

BRIAN ANDREW CAWOOD [No.2]
versus
ELASTO MADZINGIRA
and
MINISTER OF LANDS & RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MAWADZE J & MAFUSIRE J
MASVINGO, 31 May 2017 & 6 September 2017

Civil appeal

Mr *J.G. Mupoperi*, for the appellant
Mr *R. Chavi*, for the first respondent
Mr *L.T. Muradzikwa*, for the second respondent

MAFUSIRE J:

- [1] On 31 May 2017 we dismissed the appellant's appeal with costs. We promised to provide our reasons within fourteen days. Regrettably, the period proved too ambitious. We had not reckoned with a workload build-up in the days that followed.
- [2] The appeal was against an order granting the first respondent [plaintiff in the court *a quo*] an order to evict the appellant [first defendant in the court *a quo*] from a certain homestead.
- [3] The dispute in the court *a quo* stemmed from the all too familiar problem associated with the land reform programme embarked upon by Government since year 2000 whereby it has been compulsorily acquiring predominantly White-owned farms and re-distributing them to predominantly Black beneficiaries. The former owners, perhaps not unexpectedly, would resist, in some cases, not only the acquisition itself, but also the obligation cast on them by operation of the law to vacate the Gazetted land within certain time-frames.
- [4] In this case the dispute was not over the acquired farm *per se*, but on the farmhouse on it, or one of such premises.

- [5] The appellant, or the company named after him, was the former owner of the original piece of land, Lot 21A of Nuanetsi Ranch in Mwenezi, Masvingo Province. It was compulsorily acquired on a date undisclosed on the papers, but prior to 2007.
- [6] The first respondent was one of several beneficiaries allocated pieces of land on the property. It appears that the original piece of land, following more than one re-organisation, had ultimately been split into 11 or 12 sub-divisions.
- [7] In addition to the subdivision allocated to him, the second respondent [second defendant in the court *a quo*] also leased to the first respondent, under a written lease agreement for five years, the homestead on that farm. The lease agreement described the leased property as “... *a homestead on Lot 21A N.R.A in on land [sic] measuring +/- 224m² approximately situated in the district of Mwenezi as depicted on the map attached hereto. The site with the said buildings and improvements in hereinafter referred to as [“the leased premises”]*” [sic].
- [8] The first respondent complained that the appellant was refusing to move out of the homestead. In October 2015 he instituted ejectment proceedings in the magistrate’s court. He first proceeded by way of an application. The court decided there were irreconcilable disputes of fact. It referred the matter to trial.
- [9] Essentially the issues before the court *a quo*, from the pleadings and the evidence led, were basically two-fold, firstly, the actual identity and exact location of the farmhouse; and, secondly, whether or not the appellant did also have “lawful authority” to remain on a portion of the farm, the remaining extent of the original whole.
- [10] On the first issue, the appellant argued that the so-called lease of the farmhouse was so vague and so defective as to be incapable of enforcement because it referred to a farmhouse on Sub-division 10, Lot 21A of Nuanetsi Ranch, yet the only State land homestead on the whole farm was on Sub-division 11.

[11] On the second issue, the appellant relied on a certain letter to himself by the then Provincial Chief Lands Officer for Masvingo way back in April 2007. The letter stated that the original property, then measuring 14 713 hectares, had been Gazetted and was now State land; that out of it, 9 683 hectares had been allocated to A2 beneficiaries, and that the remaining 5 030 hectares had been left for Cawoods Ranch [Pvt] Ltd which was still to receive an offer letter [*emphasis added by us*].

[12] The relevant text of the letter read as follows:

“Lot 21A of Nuanetsi Ranch, which is 14713 hectares in extent was gazetted and is now state land. Out of the total hectarage, 9683 hectares were allocated to seven [7] A2 beneficiaries. All of them have been issued with offer letters by the Acquiring Authority. The Remaining Extent of the above named farm measuring 5030 hectares was left for Cawoods Ranch [Pvt] Ltd and you are still to receive an offer letter from the Minister of State Security, Lands, Land Reform and Resettlement.

The following are the beneficiaries who have been issued with offer letters.
.....

With this in mind, may you please allow the above named A2 beneficiaries of the Land Reform Programme to operate freely without interference in their respective allocated plots. Furthermore, to that, may you restrict your operations to the Remaining Extent [R/E] of Lot 21A of Nuanetsi Ranch.”

[13] The argument by the appellant on the second issue aforesaid was that the letter constituted lawful authority for his continued occupation of a portion of the farm, including the farmhouse, and that at no stage had the Government revoked it. He relied on the case of *Rodgers v State* HB 47/15.

[14] The witnesses that gave evidence at the trial were the first respondent; one Boas Vurayayi [**“Boas”**], who was the Acting District Lands Officer for Mwenezi; and the appellant’s representative, one Jason Leanders [**“Jason”**] who was acting through a power of attorney given by the appellant.

[15] On the first issue, the court’s findings were that the lease was authentic; that as between the first and second respondents, there was no confusion as to which exactly were the premises the lease referred to, and where exactly they were situated. In the course of its judgment the court said:

“There is therefore evidence to conclude that the homestead which is the subject matter is the one on the map and that it is occupied by the first defendant.”

[16] On the second issue, in the course of its judgment, the court *a quo* said:

“Mr Mupoperi submitted and supported the submission with case law, that the letter amounts to lawful authority. No doubt it does. A letter of this wording indeed amounts to lawful authority regard being had to the decision of Makonese J in Dudley Rogers vs The State HB 47/15. On the other hand the plaintiff has a lease. It is no doubt a lawful authority and it pertains to that same homestead. One might ask, which lawful authority is more lawful than the other? The one dated 2007 was a precedent to the issuing of an offer letter. Now it's 2016, and no offer was issued. Why? The answer lies in the evidence of Boas Vurayayi.”

[17] Relying largely on Boas' evidence, the court held that the letter of 2007 by the then Provincial Chief Lands Officer had been overtaken by events; that the issue of caretakership that it related to had long since been phased out; and that it was the second respondent, as the acquiring authority, who was best placed to say who should occupy the farmhouse.

[18] On 5 December 2016 the court granted the order of eviction. The appellant appealed. He challenged the magistrate's findings and said [in our own words] that the purported lease was not the one the second respondent had given to the first respondent; that having found that the appellant also had lawful authority to stay on the farm, it was wrong to order his eviction; that it was wrong to say that the letter of 2007 had been overtaken by events in the absence of an express revocation communicated to him; and that without a proper description as to whether the homestead referred to in the lease was one residential dwelling, or several residential dwellings, the eviction order was manifestly a *brutum fulmen*.

[19] We dismissed the appeal because it lacked substance. The appellant was just nit-picking. The whole appeal was just about form over substance. The homestead from which the appellant was to be evicted had sufficiently been debated and identified in, and by, the court *a quo*. It could not be identified merely or solely by reference to the

area, which was stated as +/- 224m², but also by reference to the map that depicted, among other things, the extent of the land covered.

- [20] The lease agreement clearly defined the homestead, not only as one measuring +/- 224m², but it also said “... *approximately situated in the district of Mwenezi as depicted on the map attached hereto ...*” It also said “... *the site with the said buildings [not just building] and improvements ...*” would be “... *the leased premises.*”
- [21] So the lease agreement itself, the bedrock of the eviction proceedings, recognised that the homestead was more than just one dwelling. The magistrate concluded that there was evidence that the homestead was the one on the map. That map was produced. It referred to a rectangle with a cluster of buildings. Those were the structures the first respondent wanted the appellant evicted from.
- [22] In *Rogers’* case, the appellant, Rogers, had been convicted in the magistrate’s court for contravening the provisions of the Gazetted Lands [Consequential Provisions] Act, *Cap 20:28* [“*the Gazetted Lands Act*”], in that he had refused to vacate his farm after it had been compulsorily acquired. He had relied on some verbal assurances given him by officials from the Ministry of Lands, the acquiring authority, that he could stay on a portion of the farm that was depicted and endorsed on a map as the remaining extent of the farm. He had specifically been requested to assist the several beneficiaries who had been allocated portions of his farm. He had also been handed over a copy of the endorsed map.
- [23] The one issue before the court on appeal in *Rogers’* case was whether or not that map, coupled with those verbal assurances from the Ministry officials, constituted “a permit”, or the lawful authority for his continued stay on the acquired farm, given that in terms of the Gazetted Lands Act the lawful authority to hold, use or occupy Gazetted land is in the form of either an offer letter; a permit or a land resettlement lease.

- [24] At the time of Rogers' arrest and prosecution, there were no statutory provisions setting out the form and content of a permit. These were only incepted in 2014 in the form of the Agricultural Land Settlement [Permit Terms and Conditions] Regulations, 2014, SI 53/14. Among other things, these Regulations not only specify that a permit has to be in writing, but also they provide a pro-forma or specimen of the permit.
- [25] On appeal, MAKONESE J, sitting with TAKUVA J, overturned the conviction on the basis that the appellant had been entitled to rely on that map and the verbal assurances as his lawful authority, given that SI 53/2014 had not yet been promulgated.
- [26] *Rogers'* case, which the appellant continued to rely on even in this appeal, is clearly distinguishable. Firstly, it was a criminal case. As such, the appellant's guilt had to be proved beyond any reasonable doubt. Clearly that could not have been the case where, among other things, he had been entitled to rely on the defence of claim of right.
- [27] Rogers had the endorsed map given to him by those Government officials who were tasked to administer the piece of legislation in question. At the time the Government had not yet put it in black and white what constituted a permit.
- [28] In contrast, the present case was a civil dispute. All that the first respondent needed to do, which he did, was to prove on a balance of probabilities that he was entitled to relief. In *Commercial Farmers' Union & Ors v Minister of Lands & Ors*¹ the Supreme Court, sitting as a Constitutional Court, held that the holder of an offer letter, permit or land lease has the *locus standi*, independent of the acquiring authority, to sue for the eviction of any illegal occupier of land allocated in terms of the offer letter, permit or lease.
- [29] Secondly, in this case, even though 5 030 hectares of the designated farm had been left for the appellant's company, the letter of April 2007 itself unequivocally said the appellant was still to receive an offer letter from the then Minister of State Security, Lands, Land Reform and Resettlement, the then acquiring authority. It was common cause that the appellant had never got it. Nobody said why. But without being in

¹ 2010 [1] ZLR 576 [H]

possession of any of the three instruments constituting lawful authority, it was manifestly preposterous to press the argument that the appellant had lawful authority to remain on the Gazetted land in the face of SI 53/2014.

[30] Thirdly, and perhaps most importantly, the court *a quo* noted, quite correctly, that Jason Leanders, had admitted that he had seen a letter nullifying the previous offer. On pages 35 – 36 of the record of proceedings was this exchange:

“Q Have a look on this D2 – It authorises [the appellant] to be on the farm?
A Yes.

Q It says Cawood is to receive [an] offer letter?
A Yes.

Q Did you receive the offer letter?
A No.

Q Why not?
A I did not find out.

Q So you have not yet received the offer letter?
A Yes [evidently meaning *No*].

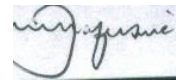
Q You have been shown a letter **nullifying the previous offering to you?**
A **I saw it last week.**

Q What [were] the contents?
A I can't recall.

Q Here it is. Please read it.
A [objected to]”
[*Emphasis added by us*]

[31] We could find no fault with the decision of the court *a quo*. In the absence of any lawful authority, the appellant had no right to remain on the Gazetted land or to remain occupying the homestead which had been leased to the first respondent.

[32] It was for these reasons that we dismissed the appeal with costs.

A handwritten signature in black ink, appearing to read 'M. J. Mawadze', is written over a horizontal line.

Hon Mawadze J: I agree _____

Saratoga Makausi Law Chambers, legal practitioners for the appellant
Kwirira & Magwaliba, legal practitioners for the first respondent
Civil Division of the Attorney-General's Office, legal practitioners for the second respondent