MOUNT LOTHIAN ESTATE (PVT) LTD
versus
COLONEL GODFREY MUTEMACHANI
& 2 OTHERS

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 4 September 2007, 5 September, 2007, 6 September, 2007 and 27 February 2008

Mr *de Bourbon*, for the Plaintiff
Mr *Magwaliba*, for the 1st Defendant
Mrs *Mwatse*, for the 3rd defendant

BHUNU J: The plaintiff company is the former owner of Mount Shannon Estates commonly known as Mount Lothian Estates measuring 572.67 hectares in extent situate in the district of Goromonzi.

The plaintiff's representative, Mr Christopher Geoffrey Tracy is a respectable grand old man of 83 years of age. He is the Chairman of Plaintiff Company and former occupier of the farm in dispute He has held positions of honour in various corporate bodies during his hay days. He is the former director of the Agricultural Marketing Authority, the former chairman of T S L and Zimbank.

The plaintiff has unfortunately lost its land owing to the on going land reform programme much to the chagrin of Mr Tracey.

His main protagonist Colonel Godfrey Mutemachani is an equally honourable middle aged gentleman with an impressive record of having relentlessly fought for the liberation of this country from colonial bondage. He is the beneficiary of the agrarian land reform programme who was allocated a potion of the plaintiff's farm together with an honourable former judge president of this court.

The second defendant is a company in the business of manufacturing seed maize that was contracted to grow seed maize at the material time by the plaintiff.

The third defendant is the acquiring authority responsible for the acquisition of the plaintiff's farm in terms of the land Acquisition Act [*Chapter 20:10*] in pursuit of the Government's land reform programme.

The justification and rational of the land reform programme was amply articulated by the then minister for Lands and Agriculture and Rural development Mr Made in his founding affidavit at page 72 of exhibit one where he says:

> *“2.* Mt Shannon Estate, measuring five – hundred and seventy – two comma six seven (572. 67) Hectares, situate in the district of Goromonzi owned by the respondent has been acquired by the applicant in terms of s 8 (1) of the said Act. An order acquiring the said land was served on the respondent, a copy of which is annexed hereto and marked hereto annexture “A”.
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> 3. The respondent has lodged a written objection to the acquisition of the land in terms of section 5 (1) (a) (iii) A of the said Act.
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> 4. The acquisition of this land is reasonably necessary for its utilization for resettlement for agricultural purposes.
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> 5. The acquisition is also in accordance with Government’s Resettlement Programme. The land concerned is suitable for resettlement under model A2 which is described in annexture “B”.
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> 6. At Independence in 1980, the Government of Zimbabwe inherited a racially oriented agricultural and land ownership structure. About 6 000 whites owned 15 million hectares of land. This represented about 45% of the total agricultural land of 33 million hectares. 50% of this land is in the high agro-ecological region 1, II and III. The smallholder farming subsection, comprising 8 500 indigenous farmers held 5 % (1.65 million hectares) of the agricultural land located mostly in the drier marginal agro-ecological regions 1V and V. The Tribal Trust lands (now communal lands), home to about 700 000 farming families occupied less than 50% of the agricultural land 75% of which is located in agro-ecological regions 1V and V with poor soil fertility.
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> 7. The problems arising out of this colonially engineered inequity in land distribution and ownership in the communal areas are common, these include land degradation, low productivity, over-stocking and over-grazing. The majority of black Zimbabweans still live precariously on less than an average of 3 hectares of rain fed agricultural land compared to an average of 2000 hectares in the white dominated commercial farming areas. This is a reflection of a colonial legacy of racial and class monopoly over forcefully alienated land, and remains a threat to national peace and stability. There is need therefore to address the inherited land ownership disparity in the land reform programme.
>
> The Commercial Farmers’ Union, the umbrella body of the commercial Farmers who own almost all the viable land aforesaid and most of their national peace and stability. There is need therefore to address the

inherited land ownership disparity in the land reform programme. The Commercial Farmers' Union, the umbrella body of the Commercial Farmers who own almost all the viable land aforesaid and most of their membership have indeed acknowledged this need to resettle the landless black population. (My emphasis)

9. *The overall aim of the land reform programme as a component of the National agrarian Agenda is therefore to create a just, democratic and efficient land economy and to evolve consensus around the drive for national economic development. The key components of this agenda are:*

(a) *to ensure equitable and just access to all types of land;*

(b) *to ensure optimum and environmentally sustainable utilization of the land;*

(c) *to ensure adequate supplies of raw materials to other sectors of the economy like manufacturing and services;*

(d) *to generally create more employment opportunities in agriculture and related sectors and increase exports; and*

(e) *pursuant to the above, create the necessary conditions for the indigenization of the Zimbabwean economy as the premise upon which to predicate durable national stability and peace.*

10. *The government of Zimbabwe has since carried out analyses that yielded strategic patterns of land holdings and ownership consistent with the foregoing vision."*

Given the historical background in which the acrimonious acquisition and allocation of the plaintiff's land occurred, it is hardly surprising that it generated intense resentment and hatred between Mr Tracy and the two new farmers. Having taken legal advice, Mr Tracy appears to have realized that the land reform programme was an irreversible reality which he had to live with. He therefore sought to make the best out of an untenable situation by enlisting the services of his two adversaries to try and at least salvage a portion of the farm for himself.

Thus despite the initial animosity the three protagonists eventually sat down at a round table conference where they hammered out an agreement in which they agreed that the two new farmers would support the plaintiffs application to government to be allowed to retain a portion of the land on condition Mr Tracy assisted them in their farming activities. The agreement which was drafted by the plaintiff's lawyers at his instance and request and duly signed by the parties reads in part:

"WHEREAS:

A. The company is normally the registered owner of a farm in the Enterprise Valley of the Goromonzi District commonly called 'Mount Lothian' but registered as mount Shannon of the meadows ['the farm'];

B. The farm is however subject to a s 8 acquisition order and a s 7 court application through which Government seeks to confirm the acquisition of the farm by Court Order under the land acquisition Act although those proceedings are yet to be determined.

C. The First and second (Read colonel Mutemachani.) parties have been given the right by Government to occupy the farm but

D. CGT (Read Christopher Geoffrey Tracey.) seeks to retain part of the farm for his own use and that of the company. CGT is endeavouring to negotiate the right to continue to remain in occupation of part of the farm and the first and Second parties require the assistance of CGT to carry out their own farming operations on the subdivisions of the Farm upon which the parties agree.

E. CGT has the equipment and manpower to attend to farming operations on the whole Farm and the First and Second Parties need assistance to farm their own subdivision.

F. The full and final rights of the parties are yet to be determined by the courts but the First and second Parties wish in the interim to utilize parts of the Farm and the company and CGT wish to be able to the other parts of the Farm and to occupy and use certain accommodation and facilities on the farm.

G. The parties have come to an interim agreement in terms of which they agree to co-exist on the Farm which agreement they wish to set out in written form.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

1. <u>Subdivision</u>

1.1.1 Subject to the provisions of clause 4.6 the company and CGT will not object to the First and Second Parties having access to and using that part of the farm which is outlined in red on the accompanying diagram [herein called 'the Western Portion'].

1.1.2 The First and Second Parties will support the Company and CGT in their endeavours to retain ownership and control of that part of the farm that is outlined in yellow [Herein after called 'the Eastern Portion'] and will support and protect them and their workers in their endeavours to regain and obtain occupation of their homes on the Farm and their ongoing use of the Eastern portion in the confident belief that there is no reasonable

> necessity for the Company or CGT to be deprived of its land holding and that the parties by their joint and individual endeavours will be able to secure the approval of this arrangement by the Acquiring Authority…"

Following the above agreement all the parties concerned performed their respective obligations calumniating in a joint submission of a request to the provincial land committee to endorse the terms of the agreement.

Unfortunately for the plaintiff and Mr Tracy the provincial land committee did not accede to the request. On 28 January 2004 the Provincial administrator wrote to Mr Tracy saying:

> "Reference is made to the heads of agreement reached between you Mr ……. and Mr Mutemachani, a copy of which was forwarded to this office in March 2003.
>
> The heads of agreement have been considered by the provincial land committee. It is the view of the committee that the heads of agreement are in no way binding on the Government and that they represent nothing more than a recommendation to the Government to allocate a portion of Mount Lothian Farm to you.
>
> Having carefully considered the matter the provincial land Committee does not accept the recommendation that a portion of the farm which was already allocated under the A2 model scheme be allocated to you. The farm was allocated to Mr … and Mr T Mutemachani. (My emphasis)
>
> The Committee takes this opportunity to remind you that Mount Lothian farm is the subject of a s 8 notice, which is binding,"

The unexpected turn of events was understandably of great disappointment to Mr Tracy thereby reviving the old rivalries over the ownership and occupation of the farm. It so happened that during the acquisition and occupation of the farm colonel Mutemachani because of his military background played a prominent role in displacing the plaintiff and Mr Tracy from the farm whereas the honourable Judge because of the sensitivity of his judicial mantle chose to keep a low profile. This apparently explains why the plaintiff has elected to sue only the colonel to the exclusion of the honourable judge.

In his grief Mr. Tracy has now through the plaintiff company initiated proceedings in this court challenging the legality of the acquisition of the farm prior to 14 September 2006 when the farm was finally acquired in terms of constitutional amendment number 17. The plaintiff therefore seeks a declaration against third defendant to the effect that prior to that date

the land was not lawfully acquired by the state in terms of the laws of the land at the material time.

As against the first and second defendants the plaintiff seeks compensation for alleged unlawful occupation and use of its land during that period.

In respect of the legality or otherwise of the acquisition of the farm during the period under review the plaintiff and third defendant have filed a statement of agreed facts in the following terms:

> "1. The parties agree that a preliminary notice was published in the Gazette as General Notice 65 of 2002 on 8 February 2002 for the acquisition of Mount Shannon Estate measuring 572.67 hectares situated in the district of Goromonzi.
>
> 2. The parties agree that an acquisition order in respect of Mount Shannon Estate was issued on 29 June 2002.
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> 3. The parties agree that the said acquisition order was served on one HANDSO LIBERRETO, an employee of the plaintiff on 29 June 2002 at the farm.
>
> *4.* The parties further agree that an application for confirmation of the acquisition of Mt. Shannon Estate was lodged with the administrative Court on 29 July 2002*."*

I take the robust view that once the acquisition order was issued and served on Handso Liberreto an employee of the plaintiff in respect of Mount Shannon Estate the farm was compulsorily acquired according to law and the plaintiff understood and accepted the position as such.

It is pertinent to note that in the above Heads of Agreement the plaintiff through its chairman unequivocally acknowledged that government had acquired the farm in question. He further acknowledged that the defendant had been given authority to occupy the farm. On a proper reading of the agreement one gets the unmistakable impression that the plaintiff had no quarrel with the legality of the acquisition of his farm. Its major concern was to be allowed to retain a portion of the farm with the assistance of the defendant and the learned judge.

Thus the defendant and his Lordship proceeded to assist the plaintiff in its endeavour to retain a portion of the farm on the understanding that it was not challenging the legality of the acquisition of the land by government as well as their right to occupy the farm. Had the plaintiff indicated otherwise, the two were unlikely to have assisted the plaintiff in its bid to retain a portion of the farm.

It is trite and a matter of elementary law that agreement is of the essence of contract. Lawful agreements are sacrosanct and have the full backing of the law. Thus both parties stand firmly bound and held unto their Heads of Agreement dated 18 February 2003.

By supporting the plaintiff's bid to retain a portion of the farm, the defendant undoubtedly discharged his part of the bargain. Having performed his part he was entitled to hold the plaintiff to its part of the bargain. That the plaintiff's bid to retain a portion of the farm did not find favour with the authorities is not the defendant's problem.

It is also important to note that the Heads of Agreement were not binding on the acquiring authority as he was not privy to that arrangement or agreement. That being the case the acquiring authority was within his rights in refusing to honour the agreement to which he was not a party.

It is therefore untenable at this juncture for the plaintiff to turn around and begin to challenge the legality of the acquisition of Mount Shannon Estate and the defendant's right to occupy the same at any stage after the 29th June 2002.

The plaintiff's Chairman gave the Court the impression that he was bitter and confused about the loss of the land coupled with his failure to retain a portion of the farm. In his evidence he confused the portion of the farm occupied by the learned judge for that which is occupied by the defendant. The unfortunate result is that the plaintiff is suing the first defendant for wrongful occupation of a portion of the farm which he has never occupied.

It also later emerged during the trial and Mr ……… unreservedly conceded that the plaintiff had infact been adequately compensated for all the acquired immovables for which compensation was being claimed. That being the case the plaintiff had no option but to withdraw all its claims for compensation based on all immovable property.

It also transpired at the trial that the plaintiff had infact no claim against the second defendant Pioneer Seeds Company (Pvt) Ltd for the simple reason that it occupied and cultivated the farm in terms of a valid agreement with the plaintiff. In the circumstances it boggles the mind why the plaintiff ever took the trouble to sue the second defendant. The plaintiff's irrational conduct in this respect merely serves to illustrate the extent of plaintiff's confusion.

On the other hand the first defendant was an honest and reliable witness whose evidence was consistent with all the proven facts. I believe him.

As regards costs counsel for the plaintiff sought costs at the higher scale *debonis propriis* against Mrs *Hove* who initially represented the first defendant as punishment for some alleged improper conduct during the course of pleadings. By the time these submissions were made Mrs *Hove* had already withdrawn from the trial and was no longer present to answer the allegations against her. No attempt was made to secure her presence to deal with the question of costs. It is again trite and a matter of elementary law that the *Audi Alteram Partem* rule, that is to say, no one should be condemned without being heard is the bedrock foundation of the justice of our legal system There is no need to rely on any authorities for that elementary proposition of law, but if any is required one need not look further than *Techniquip (Pvt) Ltd v Allan Cameron Engineering (Pvt) Ltd* 1994 ZLR 246.

Having said that, I am convinced beyond question, that there is absolutely no merit in plaintiff's claims which are accordingly dismissed with costs.

Coghlan, Welsh & Guest, plaintiff's Legal Practitioners
Hove and Associates, and Magwaliba Matutu and Kwirira, 1st defendant's legal practitioners
Civil Division of The Attorney General's Office, 3rd defendant's legal practitioners