

DISTRIBUTABLE (72)

Judgment No. SC 91/04

Civil Application No. 366/03

EDWARD T CHINDORI-CHININGA v
BALLY CARNEY (1991) (PRIVATE)
LIMITED

SUPREME COURT OF ZIMBABWE
HARARE, JUNE 2 & OCTOBER 12, 2004

J S Mandizha, for the applicant

J B Wood, for the respondent

Before: MALABA JA, In Chambers, in terms of s 31 of the Supreme Court of Zimbabwe Rules

This is an application for an extension of time within which to note an appeal against the whole judgment of the High Court delivered on 27 October 2003 and condonation of non-compliance with the Rules of Court. In the judgment sought to be appealed against, the court *a quo* made an order in favour of the respondent, to the effect that the applicant and all those claiming occupation through him of Ballycarney Farm be evicted by the Deputy Sheriff and the police be authorized to assist the Deputy Sheriff to execute the order.

It is common cause that before 22 May 2002 the respondent owned subdivision C of Barwick Estate, situated in the district of Mazoe measuring approximately 1278.93 hectares in extent (“the land”). The land was compulsorily acquired by the State for resettlement purposes on 22 May 2002, in terms of an order of acquisition made and served on the respondent by the acquiring authority in terms of subs (1) of s 8 of the Land Acquisition Act [*Chapter 20:10*] (“the Act”). The order followed the publication of the preliminary notice of the intention to acquire the land and submission by the respondent to the acquiring authority of a written objection to the proposed acquisition.

On 21 June 2002, and within thirty days of the date of service of the order of acquisition, the acquiring authority made an application to the Administrative Court for an order confirming the acquisition of the land as is required by the provisions of subs (5) of s 7 of the Act.

The legal effect of the service of the order of acquisition on the

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respondent on 22 May 2002 was that rights of ownership in the land were immediately vested in the acquiring authority and notice given to the respondent of its obligation, in terms of s 9(1)(b) of the Act, to vacate the land at the end of forty-five days and the living quarters on the land at the end of ninety days from the date of service of the order of acquisition.

The period of ninety days expired on 22 August 2002 and the continued occupation of the land and the living quarters by the respondent thereafter constituted a criminal offence under s 9(1)(b) of the Act.

It is also common cause that the acquiring authority, in the exercise of rights of ownership under s 8(2)(b) of the Act, allocated the land to the applicant for agricultural purposes. When he sought to take occupation of the land on 13 October 2003 the applicant met resistance from the respondent, represented by its manager. On 23 October 2003 the respondent made an application to the High Court, without any reference to the acquiring authority, for an order of eviction against the applicant and all those claiming the right of occupation to the land through him.

In granting the application, which was opposed, the learned judge in the court below said:

“There is no doubt that the applicant is entitled to carry out its lawful business activities at the farm pending the determination of the application made by the acquiring authority to the Administrative Court. There could be no legal basis for any interference by the respondent in those lawful activities. That the respondent does not dispute. His contention is only that he is authorised to take over the farm by virtue of a letter addressed to him in which the acquiring authority offered him the same farm.”

The applicant averred that he had sight of the judgment on 3 December 2003 and, believing that the time within which he was obliged to file a notice of appeal was reckoned from the date he had knowledge of the judgment, he had purported to file the notice of appeal against the order of eviction on the same day. As he ought in fact to have filed the notice of appeal within fifteen days of 27 October 2003 he was out of time by thirteen days. He said the mistaken belief that the notice of appeal had been filed timeously had been strengthened by an application made by the respondent to the High Court on 9 December 2003 for leave to execute pending appeal. The application was granted in case HC 11096/03 on 14 February 2004. He noted an appeal against that order in case SC 52/04.

There is no explanation for the delay up to 11 May 2004 when the application for an extension of time within which to note the appeal was then made. The delay is clearly inordinate. No affidavit was filed from the applicant’s legal practitioner to explain the delay. It is, however, possible that by purporting to have filed the notice of appeal timeously on 3 December 2003, and subsequently having him oppose the application for leave to execute pending “appeal”, the applicant’s legal practitioner misled the applicant into believing that there had been proper compliance with the rules of court. The fault was therefore with the legal practitioner.

In *Talbert v Yeoman Products (Pvt) Ltd* S-111-99
MUCHECHETERE JA said at p 5 of the cyclostyled judgment:

“It is clear from the above that the fault in this matter was that the applicant’s counsel and not of the applicant himself. In these circumstances the courts usually take the view that a client ought not to be punished for the ‘sins’ of his legal representative unless he connived with the legal representative in the commission of the sins or sat back and did nothing when he became aware of the impending default.”

The applicant cannot be accused of having sat back and done nothing when he became aware that the appeal had been noted out of time.

The prospects of the appeal succeeding are good. The respondent could not have been carrying out lawful business activities on the land when it made the application for the order of eviction against the applicant because its occupation of the land at the time constituted a criminal offence under s 9(1)(b) of the Act. The period of ninety days from the date of service upon it of the order of acquisition within which it had a right to remain in the living quarters had long expired.

All rights of ownership in the land had vested in the acquiring authority, which had the power to allocate it to whomsoever it chose for agricultural purposes, notwithstanding the pendency of the application for an order confirming the acquisition before the Administrative Court. In this case the acquiring authority had allocated the land to the applicant. The respondent had no right to have the applicant evicted from the land when the acquiring authority regarded its continued occupation of it a criminal offence. Section 9(1)(b) of the Act required the respondent to stop all farming operations on the land at the end of forty-five days and to have vacated the living quarters at the end of ninety days from the date of service of the order of acquisition upon it, notwithstanding the fact that the application for an order confirming the acquisition was pending before the Administrative Court.

The legal effect of the obligation to cease to occupy, hold or use the land at the end of the periods prescribed in s 9(1)(b) of the Act is that no right at all could be claimed by the respondent to remain on the land from the fact that an application for an order confirming the acquisition was pending determination by the Administrative Court. *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture and Rural Resettlement and Ors* S-36-04 makes the point that orders of the nature granted in this case to a former owner or occupier of acquired land who is in open defiance of the law by remaining on the land at the end of the period when he was required to have vacated give a stamp of approval to illegality.

In the result, the application is granted and an order made in terms of the draft.

Mandizha & Co, applicant’s legal practitioners
Byron Venturas & Partners, respondent’s legal practitioners