HC 232/03

VERNON CHRISTOPHER EDWARD NICOLLE
versus
MINISTER OF LANDS, AGRICULTURE AND RURAL RESETTLEMENT
and
THE HONOURABLE MR JUSTICE HLATSHWAYO

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE, 24 January and 7 March 2003

Opposed Urgent Application

Adv. *A.P. de Bourbon S.C.,* for the applicant
Mr *Mutsonziwa*, for the 1st respondent
Mr *Mutizwa,* for the 2nd respondent

GARWE JP: In this application, the applicant seeks the leave of this court to institute proceedings against the second respondent and for an order (1) that he (i.e. the applicant) shall not be precluded from occupying, holding or using the land in question for farming operations and (2) that the respondent removes all his equipment from the farm within 78 hours of the order and further that he and all persons claiming right through him be evicted from the farm.

The farm in question, Lot 1 of Gwina in the Lomagundi District has been listed for acquisition, although in the relevant notices it has not been correctly described. Indeed the applicant admits this in paragraph 3 of his founding affidavit. The first respondent, during submissions, advised that the property was once known as Lot 1 of Gwina of Loverdale Estate but at a later stage was subdivided. The property registered in the name of the applicant is only part of the original estate. The applicant's property was further demarcated following the notice of acquisition issued by the first respondent and a portion was allocated to the second respondent. This explains why only a portion of 375 hectares forms the subject of the present proceedings.

There are two preliminary matters I need to deal with. The first is that in terms of Rule 18 of the Rules of the High Court of Zimbabwe no civil process of the court may be sued out against the President or against any of the Judges of the High Court without the leave of the court granted on court application being made for that purpose. Contrary to this provision, this application was filed as a chamber application. The result was that the respondents were not called upon to file any opposing papers. The submission by Advocate *de Bourbon* that as no response has been filed by either respondent, the respondents should be treated as being in default is therefore not tenable. It is not tenable because it was the applicant who employed the wrong procedure, resulting in a situation where the respondents were not called upon to file notices of opposition with the Court. The respondents had to make oral submissions at the hearing of the urgent application.

Having considered all the facts of this matter I have reached the conclusion that the failure to follow the correct procedure is one I can condone. In terms of Rule 4(c) I have the power to condone a departure from any of the provisions of the rules. Moreover in terms of Rule 229C the fact that an applicant has instituted proceedings by court application instead of chamber application, or vice-versa shall not in itself be a ground for dismissing the application unless there is evidence some interested party has or may have been prejudiced and such prejudice cannot be remedied by directions for the service of the application on that party. Accordingly I condone the failure by the applicant to follow the laid-down procedure.

The second issue relates to the combined nature of the application. It is not in dispute that the application for leave to cite the second respondent has been combined with a further application on the merits and in which interim relief is sought.

The purpose of Rule 18 is clearly to protect or shield judges from

vexatious litigation instituted against them in the very same court where they preside. Litigation can be instituted purely to embarrass a particular judge. The intention of Rule 18 is to ensure that that does not happen, unless leave is granted first. Rule 18 is, so to speak, a sifting mechanism. The intention clearly is that leave must be sought first before proceedings for the substantive relief are filed. Obviously the applicant applying for such leave must provide a proper basis upon which such leave should be granted. This might entail disclosing the basis upon which the judge in question should be made answerable. Only in the event of such leave being granted would the applicant then properly file civil proceedings seeking certain relief against the judge.

This is not what has happened in the present case. Rather than confine the application to one seeking leave of the court to cite the judge, the applicant has in addition dealt with the merits of the case against the judge and in the draft order seeks an order that he (i.e. the applicant) remains in occupation and that the judge (the second respondent) be ordered to remove all his equipment and that he and all persons claiming through him be evicted.

This I find most unacceptable. The procedure adopted in this case renders nugatory the provisions of Rule 18. Clearly a situation such as the present cannot be allowed. The possibility of prejudice to a judge cannot be discounted if a party is allowed to seek leave and simultaneously institute civil proceedings against a judge as has happened in this case. This is not the kind of departure that should be condoned. For that reason I will dismiss, for want of procedure, paragraphs 2, 3 and 4 of the interim relief sought by the applicant. In saying so however it should be pointed out that the facts disclosed by the applicant will be considered in order to determine whether or not such leave should be granted.

The facts which are common cause or at least not seriously in dispute are as follows. The farm has been listed for acquisition three

times. The notices in terms of section 5 were not served on the bondholder. A notice in terms of section 8 of the Land Acquisition Act [*Chapter 20:10*] was signed by the first respondent on 4 April 2002 and served on the applicant on 7 April 2002. On 30 June 2002 the second respondent was offered a subdivision of the applicant's farm which he accepted. On 6 May 2002 the first respondent had applied to the Administrative Court for an order confirming acquisition of the property. This was opposed by the applicant on 24 May 2002. On the 9th September 2002 the applicant filed an urgent chamber application seeking certain relief against the Minister of Lands, Agriculture and Rural resettlement, the Minister of Justice, Legal and Parliamentary Affairs and the Attorney-General of Zimbabwe. A provisional order was granted on 12 September 2002. The relevant portion of the interim order granted by consent reads:

> "Pending final determination of this matter, the acquisition order issued by 1st respondent on 4 April 2002 in respect of Lot 1 of Gwina shall not preclude the applicant from occupying, holding or using the land including all improvements thereon or from undertaking farming operations." (**the emphasis is mine**)

On 17 December 2002 a further notice in terms of section 8 was signed by the first respondent and served on the applicant on 24 December 2002. The second respondent moved onto the farm on 22 December 2002. On a date not disclosed during the hearing the first respondent re-served the notice in terms of section 5 of the Act on the bondholder. On 23 January 2003 the first respondent withdrew the confirmation proceedings before the Administrative Court.

The Land Acquisition Act has been amended on a number of occasions. For purposes of this application, the applicable provisions of the Act are the following:

(a) In terms of section 5 where an acquiring authority intends to compulsorily acquire land, he shall, *inter alia,* serve on the owner of the land and the holder of any other registered real right in that

land a notice in terms of that section (section 5(1)).

(b) The fact that a preliminary notice is not served on the holder of any real right in the land to be acquired at the same time it is served on the owner of the land shall not render the preliminary notice invalid as long as it is served on such holder *inter alia,* not less than 30 days before a notice of acquisition in terms of section 8(1) is made. (Section 5(9)(c) as amended by Act 10/02)

(c) Where an order made in terms of subsection (1) of section 8 in relation to any agricultural land required for resettlement purposes is or becomes invalid by reason of the failure (a) to serve a preliminary notice on the owner of any registered real right in the land or to apply to the Administrative Court for an order confirming the acquisition within thirty days after the coming into force of the order or for any other reason whatsoever, the service on the owner or occupier of the land of a subsequent order in substitution for the invalid order after the expiry of 90 days from the date of service of the invalid order shall constitute notice in writing to the owner or occupier to cease to occupy, hold, or use that land and his living quarters seven days after the service of the subsequent order on the owner or occupier and if he fails to do so, he shall be guilty of an offence (section 9(2) as amended by Act 10/02).

The issue that arises at this stage is the legal status of the notice of acquisition issued under section 8 on 4 April 2002 and served on 7 April 2002. It is not in dispute that at the time the notice was served no preliminary notice of acquisition had been served on the bondholder.

This court has previously held that the failure by an acquiring authority to serve the preliminary notice of acquisition on the holder of a registered real right renders the preliminary notice invalid – *Tengwe Estates v Minister of Lands, Agriculture and Rural Resettlement* HH 109-02.

A notice issued in terms of section 8(1) of the Act depends for its validity on the legality of the preliminary notice of acquisition. If the preliminary notice of acquisition is null and void, so too is the notice of acquisition in terms of section 8(1). Indeed the land Acquisition Amendment Act (No. 2) 10.2002 accepts this to be the position. That amendment provides in subsection (2) of section 9 that where an order made in terms of subsection (1) of section 8 is or becomes invalid by reason *inter alia* of the failure to serve a preliminary notice on the owner of any registered real right in the land or for any reason whatsoever, a further notice in terms of section 8(1) may be served and shall constitute notice to the owner or occupier to cease to occupy, hold or use that land after the period indicated. That same amendment provides that the preliminary notice is not rendered invalid as long as it is served not less than 30 days before the making of an order in terms of section 8(1).

The position in law therefore is that the notice of acquisition issued on 4 April 2002 and served on 7 April 2002 was and is null and void because of the failure to serve the preliminary notice on the bondholder. That this is the law in this country there can be no doubt. As LORD DENNING put it in *MacFay v United Africa Co. Ltd* (1961) 3 All ER 1169, 1172:-

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

See also *Mugwebie v Seed Company Ltd & Anor* SC 141/99

What this means is that the acquisition order issued on 4 April 2002 must be treated as if it never existed.

It was submitted during the hearing by the first respondent that the preliminary notice was thereafter served on the bondholder. A further

notice of acquisition in substitution of the invalid one was then issued on 17 December 2002 and served on 24 December 2002. The latter submission is common cause.

The current position therefore is that the notice of acquisition dated 4 April 2002 is invalid. It must as I have already said be treated as if it never existed. What now exists is the notice of acquisition issued on 17 December 2002. Indeed on 23 January 2003 the first respondent presumably out of caution withdrew the application for an order authorising the acquisition before the Administrative Court.

In the result, the interim order made by OMERJEE J on 12 September 2002 has been overtaken by events. That order provided that pending the final determination of the matter, the acquisition order issued on 4 April 2002 was not to preclude the applicant from occupying, holding or using the land. That order was based on an order of acquisition that was null and void.

There is accordingly no question of the second respondent being in contempt of that order. Without in any way suggesting what the applicant needs to do next, it is obvious that the notice issued on 17 December is currently in operation. Indeed in terms of the Land Acquisition Amendment (No. 2) Act 10/02, the applicant was required, in terms of section 9(2) to cease to occupy, hold, or use that land and his living quarters on that land seven days after the date of service of the subsequent order. If my interpretation of the law is correct then at the time the present application was filed, the applicant had no right to be on the farm. Put another way, he had no *locus standi* to institute civil proceedings on the basis that he was entitled to remain in occupation.

The real dispute, it appears, is between the applicant and the acquiring authority. The dispute is not between the applicant and the second respondent, whose rights and interest in the property have been acquired through the first respondent. If, as was contended, the second

notice, is now invalid by virtue of the failure to confirm the acquisition in terms of section 7, this is a matter between the applicant and the first respondent and should be determined separately. It does not involve the second respondent. It is not even known whether as a matter of fact no application to confirm the acquisition has been filed with the Administrative Court.

I have already indicated that the application for interim relief in respect of paragraphs 2, 3 and 4 will be dismissed for want of correct procedure.

In the result, it be and is hereby ordered as follows:-

1. That the application for leave to sue the second respondent be and is hereby dismissed.

2. That the application for other temporary relief be and is hereby dismissed.

3. That the applicant is to bear the costs of this application.

Stumbles & Rowe, applicant's legal practitioners.
Civil Division of the Attorney-General's Office, 1st respondent's legal practitioners.

Chihambakwe & Mutizwa, 2nd respondent's legal practitioners.