and not the withdrawal of rights to occupy, hold and use State land given to a person in terms of an offer letter.

The fourth ground on which the application was opposed was that the existence of the Administrative Justice Act [*Cap. 10:28*] gives effect to the fundamental rights enshrined in s 68(1) and (2) of the Constitution and provides an effective remedy for their protection and enforcement.

All the four points raised by Mr *Mpofu* on behalf of the second respondent are unassailable. Section 85(1) of the Constitution in terms of which the application was made grants *locus standi* to the persons listed therein who allege that a fundamental right enshrined in Chapter 4 has been, is being or is likely to be infringed.

Section 291 is in Chapter 16 of the Constitution. Its provisions do not enshrine a fundamental right. It provides that any person who immediately before the effective date of the new Constitution was using or occupying, or was entitled to use or occupy any agricultural land by virtue of a lease or other agreement with the State continues to be entitled to use or occupy that land on or after the effective date in accordance with the lease or other agreement. The provision was intended to put beyond doubt the fact that the coming into effect of the new Constitution did not terminate existing rights to occupy, or use agricultural land. It clearly did not interfere with the rights and obligations of the parties under the lease or any other agreement

governing the occupation and use of State land. Any person claiming lawful authority to occupy or use State land had to produce an offer letter, or lease relating to the agricultural land concerned.

The applicant founded her cause of action on s 68 of the Constitution. In paras. 17 and 18 of the founding affidavit, the applicant avers as follows:

- “17. Second respondent was allocated the arable portion of the property which I was using in my rose production. This is the portion of the property where one can engage in farming activities as compared to the other portion which is not arable.
18. The decision of the 1st respondent to subdivide the property and allocate the 2nd respondent the portion that I was using and shoving me to the rocky, mountainous and unarable portion is grossly arbitrary and unreasonable.”

The meaning of s 68 of the Constitution escaped the applicant’s legal representative. Section 68(1) of the Constitution gives every person the right to administrative conduct and sets out the standards the conduct has to meet. In subs (1), s 68 of the Constitution defines the scope, substantive and procedural content of the right concerned. Subsection (2) gives a person whose right has been infringed by an administrative conduct a right to be given promptly written reasons for the conduct. In subs (3) s 68 of the Constitution goes on to provide that there shall be an Act of Parliament that gives effect to the rights given under subss (1) and (2).

Subsection (3) of s 68 of the Constitution provides that the Act of Parliament giving effect to the rights given under subss (1) and (2) must require that administrative conduct should meet the standards set out in subs (1) and that there be the substantive and procedural protection required under subs (2) in the event of alleged infringement of the right by an

administrative conduct. Subsection (3) of s 68 of the Constitution provides that the Act of Parliament must include remedies for effective judicial review of administrative conduct complained of to ensure that it meets the standards set out in subs (1). The remedy would include the right of access to a court with power to review administrative conduct.

Once an Act of Parliament which gives effect to all the rights to just administrative conduct set out in subs (1), (2) and (3) is enacted, s 68 of the Constitution takes a back seat. The question whether any administrative conduct meets the requirements of administrative justice must be determined in accordance with the provisions of the Administrative Justice Act. Unless there is no Administrative Justice Act or the complaint is that the provisions of the Act do not give effect to the fundamental rights guaranteed under s 68(1) of the Constitution in the terms required by subs (3), s 68 cannot found a complaint of its violation in terms of s 85 of the Constitution.

Where there is an Administrative Justice Act which gives full effect to all the substantive and procedural requirements for effective protection of the fundamental rights guaranteed under s 68, the Act must surely govern the process for the determination of the question whether a specific administrative conduct is in accordance with the standards of administrative justice. There cannot be an allegation in terms of s 85(1) of the Constitution of administrative conduct violating the fundamental right to administrative justice enshrined in s 68 of the Constitution when there is an Act of Parliament which validly gives full effect to the requirements for the protection of the fundamental right against the provision of which the legality of the administrative conduct must be tested.

Section 33(1) of the Constitution of the Republic of South Africa 1996 on which s 68 of the Constitution is broadly modeled provides:

“Just Administrative Action

33(1) Every one has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal.

(b) impose a duty on the State to give effect to the rights in subsections (1) and (2) and
(c) promote an efficient administration.”

The rights given under subs (1) and (2) of s 33 of the Constitution of the Republic of South Africa were given effect to by the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) which is the equivalent of our Administrative Justice Act (AJA). Commenting on the relationship of PAJA to administrative justice rights and the status of rights in s 33 of the Constitution of the Republic of South Africa CURRIE I and DE WAAL J in the “*Bill of Rights Handbook*”, JUTA & Co. 6 ed. at p 646 say:

“Since the commencement of the PAJA judicial review of administrative action generally has a legislative basis. In other words, it is based on the rights, duties and remedies provided for in the Act itself. The rights to just administrative action in the Constitution now play an indirect rather than direct role in judicial review.”

At p 649 of the “*Bill of Rights Handbook*” the learned authors state:

“Before the introduction of PAJA, challenges to the validity of administrative action were constitutional challenges based on the rights to administrative justice in the Bill of Rights – rights that are interpreted by reference to corresponding rights in the common law. But what is the status of the constitutional rights in section 33 today?”

The PAJA “gives effect to” the constitutional rights in section 33. This means that the Act makes the rights effective by providing an elaborated and detailed expression of the rights to just administrative action and providing remedies to vindicate them. The constitutional rights exist independently of the statute that gives effect to them, but retreat to a background role. This is because Parliament chose to give effect to the rights in

section 33 by enacting a general and comprehensive administrative action as defined by the Act.”

Two principles discourage reliance on the constitutional rights to administrative justice. The first is the principle of avoidance which dictates that remedies should be found in legislation before resorting to constitutional remedies. The second principle is one of subsidiarity which holds that norms of greater specificity should be relied on before resorting to norms of greater abstraction.

The applicant is not challenging the constitutional validity of any provision of AJA nor is she seeking to use the constitutional rights to administrative justice to interpret the provisions of AJA. The exceptional circumstances in which an applicant can rely on the constitutional rights to administrative justice do not apply to the applicant. She ought to have used the remedies provided for under AJA to enforce her rights to just administrative conduct.

The application is dismissed. There shall be no order as to costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GARWE JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: I agree

GUVAVA JCC: I agree

MAVANGIRA JCC: I agree

Mangwana & Partners, applicant's legal practitioners

Civil Division of the Attorney-General's Office, first respondent's legal practitioners

Venturas & Samukange, second respondent's legal practitioners