

BRIAN DAVIES

Versus

FLOYD AMBROSE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE AND TAKUVA JJ
BULAWAYO 17 FEBRUARY 2020 & 19 MARCH 2020

Civil Appeal

MAKONESE J: This is an appeal against the whole judgment of the magistrate sitting at Bulawayo handed down on the 25th January 2019.

The background to this matter is that the appellant is the former owner of a farm known as Tabas Induna Farm, Umguza (hereinafter referred to as the farm). The farm was acquired by the Government of Zimbabwe under the Land Reform Programme and in terms of the Land Acquisition Act (Chapter 20:10) during the year 2002. Upon its acquisition, the land was subdivided into several Lots and distributed to several beneficiaries. The respondent was allocated Subdivision Lot 15 of Tabas Induna in Umguza by way of an offer letter. The respondent's farm shall be referred to as "Lot 15." The offer letter is dated 16th July 2010 and was issued under the hand of the then Minister of Lands and Rural Resettlement. The appellant, as the former owner of the farm remained in occupation of what is known as the remaining extent of Tabas Induna Farm, Umguza (hereinafter referred to as Lot "R").

Sometime in July 2015, the appellant and respondent entered into an agreement of swap in terms of which they agreed to swap occupation of their respective portions of Tabas Induna Farm. It is not disputed that the respondent at that time approached officers in the Ministry of Lands and Rural Resettlement who confirmed that the parties could proceed with the swap. The parties took occupation of their new portions while awaiting confirmation of the swap from the Ministry. The parties recorded their swap in a written Memorandum of Understanding dated 9th July 2015 in terms of which they ceded their rights of occupation to each other in respective portions of their allocated land, subject to consent being granted by the Ministry of

Lands and Rural Resettlement. In a letter dated 21 November 2018 the Ministry of Lands confirmed the swop in the following terms:

“21 November 2018

*Webb, Low & Barry
11 Luton Street
Belmont East
Bulawayo*

Attention: Mr Tshuma

Re: TABAS INDUNA FARM UMGUZA

Your letter in the above matter dated 12 November 2018 refers.

It is confirmed that the Ministry officials in the province were informed of the swop and had advised Mr Davies to wait for the outcome of this application to remain on part of the farm in question before his agreement with Mr Ambrose could be acknowledged and formalized by the Ministry of Lands.

Mr Davies’s application is yet to be finalized by the Ministry of Lands. The Ministry is looking into the matter with a view to arriving at an equitable solution.”

The respondent subsequently made an application to the Magistrates Court seeking the eviction of the appellant on the grounds that the Memorandum of Understanding was illegal and therefore null and void. In a letter dated 9th October 2017, the respondent purported to cancel the Memorandum of Understanding in the following terms:

“With reference to the above matter,

With regards to the Memorandum of Understanding signed on the 9th of July 2015, I am obliged to inform you that that Memorandum of Understanding is null and void and Mr F Ambrose has withdrawn from such agreement with immediate effect.

*Please be advised to vacate Lot 15 of Tabas Induna Farm on or before the 15th of November 2017. So we revert to the status quo ante. Failure to vacate the property by 1st of November of 2017 will result in appropriate action being taken against you
.....”*

The respondent then instituted proceedings in the Magistrates Court for appellant's eviction from Lot 15 of Tabas Induna Umguza. The court *a quo* granted judgment in favour of the respondent. This appeal seeks to set aside the decision that was made in favour of the respondent.

In his Notice of Appeal, the appellant raises the following grounds of appeal:

1. The learned magistrate erred at law in finding that the Magistrates Court had jurisdiction to determine a matter under the Land Reform Programme.
2. The learned magistrate erred at law in finding that the plaintiff's failure to cite the Minister of Lands and Rural Resettlement was not fatal, material non-joinder.
3. The learned magistrate erred at law in finding that cession of plaintiff's right to occupy Lot 15 Tabas Induna Farm, Umguza to the defendant and the Memorandum of Understanding entered into between the parties on the 9th July 2015 was null and void.
4. The learned magistrate erred at law in failing to consider that the Memorandum of Understanding was extant until the approval of the swop by the Minister of Lands and Rural Resettlement which approval was still pending at the material time.

I shall consider each of the grounds of appeal in turn.

WHETHER THE FAILURE TO CITE THE MINISTER OF LANDS IS FATAL

It is common cause that the Gazetted Lands (Consequential Provisions) Act (Chapter 20:28) regulates all matters concerning the acquisition and allocation of gazetted land in Zimbabwe. In terms of this Act, the Minister of Lands and Rural Resettlement is appointed by the President to administer the Act as the acquiring authority. All matters relating to Gazetted Land are regulated by statute and the Minister of Lands is the authority appointed for the administration of all land acquired by the state under the Land Reform Programme.

It is now settled law that without the explicit authority from the legislation concerned, no other party may make decisions incidental to the administration of the Gazetted Lands (Consequential Provisions) Act (Chapter 20: 28) on behalf of the Minister as such power does not exist in terms of the Act.

In this matter the parties entered into an arrangement to swap land acquired in terms of the Land Reform exercise. The Minister, being the acquiring authority was advised of such swap. The Ministry of Lands officials confirmed the arrangement and indicated that they would await the approval of such a swap from the Minister. At the time the summons was instituted against the appellant in the court *a quo* the Minister's approval had not been obtained. Both appellant and the respondent admit that they sought approval from the Minister as the acquiring authority.

It is also settled law that the sole power to deal with gazetted land vests in the Minister who is the acquiring authority. In this matter, there can be no doubt that where a decision by the Minister is warranted, the non-joinder and failure to cite the Minister is fatal to the proceedings as this is in contravention of the Gazetted Lands (Consequential Provisions) Act which vests all authority in the gazetted lands with the Minister. This much appears to me to be common cause. Any party who purports to exercise any authority in relation to gazetted land, outside the Act, does so illegally. The respondent would clearly have no *locus standi* to institute action for the removal of the appellant from gazetted land. Such powers rest solely and squarely with the Minister. The Constitutional Court in *Tour Operators Business Association of Zimbabwe v Motor Insurance Pool and Others* 2015 (1) ZLR 965 (SC) outlined certain factors that would make the non-joinder of a Minister material to proceedings and thus rendering such non-joinder fatal to the proceedings. These factors may be summarized as follows:

- (a) Where one is seeking relief directly against the Minister.
- (b) When the relief sought calls into question the Minister's authority or the approval confirmed on him/her.
- (c) When the relief sought has a direct bearing on the Minister's powers or exercise of his discretion.

- (d) When the Minister's interest is not purely peripheral and any relief that may be granted will have an appreciable impact on his/her rights.

The court in that case observed that as a matter of procedure, it is trite that a party instituting any legal proceedings must cite every person who has a direct and substantial interest in the matter or who is likely to be prejudicially affected by the relief sought therein. The failure to do so is not necessarily fatal in every case in as much as the courts have an inherent discretion to cure any material non-joinder by giving such directions as may be just and appropriate for that purpose. This is recognized in Rule 87 of the High Court Rules, 1971.

In the present matter, the Minister of Lands has not yet exercised his discretion whether or not to approve the swop. He has not objected to the cession of exchange of rights proposed in the Memorandum of Understanding entered into between the parties. The purported cancellation of the agreement between the parties was ill conceived as both parties understood that the Minister's approval or objection was required in terms of their agreement. The court *a quo* was not vested with the powers to wear the shoes of the Minister in making a determination on the rights of the parties. The court *a quo* erroneously exercised a right not provided by statute. The power to deal with gazetted lands lies with the Minister of Lands and Rural Resettlement.

The failure to cite the Minister by the respondent is not explained by the respondent and the court *a quo* ought to have found that there was a material non-joinder of an interested party. The learned magistrate erred in finding that the Magistrates Court had the jurisdiction to make an order ejecting the appellant from Lot 15 Tabas Induna, Umguzu.

The magistrate in the court *a quo* reasoned that the basis for the ejection of the appellant from Lot 15 was that he did not have "lawful authority" as defined in section 2 of the Gazetted Lands (Consequential Provisions) Act. The court further ruled that appellant's occupation was unlawful in terms of section 3 of the same Act. It is important to note that section 3 (5) of the Gazetted Lands (Consequential Provisions) Act provides as follows:

“a court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from such land to which the offence relates”.

It is clear that section 3 of the Act envisaged a scenario where a competent criminal court convicts a former owner of Gazetted Land who continues to occupy that land, despite it having been gazetted. The criminal court in such circumstances is granted special jurisdiction in terms of the Act to also order an ejection of the former owner who is found guilty of that offence. Clearly in this case the appellant was not being criminally prosecuted in terms of section 3 of the Act by any criminal court. The appellant was not refusing to vacate gazetted land as envisaged in section 3 of the Act. The learned magistrate in the court *a quo* clearly misdirected himself and erred in purporting to exercise a power that is granted in terms of section 3 of the Act.

It is not in dispute that the state is vested with ownership of all Gazetted Land. The Minister of Lands and Rural Resettlement is authorized to issue offer letters to beneficiaries and such offers may be withdrawn by the Minister, at his discretion. The cession of rights in the gazetted land is not in itself unlawful but is subject to the approval by the Minister. This position is supported by the letter addressed by the Ministry on the 21st November 2018 to the appellant's legal practitioners. In that letter the Ministry officials specifically acknowledged that they were aware of the swap and that the exchange of rights in the lands was awaiting approval by the Minister. The court *a quo* therefore, did not have the discretion or power to declare such cession to be unlawful without the direction by the Minister. The Magistrates' Court is a creature of statute and section 11 (1) (b) (iii) of the Magistrates' Court Act (Chapter 7:10) provides that the court shall have the jurisdiction “in actions of ejection against the occupier of any house, land or premises situate within the province.”

By virtue of this provision, the court is not clothed with jurisdiction to deal with land matters which are governed by the Gazetted Lands (Consequential Provisions) Act.

DID THE MAGISTRATE ERR AT LAW IN FINDING THAT THE MEMORANDUM OF UNDERSTANDING WAS NULL AND VOID

It is my view, that there was nothing unlawful in the appellant ceding his rights to the respondent and *vice versa*. All the formalities of a cession were complied with the requirements are:

- (a) an agreement between the cedent and the cessionary to give and accept transfer
- (b) a right deriving to the cedent.
- (c) All the formalities of the law must be complied with.

See: *Madzima v Mate* HH 86/17 and *Botha v Fick* 1995 (2) SA 339 (A)

On the facts of the present case, there was a valid and binding agreement of cession as captured in the Memorandum of Understanding. The appellant and the respondent sought the consent of the Minister and notified him of the cession in writing. The respondent could not unilaterally terminate the agreement. The learned magistrate in the court *a quo* heavily relied on the cases, namely; *Commercial Farmers Union and Others v Minister of Lands and Rural Resettlement and Others* 2010 (2) ZLR 576 H and *Douglas Stuart Taylor – Freeme v The Senior Magistrate Chinhoyi and Another* CCZ 10/14. In the cited cases, the court dealt with the unlawful occupation of state land by former owners of the land. The thread that ran through these cases is that it was unlawful for the occupier of gazetted land to remain in occupation of that land without an offer letter or land settlement lease. In this matter the issue at hand is whether the appellant had the right to receive cession of Lot 15 for the respondent. In the event that the swop arrangement was not in compliance with any law, the Minister of Lands had the sole prerogative by virtue of statute to regulate in the appropriate manner, the use or occupation of such land. The court *a quo* arrogated to itself the power that it did not have in ordering the ejection of the appellant from the land in question.

The learned magistrate in the court *a quo* erred in relying on section 3 of the Gazetted Lands (Consequential Provisions) Act and the authorities cited in support of the decision to eject the appellant. The finding that the Memorandum of Understanding was void *ab initio* was erroneous. The Minister of Lands has not made any determination on the swop arrangement. The Minister, whose citation has a direct bearing in the matter was not joined in these proceedings. The non-joinder is fatal to the proceedings.

DISPOSITION

After a careful analysis of the factual background in this matter and the express provisions of the Gazetted Land (Consequential Provisions) Act, in particular section 3 thereof, it is my view that the court *a quo* erred in ejecting the appellant when the court did not have jurisdiction to do so. Further, and in any event, the failure to cite the Minister of Lands and Rural Resettlement by the respondent was a material non-joinder of an interested party. The learned magistrate's decision to eject the respondent is not sustainable at law.

I find merit in the appeal and order as follows:

1. The appeal is upheld
2. The judgment of the court *a quo* be and is hereby set aside and substituted with the following:
"The plaintiff's claim is dismissed with costs."
3. The respondent shall bear the costs of suit.

Takuva Jagrees

Webb, Low & Barry Inc. Ben Baron & Partners, appellant's legal practitioners
Messrs Job Sibanda and Associates, respondent's legal practitioners