HC 10930/02

A.L. GEORGE (PRIVATE) LIMITED
versus
THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE
and
MUSA MESA, CHAIRMAN OF THE WORKERS' COMMITTEE
and
AUSTIN LEWIS, VICE-CHAIRMAN OF THE WORKERS' COMMITTEE
and
COMRADE CHAKANETSA
and
CHATHERINE ZAWE
and
FREDDY MURINDAMOMBE

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE 6 and 8 January 2003 hh-08-3

Chamber Application (Urgent)

R.M. Passaportis, for the applicant
N. Mutsonziwa, for the first respondent
Adv. *C. Selemani,* for the second to sixth respondents

CHINHENGO J: This application arises from an allegation by the applicant that it was forcibly removed from a farm, Chikwepa Farm, near Marondera, which the applicant leased from 1993. The owner of the farm is Forest Lodge Nursery (Private) Limited (hereinafter called "Forest Lodge"). Forest Lodge owned two farms in the Marondera area, Chikwepa Farm aforesaid and Billabong Farm.

It is common cause that Forest Lodge was served with notices issued in terms of ss 5 and 8 of the Land Acquisition Act [*Chapter 20:10*] (hereinafter called "the Act") in respect of Billabong Farm. After an application for the approval or confirmation of the compulsory acquisition of Billabong Farm was lodged with the Administrative Court in terms of s 7 of the Act, Forest Lodge in addition to opposing the application offered Chikwepa Farm in substitution for or in lieu of the acquisition of Billabong Farm. This is permissible in terms of s 6A of the Act. The applicant and Forest Lodge both averred that the acquiring authority did not formally

accept Chikwepa Farm in terms of s 6A(6) of the Act. Forest Lodge's position on this aspect of the mater is clearly spelt out in an affidavit by Andrew James Ker Thompson on its behalf where he averred in paragraphs 5, 6, 8, 9 and 10, that –

> "5. After receiving the Section 7 Application, I approached the Area Lands Committee in Marondera. I offered Chikwepa Farm and in exchange wished to keep Billabong. I completed the relevant form, signed it on behalf of the Company and submitted it to the Committee. At that time I dealt with a Mr Mazaiwana. I was told that the Committee would consider my offer and get back to me.
>
> 6. I never heard from the Area lands Committee again concerning my offer described above. I did make several inquiries and I have been assured that Billabong Farm has been de-listed. However, I have never received any documentation to that effect and the de-listing has not appeared in the Government *Gazette.*
>
> 7. …
>
> 8. Chikwepa Farm is un-listed. It has never received a Section 5 Notice. It remains the property of Forest Lodge Nursery (Private) Ltd.
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> 9. Although the offer to relinguish Chikwepa Farm was made nearly a year ago, I am prepared to re-offer this farm on condition that I keep Billabong Farm. This is a decision which the Area Lands Committee and the Government authorities must make.
>
> 10. I am advised that during these proceedings the allegation was made that Chikwepa Farm has been taken over by Government. This is incorrect. If Government had taken over the farm, I would have been advised and the formalities complied with. I repeat that acceptance of my written offer to relinguish Chikwepa Farm has never been communicated to me. Neither has Billabong Farm been de-listed which is the other part of the equation."

The applicant on its part accepts that indeed Forest Lodge offered Chikwepa farm in substitution of Billabong Farm. It averred that two persons, namely a Mr Munzara and a Mr Musoni have been allocated Chikwepa Farm and they have settled on it after it was subdivided into two

portions. The applicant alleged that Mr Munzara and Mr Musoni have been instrumental in inciting its farm workers, ten permanent employees and forty contract and seasonal workers, to disrupt its farming activities and to threaten its directors and members of their family. The applicant averred that in September and October 2002, the workers refused to do any work until they received their terminal packages in terms of the Labour relations (Terminal Benefits and Entitlements of Agricultural Employees Affected by Compulsory Acquisition) Regulations 2002.
(S.I. 6 of 2002) (hereinafter called "the Regulations"). It averred that during that period the workers would stay off work for a few days, then work, go off again for a few days and return to work. He said that on 19 November 2002 the situation further deteriorated. The workers barricaded the deponent's family in the farm homestead. They broke the security fence, lit fires by the gate and beat drums for hours on end. They threw sticks and rocks on the roof of the homestead and threatened to commit other acts of violence if the applicant did not pay their terminal benefits. They threatened to take possession of tractors and other farm equipment together with cattle and sell them. It averred that these disturbances were quelled by the police later in the evening on that day when the police persuaded the workers to leave.

The applicant averred that as a result of these disturbances and threats it decided to vacate Chikwepa Farm because it considered that it was no longer safe for the directors to stay on the farm. It averred that the directors cannot go back to the farm because the situation which exists on the farm is dangerous to them and to their families. The applicant averred that it was forced to move off the farm and that although it has never wanted to stop farming and to terminate the workers' contracts of employment it has been forced to do so because of the disruptions and threats. In essence the applicant averred that the farming operations have not stopped because Chikwepa Farm has been compulsorily acquired but because of the disruptions and the threats.

The purpose of this application in so far as the applicant was

concerned was to seek the court's endorsement that the termination of its workers' employment on Chikwepa Farm and the payment of their terminal benefits should be in accordance with the provisions of the Labour Relations (Retrenchment) Regulations, 1990 (S.I. 404 of 1990) hereinafter called "the retrenchment regulations" and not in terms of the Regulations (S.I. 6 of 2002).

The applicant has two reasons for adopting this position. The first, as it must be apparent, is that its proposal to lay off the workers has not been prompted by the compulsory acquisition of Chikwepa Farm as envisaged in the Regulations but by factors unconnected to the status of the farm in so far as its acquisition is concerned. Its second reason is that even if it were conceded that Chikwepa Farm has been compulsorily acquired, the Regulations do not, and were never intended to apply to a lessee of a farm such as the applicant. I will refer to a lessee of a farm as a "tenant farmer". The applicant contended that a proper reading of the Regulations shows that those Regulations were intended to apply only to the owner of the farmer who is not only the target of the Regulations but also the person from whom compensation payable in terms of ss 25 and 29C of the Act may be withheld until the workers on the farm concerned have been paid. The applicant is in this application concerned only with the question whether the terminal benefits of its workers should, for the reasons advanced by him, be paid in terms of the Regulations or in terms of the retrenchment regulations. That is the straightforward issue for my determination.

The applicant has also sought interim orders to the effect that the seasonal workers be declared to be disentitled to any "retrenchment package" and that the workers on Chikwepa Farm be interdicted from interfering with the removal from the farm of the applicant's movable assets which it alleged are valued at $65 million and further interdicted from threatening or harassing the deponent and certain members of his family and directors of the applicant. As a part of the final order sought the applicant asked the court, in addition to confirming the interim orders

above, to declare that the Regulations do not apply to an employer who is not the owner of the farm on which the employees are employed.

The first respondent opposed the granting of the provisional order and so did the second to sixth respondents. The basis of their opposition is that the Regulations apply to the termination of the employment of the applicant's employees. The first respondent dealt only with the applicability of the Regulations to the applicant and its workers. The first respondent argued that a tenant farmer should comply with the Regulations where he or it intends to lay off workers because the farm on which they are employed has been compulsorily acquired.

The second to sixth respondents (who I shall refer to as "the workers" because they represented the workers in this application) averred that, to the best of their knowledge, Chikwepa Farm was compulsorily acquired in lieu of Billabong Farm and, as is common cause, Forest Lodge offered Chikwepa Farm in substitution of Billabong Farm. They averred that as a result of the offer of Chikwerpa Farm, the acquiring authority demarcated and allocated Chikwepa Farm to Mr Munzara and Mr Musoni. They attached as proof of the allocation two letters of offer of land on Chikwepa Farm written by the Minister of Lands, Agriculture and Rural Resettlement and addressed to Mr Munzara and Mr Musoni. In so far as the workers were concerned, Chikwepa Farm has been compulsorily acquired, two farmers have been settled on it and their employer should pay them terminal benefits in terms of the Regulations.

It is unfortunate, and to the detriment of the applicant's case that the applicant did not cite the Minister of Lands, Agriculture and Rural Resettlement as a party to these proceedings. The failure to make the Minister a party to these proceedings resulted in it being impossible for me to become fully informed about the precise status of the farm. The evidence before me suggests that Chikwepa Farm has been acquired in terms of s 6A of the Act with the consent of the owner. The evidence also suggests that it is for that reason that the applicant decided to terminate its workers' contracts of employment. The background to the matter

which I have outlined in some detail indicates that –

a) when Billabong Farm was listed for compulsory acquisition and the necessary notices were served on the owner, the owner offered Chikwepa Farm in substitution of Billabong Farm;

b) the owner was advised that the acquiring authority was accepting his offer of Chikwepa Farm and that Billabong Farm would be de-listed, that is to say, it would be removed from the list of farms proposed for compulsory acquisition;

c) Chikwepa Farm was then divided into two farms which were allocated to Messrs Munzara and Muzoni who have since taken occupation;

d) having become aware of these developments the workers at Chikwepa Farm demanded from their employer the payment of the benefits to which they are entitled in terms of the Regulations;

e) it is the demand for the payment of the benefits by the workers which prompted the intermittent "stay aways" and the alleged disruption of farming operations by the workers as well as the alleged harassment of the applicant's directors or management personnel;

f) it was only after these developments had taken place that the applicant decided that it should lay off its workers and cease farming operations and vacate Chikwepa Farm.

In my view, it is quite clear that the real reason that the applicant decided to lay off his workers and pay them terminal benefits, albeit that he wants to pay them in terms of the retrenchment regulations, is that Chikwepa Farm has been acquired for resettlement purposes in terms of s 6A of the Act. Any other interpretation as to the causes of the termination of the workers' employment would be puerile, far-fetched and not in accordance with the realities. The fact that the formalities for the de-listing of Billabong Farm and the acceptance of Chikwepa Farm for acquisition in lieu of Billabong Farm may not have been completed is

irrelevant to this application. What is relevant in my view is the existence of an offer by Forest Lodge of Chikwepa Farm and the oral acceptance of that farm by the acquiring authority. There is some evidence that the acquiring authority has accepted Chikwepa Farm and that it has acted on that acceptance. It has proceeded to allocate Chikwepa Farm to Messrs Munzara and Musoni. It has not taken any further steps to acquire Billabong Farm and has in fact assured the owner of Billabong Farm, as it emerges from paragraph 6 of applicant's affidavit, that Billabong Farm will be de-listed. I am therefore quite satisfied that although the formalities for acquiring Chikwepa Farm may not have been completed, all the interested parties understand and accept that Chikwepa Farm has been acquired and that the real reason that the applicant wishes to lay off its workers is its appreciation that Chikwepa Farm has been compulsorily acquired for resettlement purposes. As such therefore I find that the Regulations apply to the termination of the contracts of employment of the workers at Chikwepa Farm.

It seems to me that the applicant and, indeed, Forest Lodge doubt the *bona fides* of the acquiring authority about the verbal agreement reached in respect of Billabong and Chikwepa farms. The lack of mutual trust between the farmer and the Government has dogged the land acquisition exercise over the last few years and has resulted in some of the problems that have bedevilled the land redistribution exercise. That trust can exist only if the two parties acted with forthrightness in the undertakings which they make.

I now proceed to deal with the applicant's second argument as to why the Regulations do not apply to it. The applicant's argument is contained in paras 14:1 and 14:2 of its affidavit. Therein the applicant averred that –

> "14:1 I maintain that the Regulations under S.I. 6/02, S.I. 101/02 and S.I. 232/02 are unreasonable because they are vague. The definition of an "employer" includes the "manager, agent or representative" of the employer. This definition runs contrary to basic legal principles. A manager can never be an employer. This would lead to absurd situations and results. Many farms may be owned by one person, leased to another and operated under the direction of a third. Who is

responsible for the payment of the retrenchment package? Clearly the owner would not be liable because he does not employ the persons concerned. The lessee would not be liable because, on a strict interpretation of the Regulations, the Lessee does not own the farm which has precipitated the termination of the worker's employment. The same argument would apply to the entity carrying on the farming operations on the property.

14:2 The Regulations seem to be premised on the assumption that the employer and the owner of the land are one and the same. ...."

To begin with, it must be noted that the Regulations were put in place for the benefit of the farm worker who would be left in the cold where a farm on which he was employed was compulsorily acquired and his employer has left the farm. It must be noted also that the regulations were put in place to benefit the farmer/employer who would be burdened with a workforce whose source of work has been taken away. The employer would then be able, in compliance with the Regulations, to lay off his workers.

The Regulations define the words "employee" and "employer". An employee is –

> "any person employed by, or working for, any employer in the agricultural industry and receiving or entitled to receive remuneration in respect of such employment or work."

This definition is very wide and it covers contract and/or seasonal employees. The provisions of the Regulations therefore apply to all employees as defined.

An "employer" is defined as –

> "any person who employs or provides work for another person in the agricultural industry and remunerates or expressly or tacitly undertakes to remunerate him and includes a manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed."

Again the meaning of employer has been widened to cover any person who must be held responsible for ensuring that employees covered by the Regulations receive their benefits on termination of their

employment consequent upon the acquisition of the farm on which they were employed. A tenant farmer is obviously an employer as defined because it is him who employs or provides work to the employee and remunerates him. And the farm employee is obviously the tenant farmer's employee because he is employed by, or works for, the tenant farmer.

The Regulations provide in s 3(1) as follows –

> "Notwithstanding any other statutory instrument, arrangement or agreement to the contrary, if it becomes necessary for an employer to terminate the employment of any employee because any farm or part of a farm belonging to the employer has been compulsorily acquired for resettlement or other purposes in terms of the Land Acquisition Act [*Chapter 20:*10], the following amounts shall be payable by the employer to each employee whose employment is so terminated. …."

There then follows an itemisation of the payments to be made.

The important words in this provision and on which the applicant relied for the proposition that a tenant farmer is not covered by the Regulations are the words "belonging to". The applicant contended that these words must be construed as a reference to the owner of the farm and not a lessee. That is why the applicant made a further argument that because s 3(1) of the Regulations is concerned with the owner the notices in terms of ss 5 and 8 of the Act can never relate to it as lessee but only to the owner. I do not think that this is a correct argument at all.

The words "belonging to" ordinarily connote ownership. They may however and, depending on the context, not only encompass ownership but denote something far wider than ownership. An extended meaning can therefore be ascribed to the words "belonging to" to describe the relationship of a thing to a person who is not the owner thereof but has possession, control or use of the thing. This extended meaning was recognised and accepted in *Bedenhorst v Van Rensburg* 1985 (2) SA 321. I am satisfied that the words "belonging to" as used in s 3(1) of the Regulations do not denote ownership only but they also denote a relationship to the farm arising from possession, control or use and which

places the person concerned in the position of owner in so far as the matters which the Regulations deal with are concerned. Thus whether the person is a tenant farmer, or his manager or agent or representative the farm concerned is regarded as belonging to him for the purposes of the Regulations.

A close analysis of s 3(1) of the Regulations indicates that the Regulations are not concerned with the status of the employer in respect of the farm as such provided that the farm belongs to him in the sense I have adumburated above and he employs employees on it. The provision also makes it clear that the farm or part of a farm which has been compulsorily acquired need not be owned by the employer, *vide* the phrase "any farm or part of a farm belonging to the employer". Apart from what I have said about the words "belonging to", the provision is clear that it is concerned with the termination of the employee's employment on "any farm" that is to say any farm whether owned or not owned by the employer as long is it belongs to him (in the sense I have stated) and he employs employees on it and as long as it has been compulsorily acquired.

Section 3(1) of the Regulations also makes it quite clear that it is to the employer that it may become necessary to terminate the employment of the employees. The determination that it has become necessary to do so is that of the employer. This is a sensible provision because an employer may, depending on his own circumstances, decide not to terminate the employees' employment as when he can absorb the employees in his other businesses. Thus whether or not a farm has been acquired is a factual matter which the employer can determine on his own before he makes the determination that it has become necessary to terminate his workers' contracts of employment. And even where his appreciation of the factual position with regard to the status of the farm may be erroneous, he may still be able to lay off his workers in terms of the regulations if no other person came forward to contest that factual position. I may also note that the applicant's reason for terminating the

employment of its employees is not convincing. It has laid no basis for me to agree with it that the criteria for retrenchment in terms of the retrenchment regulations have been met. The applicant seems to me to be asking for a blank cheque to proceed in terms of the retrenchment regulations without showing any good cause therefor. I have no basis for giving such a blank cheque.

Section 4 of the Regulations seems to some extend to support the finding which I have made. It provides that if at any time after a preliminary notice is served on an employer in terms of s 5 of the Land Acquisition Act, the employment of any person on the farm referred to in that notice is terminated, then it shall be presumed for the purposes of s 3 of the Regulations that such employment was terminated because of such acquisition, unless the contrary is proved by the employer concerned. The assumption in s 4 of the Regulations is that the employer is invariably the owner of the farm in respect of which a preliminary notice of acquisition is issued. That is not always the case as is exemplified by this application. The same assumption is also made in s 6 of the Regulations in respect of the withholding of the compensation payable in terms of s 25 or 29C of the Act. Whilst ss 4 and 6 of the Regulations are relevant to the owner of the land, it is only s 6 which is exclusively so. Section 4 read together with s 3(1) of the Regulations appears to me to be obliquely relevant to the tenant farmer also especially where the acquisition of the farm is in terms of s 6A of the Act or a section 8 order had been issued in respect of another farm the subject of the substitution offer. The essential point being that land which is acquired pursuant to s 6A of the Act will inevitably not be subject of a notice in terms of s 5 of the Act but it will be land which is compulsorily acquired anyway. I think that the presumption in s 4 of the Regulations may work to the benefit of the tenant farmer and it applies to him. He can take advantage of it and rebut that presumption in an appropriate case. I think, in a way, the applicant in this case endeavoured to show that the termination of its workers' contracts of employment were occasioned by factors other than

the acquisition of Chikwepa Farm and, as it were, it purported to rebut the presumption in s 4 of the Regulations without acknowledging the relevance of that section to its situation. If that was the applicant's endeavour he failed in that regard.

The last issue which I must address is whether the seasonal workers should not benefit from the Regulations. I have already said that they are covered by the definition of "employee" in s 2 of the Regulations. They must therefore benefit from the Regulations. The extent of the payments to which the seasonable workers are entitled to, in my view, be determined by reference to s 5(3) of the Regulations which empowers the Agricultural Employee Compensation Committee established by that section to determine what benefits and entitlements, if any, are due to any employee. For the purposes of my decision on the relief sought in respect of seasonal workers the question as to how their benefits or entitlements will be determined is not before me. What is before me is the question whether they are covered by the Regulations or not. I have determined that they are.

I think that from what I have said above it is evident that the applicant has not made a case for the issuance in its favour of a provisional order in the terms stated. The applicant is not unwilling to pay its workers in respect of the termination of their employment by it. The applicant's concern was solely whether the payments should be made in terms of the Regulations or in terms of the retrenchment regulations. I am satisfied that the applicant has failed, for the reasons I have outlined in this judgment, to make out a *prima facie* case for the issuance of a provisional order in its entirety.

I did not get the impression that the applicant was seriously concerned about the alleged threats and harassment by the workers. The workers denied those allegations and stated that if they are paid their benefits and entitlements the whole matter will become resolved. That explains why the relief sought by the applicant in that regard was quite incidental to the issue of whether he should pay his workers in terms of the Regulations or

the retrenchment regulations. The latter was the mainstay of its application. That also explains why its affidavit does not contain persuasive evidence to support the incidental relief. The dispute between the parties will be resolved upon the applicant paying its workers in terms of the Regulations. The respondents did not argue that there is any basis in law on which they could interfere with the applicant's right to remove his movable property nor did they admit that they have threatened to take possession of the applicant's movable assets and sale them. They also did not admit that they have harassed the applicant's directors and members of their family. As any such action, if embarked upon, would be unlawful anyway, I think that I can issue, as a final order an order restraining the respondents from interfering with the applicant's removal of his movable assets and restraining them further from harassing the applicant's directors. Such an order is merited on the facts of this case,

I have not addressed the question of urgency because the manner in which this matter evolved from the day that the application was lodged meant that the question of urgency did not have to detain me. In any case all the parties proceeded, despite Mr *Selemani'*s half-hearted submissions to the contrary, on the understanding that the application had to be resolved. I will order that the applicant pay the costs as it has not succeeded on its main claim which was the main reason for instituting these proceedings.

In the result -

(a) the main application is dismissed;

(b) a final order in terms of paras 4 and 5 of the draft order is issued to wit -

"(i) The Respondents and all employees on Chikwepa Farm in the District of Marondera be and are hereby ordered not to interfere in any way in the removal from the farm of applicant's movable assets.

(ii) The Respondents and all persons occupying Chikwepa Farm through them, be and are hereby interdicted from threatening or harassing Alan Leornard George, Melanie George, Roxanne George, Dustin George, Colin George and Kephas Mhlanga."

(c) The applicant shall pay the costs of this application.

Honey & Blanckenberg, applicant's legal practitioners.

Civil Division of Attorney General's Office, 1st respondent's legal practitioners.