

CORNIEL DUBE

Versus

GEORGE GRAHAM

And

OFFICER-IN-CHARGE, MBEMBESI POLICE STATION

And

DEPUTY SHERIFF FOR BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 24 JULY 2009 AND 15 JULY 2010

G Nyoni, for the applicant
J James, for the 1st respondent

Opposed Application

NDOU J: The applicant is the Chief Lands Officer for Matabeleland North. On 8 November 2006 he was allocated by the Minister of Lands a piece of land known as R/E of Three Fountains in Umguza measuring approximately 929 hectares under land reform programme. He took occupation in November 2006 and he is still there. He occupies the main farm house. The farm owner at the time the applicant was allocated was one William Ernest McNair. Upon acquisition of the farm by the applicant the said Mr McNair moved out of the farm "for fear of being arrested" for remaining in the land after its acquisition. The 1st respondent moved his cattle on the farm. There is a dispute as to when he did so. It is applicant's case that he did so after he (i.e. applicant) had taken occupation of the farm. The 1st respondent's case is that he did so before the applicant took occupation. Be that as it may, in paragraphs 5.5 to 5.6 of the opposing affidavit the 1st respondent avers:

- "5.5 However Mr McNair moved off his farm for fear of arrest.
5.6 I became aware of this situation and spoke to Mr McNair as I wanted to be settled on his farm."

It is clear that the 1st respondent came into the picture after the applicant had surrendered his possession of the farm. It is not clear how he allegedly acquired the farm.

What can be discerned from the opposing papers is that by some arrangement with Mr McNair he ended up on the land. 1st respondent does not disclose the nature of this arrangement. It is not stated whether it was sale or lease. It is not averred whether the transfer from Mr McNair to 1st respondent was done in terms of the relevant statutory provisions. In his "To whom it may concern" letter dated 20 October 2006, Mr McNair states-

"... We have appointed Mr George Graham to act on our behalf [*sic*] in the resuscitating of farming operations and to ensure the security of the above farm and due operations."

This implies that 1st respondent was acting as an agent of Mr McNair. It can be discerned from paragraph 6 of his opposing affidavit that the 1st respondent was on the farm at the behest of Mr McNair whilst he waited for his application to be settled on the farm to be determined by the Minister of Lands, Land Reform and Resettlement. This was not to be as the latter in his wisdom allocated the disputed land to applicant. The 1st respondent is clearly not satisfied by the turn of events. He has however, not bothered to seek remedy by way of a review of the decision of the Minister. Instead he has chosen to defiantly remain on the farm because he believes that the applicant used his office to corruptly and clandestinely have the farm allocated to him.

On the above facts, it is clear that Mr McNair left the farm on his own accord fearing his arrest and possible prosecution and eviction under section 3 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28]. This being gazetted land, the parties' position on the farm is determined by what the law allows the acquiring authority and former owner to do on the farm after the acquisition – *Ferrera & Anor v Nhandara* HC3995/08. Section 3(1) of the Gazetted Land Act provides that:

"Subject to this section, no person may hold, use or occupy, gazetted land without lawful authority". In terms of section 2 "lawful authority" means –

- (a) An offer letter; or
- (b) A permit or
- (c) A land settlement lease"

It is common cause that the 1st respondent (and by extension his principal, Mr McNair) does not occupy the land in question by lawful authority, but by defiance of the law and the acquiring authority. In the circumstances, Mr McNair through that defiance would be entitled to be evicted from the homestead by due process of the law. The acquiring authority is entitled to use the farm as it pleases as long as it does not interfere with the former owner's living quarters (homestead). The former owner has no *locus standi* to challenge the acquiring

authority's invitee's (i.e. applicant's) use and occupation of the farm land as long as it does not interfere with the living quarters – see also *Airfield Investments v Min of Lands, Agriculture & Rural Resettlement & Ors* SC 36-04. *In casu*, the former owner, Mr McNair, removed himself from the living quarters. The applicant then occupied the living quarters. Mr McNair did not seek to evict the applicant from the living quarters. Instead, he brought the 1st respondent into the picture via the letter alluded to above. Mr McNair had no lawful authority after its acquisition to allocate the land to the 1st respondent. The application for settlement by the 1st respondent does not give him lawful authority to be on the farm. He has no lawful authority in terms of the Act to be on the farm.

On the allegations levelled against the applicant, it is beyond dispute that there is no law preventing employees of the acquiring authority from being beneficiaries of the land reform programme. The acquiring authority would be expected to have known that the applicant was one of its senior employees in Matabeleland North at the time it allocated him the farm. Even if it is accepted that the applicant clandestinely and corruptly manipulated his acquisition of the farm, (I make no such finding), this would not give 1st respondent a right to occupy the farm. In any event, the allocation to the applicant was never formally challenged by the 1st respondent or his principal, Mr McNair.

In light of the above I agree with applicant that there is no material dispute of facts. Issues raised by the 1st respondent and supported by a Mr Gibson Siziba are not material for the resolution of the dispute before me. In any event, Mr Siziba's status in this matter is not clear. He claims to be a chairperson of "anti-corruption unit of war veterans audit unit in Matabeleland South." The land in dispute is in another province i.e. Matabeleland North with its own similar structures. If there was merit in these allegations of applicant's corruption in the allocation it is the latter province's structures which would have dealt with the matter. But the bottom line is that the issues here are of a legal and not factual nature. The applicant has established his case and I accordingly order as follows:

- (a) That the 1st respondent and all those claiming through him be and are hereby ordered to forthwith vacate applicant's allocated land known as sub-division R/E of Three Fountains measuring approximately 929 hectares together with his cattle and all his other livestock that may be thereat.
- (b) That should the 1st respondent fail to comply with paragraph (a) above within 48 hours of the service of this order on him, 2nd respondent with or without the aid of the 3rd respondent be and is hereby ordered to proceed to applicant's farm and thereat drive out 1st respondent, his workers and his livestock there from.

- (c) That 1st respondent be and is hereby barred and interdicted from entering or in any way interfering or disturbing applicant's occupation of his allocated farm stated in paragraph (a) above, unless with the express written consent of the applicant.
- (d) That 1st respondent be and is hereby barred and interdicted from fetching firewood, digging manure or taking anything mentioned in paragraph (a) above except with the express written consent of the applicant.
- (e) That 1st respondent to pay costs of this application on the ordinary scale.

Moyo & Nyoni, applicant's legal practitioners

James, Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners