

DARLINGTON SIREWU
versus
WAYNE (GALLOP) SWALES
and
MINISTER OF LANDS, LAND REFORM
AND RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHIWESHE JP
HARARE, 21 & 26 September 2011

The applicant in person
Adv uriri & J. Shekede, for the first respondent
Mr *T. Mudonhi*, for the second respondent

CHIWESHE JP: In this urgent chamber application, the applicant seeks in the main the eviction of the first respondent and all those claiming through him from a certain piece of land known as plot 2, of subdivision A of Hunyani East, popularly known as Malaba Farm (“the farm”).

The facts of the matter according to the applicant are as follows. He was allocated the piece of land the subject matter of the present dispute by the second respondent by means of an offer letter dated 8 of the second respondent. He was to hold on to the offer letter until such a time as a lands officer would be assigned to accompany him to view the farm. In September 2008 a lands officer took him to the farm. He found that the first respondent was in occupation of the land allocated to him, which included the farm house, tobacco barns and grading sheds. The first respondent requested of the lands officer a grace period of one year during which time he would be winding up his farming operations. The first respondent had said he could not abandon his operations at that stage because he was servicing on agricultural loan obtained from a bank. The lands officer then instructed the applicant to allow the first respondent a year’s grace period up to the end of September 2009. The applicant says he agreed to do so and left the farm.

In September 2009 the applicant approached first respondent who flatly refused to move out as agreed saying he had the District Administrator’s authority to stay on. On checking with the DA’s office, the applicant was advised that no such authority had been given.

Since then all attempts by the applicant to take occupation of the farm have met with resistance including physical violence. The applicant states that despite lodging reports with Darwendale Police Station no action was taken. To date he is unable to take occupation of the farm. For this reason he has approached this court for urgent relief.

The second respondent filed an affidavit sworn to by Marius Dzinoreva, the Director of Acquisition in the Ministry of Lands, and Rural Resettlement in which it is stated *inter alia* that :-

- “3. Applicant has a valid offer letter for the property in question.
4. 1st respondent does not have lawful authority to occupy or utilise the property.
5. The Supreme Court has indeed indicated in SC 31/10 that holders of offer letters should be assisted to take occupation of the land they are offered.
6. In the premise, the application is not opposed.”

The first respondent opposed the application. He raised a point *in limine*, namely that the application should not be heard on an urgent basis. I will return to this issue later.

On the merits the first respondent avers as follows. He is improperly cited as the first respondent in this matter as he is in occupation not in his own right but as an employee of Sagar Farming (Pvt) Ltd (“the company”). The company leases the farm from L.D. Harvey (Pvt) Ltd. The lease agreement, copy of which is filed of record, has been in place since 1997. His parents own Sagar. The first respondent and his brother have equity in that company. His father however, has since been offered plots 2 and 6 of the farm and “to that limited extent” Sagar claims occupation through his father. To the extent that Sagar occupies the land through Harvey (Pvt) Ltd, the correct respondents, so argues the first respondent ought to be Harvey (Pvt) Ltd and Sagar (Pvt) Ltd. For this reason, the first respondent argues that the claim against him must be dismissed.

The first respondent denies being violent towards the applicant. He states that Sagar’s occupation of the farm has been “with the blessings of the State” citing a letter from the Ministry of Local Government dated 26 October 2010 addressed to the Provincial Lands Officer, Mashonaland West wherein it is recommended that applicant’s father, A.D. Swales, and eleven other “white farmers”, be allowed to remain on their respective farms and further that offer letters in their favour be processed. Assurances according to the first respondent have also come from the District Administrator who has confirmed that the stay of Sagar is lawful. Sagar was also assured of its stay by the support it received from the local lands committee. It was told that it could continue farming notwithstanding the applicant’s purported possession of an offer letter.

The first respondent chronicled a number of incidents involving the applicant's misdemeanours at the farm during the year 2010 such as break-ins, violence and malicious injury to property.

The first respondent states that they presently grow 55 hectares of tobacco. They have tobacco barns and curing facilities. There are sheep and goats numbering 70. 6 hectares of eucalyptus has been planted and more hectares will be planted next year. There are 250 permanent employees on the farm. The first respondent further states that there is a loan facility to the tune of \$480 715.00 to finance the current season. A new centre pivot, new shed and other infrastructure was put up during the last two years at a total cost of \$160 000.00. A further 55 hectares of tobacco was planted on 14 September and a similar hectrage will be planted on 17 October 2011. Stopping all these operations at short notice would mean financial disaster on Sagar, he states.

I agree with the applicant that the first respondent has no valid defence to the applicants' claim. Firstly, it is not in issue that the farm was acquired by the State. It therefore falls into that category of property commonly referred to as "gazetted land". Secondly, the applicant is in possession of a valid offer letter to occupy and utilize the farm or such portion thereof. The second respondent, the acquiring authority, has confirmed this fact. Thirdly, the first respondent, as confirmed by the second respondent, has not been authorised by means of an offer, a land settlement lease or a permit issued by a competent authority to occupy or utilise the farm.

On the face of it therefore the first respondent is in occupation of gazetted land without lawful authority. It is a criminal offence to do so. He has in open defiance of the law held on to such occupation since 2007, a period of four years.

The first respondent avers that he has the authority of the District Administrator to remain in occupation. He also has the support of the local land committees. However, none of these persons or structures are competent authorities in the allocation of gazetted land. That is the preserve of the acquiring authority, the second respondent. The DA or land committees can only make recommendations to the acquiring authority as to who they wish considered for resettlement in their area. In this case the second respondent has not acceded to such request, if any, with regards the first respondent. On the contrary, the second respondent has categorically stated that the first respondent has not been authorised to occupy this farm or portion thereof. Clearly the first respondent has no leg to stand on. His legal position may be summarised by reference to certain pronouncements by the Supreme

Court in the case *Commercial Farmers Union and 9 Others v The Minister of Lands and 6 Others* SC 31/10 wherein it was held at pages 21 and 23 of the cyclostyled judgment that:

“On the other hand, s 3 of the Act criminalises the continued occupation of acquired land by owners or occupiers of land acquired in terms of s 16 B of the Constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the Act that the individual applicants as former owners or occupiers of the acquired land have no legal rights of any description in respect of the acquired land once the prescribed period has expired.”

And it was held further that:

“The holders of offer letters, permits or land settlements leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants as former owners or occupiers of acquired land lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holders of offer letters, permits or land settlement leases. Given this legal position it is the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights.”

The first respondent argues that he is wrongly cited in the application as he is not the owner of the farm but merely an employee of a tenant company. I disagree. The first respondent is in physical occupation of the farm and therefore an “occupier” in terms of the land laws of the country. In his personal capacity he has no authority to occupy the farm neither has Sagar the tenant company for which he works. The “landlord” Harvey (Pvt) Ltd is a former owner. It no longer holds any rights over the farm and as such cannot lease it to anyone. I would accordingly dismiss the first respondent’s defence in that regard.

I now return to the issue of the point *in limine* raised by the first respondent, namely, that the application is devoid of urgency. The applicant is a self-actor. He filed under his own hand a certificate of urgency in his own case. In terms of the rules, only a legal practitioner by virtue of his position as an officer of this court, is competent to issue a certificate of urgency in a matter in which he has no interest. The applicant is not a legal practitioner and worse still his interest in the outcome of the matter is obvious. A certificate of urgency issued under his hand would be incompetent for conflict of interest.

However, this court has previously held that matters pertaining to land disputes should be heard on an urgent basis. I agree with BHUNU J when he held in *Hudson Zhanda and Anor v T.J. Greaves (Pvt) Ltd and 2 Ors* HH - H - 11 (HC 6257/11) as follows:

“Having regard to the importance of land disputes, the need to provide order, peace and tranquility and the restoration of legality on the land, there is need to resolve such disputes with a measure of urgency.” And further the learned judge observed that “A perusal of land cases in this court will show that the bulk of land cases are dealt with on an urgent basis.”

It was for these reasons that notwithstanding the applicant’s failure to strictly abide by the rules of the court, I condoned that failure in the wider interests of public policy. In any event this is not a case in which the applicant had sat back over the years doing nothing about his occupation of the farm. It has been shown that the applicant worked in cooperation with the lands office whose advice he followed. It was the first respondent’s intransigence and resistance that prevented the applicant’s timely occupation. Indeed the first respondent was actively encouraged by the District Administrator and the Lands Committee to defy the applicant’s legitimate demands. Sight must not be lost of the fact that it is the first respondent who is on the wrong side of the law. It would be wrong and improper for this court to prolong this illegality on the part of the first respondent merely because the technical requirements of a certificate of urgency have not been met.

For these reasons this application must succeed. The applicant wishes to have the first respondent evicted forthwith. I do not think that it would be fair or prudent to do so. The first respondent moral’s blameworthiness is somewhat reduced by the encouragement he received from the Ministry of Local Government (DA’s office) and the lands committee. He has planted about 100 hectares of tobacco which crop is at different stages of maturity. The applicant has not disputed this fact. I am therefore inclined to the view that it would be just and equitable to give the first respondent reasonable time to wind up his activities on the farm. In view of the illegality of his occupation he should not expect to be given anything more than the minimum reasonable time.

Accordingly to that extent the application succeeds and it is ordered as follows:

1. That the first respondent and all those claiming through him be and is hereby ordered to vacate the farm, namely a certain piece of land known as plot 2 of subdivision A of Hunyani East, popularly known as Malaba Farm, on or before 30 April 2012, failing which the Deputy Sheriff be and is hereby authorised to evict the said first respondent and all those claiming through him from the said property.
2. The Deputy Sheriff may enlist the assistance of the Zimbabwe Republic Police in the enforcement of this order.
3. The first respondent shall pay the costs of this application.

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HH 111-12
HC 9055/11

Messrs Wintertons, first respondent's legal practitioners