NICOLAS MUSONA
versus
BROYGLOW INVESTMENTS PVT LTD
and
HOWLAY INVESTMENTS PVT LTD

HIGH COURT OF ZIMBABWE
TSANGA AND CHITAKUNYE JJ
HARARE, 16 September & 15 January 2015

Civil Appeal

M. Chinyangarara-Kaseke, for appellant
E. Ndlovu, for respondent

TSANGA J: This appeal challenges an interdict granted to the respondents by the Magistrate Court with respect to land which the appellant refuses to vacate on the basis that it is State land. The respondents are registered companies who own, under title deeds, the two separate properties described as Lot 2 and Lot 13 of Spitzkop Estate. It is in terms of these title deeds that they base their clear right to the properties, having obtained title following acquisition through authorised subdivision of the land owned by E Drakes and Son (Pvt) Ltd in 2012 who were the holders of the original Title Deed.

The appellant argues that the land in question being State land by virtue of its acquisition through the constitutionally sanctioned land reform programme, as such the respondents have no greater right than himself to be on this property and cannot chase him away. He argues that the respondents obtained title under a "dead deed" since the land was effectively owned by the State at the time that transfer to the respondents occurred. The circumstances are articulated more fully below. The respondents successfully obtained an interdict in the court below with the magistrate finding that there was no land ownership dispute and that the respondents were entitled to an interdict. The grounds upon which the appeal is brought are as follows:

1. That the court *a quo* erred in finding that there was no ownership dispute between the parties.
2. That the court *a quo* erred in holding that the respondents established a clear right and all other requirements required to warrant the relief sought of an interdict.

The appellant's prayer is that the appeal be allowed and the judgment of the court a quo be set aside. The appellant also prays for an order as to costs on a legal practitioner client scale.

The context in which the appellant frames his "State land" argument is as follows: In 2000 the land in question which belonged to E Drakes and Son (Pvt) Ltd, was acquired by the State under General Notice 418A of 2000. It was listed therein as item 324. However, following this listing, the itemised land, among others, was withdrawn from the compulsory acquisition list in 2001. This was through GN 613 of 2001. The land in question nonetheless found itself re-listed again in 2005 when s16 (B) was incorporated into the then Constitution together with Schedule 7. The latter listed the properties affected by the amendment.
The relevant aspects of s16B of the old Constitution read as follows:

> "1) . …….
> 2) Notwithstanding anything contained in this chapter
> a) All agricultural land
> i) that was identified on or before the 8th July 2005, in the Gazette or Gazette Extraordinary under s 5(1) of the Land Acquisition Act [Chapter 20:10] and which is itemised in Schedule 7, being agricultural land acquired for resettlement purposes referred to in subparagraph A or B
> ii)……
> iii) ……
> is acquired by and vested in the State with full title therein with effect from the appointed day……"

Section 290 of the new Constitution of Zimbabwe Amendment (no.20) Act 2013 which deals with the continuation of rights of the State in agricultural land, effectively captures the spirit of s16B. It reads as follows:

> "290 (1) All agricultural land which-
> a) was itemised in Schedule 7 to the former Constitution ;or
> b) before the effective date, was identified in terms of s 16B (2) (a) (ii) or (iii) of the former Constitution;
>
> continues to be vested in the State.
> (2) Any inconsistency between anything contained in –
> a) A notice itemised in Schedule 7 to the former Constitution; or

b) A notice relating to agricultural land and published in terms of section 16B (2) (a) (ii) or (iii) of the former Constitution;

and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, does not affect the operation of subsection (1) or invalidate the State's title to agricultural land contained in terms of that subsection."

It is on the basis of the above provisions that the appellant argues that the land belongs to the State and that the magistrate erred in finding no ownership dispute. He also relies for his interpretation on the more recent case of *Kennedy Magenje* v *TBIC Investments Private Ltd & 4 Ors (Case1) and Kennedy Godwin Mangenje* v *Minister of Lands & Rural Resettlement & Ors (Case 2)* HH 377-13. In that case MAFUSIRE J, disagreeing with the interpretation by MAKONI J in *Matanda (Pvt) ltd* v *Minister of Lands & Ors* 2009 (2) ZLR 340 which regarded the re-listing of property previously withdrawn as an error, opined as follows with regards to interpretation of s16B:

> "If indeed such a property would have been withdrawn but nonetheless found itself back on the list in terms of s16B of the of the Constitution then the acquisition in terms of the Constitution would prevail. Such an error if ever it was would be "any error whatsoever contained in such notice…" within the meaning of s 16 (5) (a) and (b). The Supreme Court, in the *Mike Campbell*[1] case above, stated that the pieces of agricultural land listed in the 157 Preliminary notices as itemised in Schedule 7 had been acquired by and vested in the state with full title therein with effect from the appointed day, namely 14 September 2005."

The appellant further draws strength on his occupation of the land since 2000 when forced occupations of white farms occurred although he admits that his occupation has not been regularised.

Whilst the "State land" argument makes sense by virtue of the supremacy of the Constitution, what complicates the picture for the appellant *vis a vis* the standing of the Respondents as compared to his own is the State's own expressed "lack of interest" in the particular land in question subsequent to the enactment of the above provision. It is trite that the State can issue a certificate of no interest to land that it is otherwise entitled to, if it deems it proper to issue such a certificate. Such action by the State cannot be regarded as irrelevant and neither can it be overlooked. It is indeed a legitimate action which suspends the State's de facto acquisition of the land thereby allowing for whatever status quo to prevail until such time that interest is expressed. In the present case the State through the Ministry of Lands, issued a certificate of no present interest in the land in question on 2 February 2011. This was

[1] 2008 (1) ZLR 17 (S)

valid for a year. The land was transferred to the respondents in 2012 following an authorised subdivision of the land by the Department of Physical Planning for Mashonaland West Province. The gist of the respondents argument is that by allowing subdivision and transfer, there was no other interest by the state in the land. The result is that the title of the respondents have not been cancelled by the State whom the appellant argues is the rightful owner of the land. The appellant's argument that the respondents have no claim to the land lacks merit in light of these facts. The interdict was rightly granted. Moreover the appellant concedes that he has failed in his efforts to have the Ministry of Lands regularise his occupation of the land by granting him any permit. If the State has issued a certificate of no interest it cannot in the same breath issue a permit in relation to this land without any indication that it now has an interest in such land. The offer letter, permit or land settlement lease has been the basis upon which the State has granted the right to occupy hold or use allocated land that it has acquired. (See *Commercial Farmers Union & Ors* v *Minister of Lands and Rural Resettlement & Ors* SC 31/10) Now Statutory Instrument S.I 53 of 2014 outlines the regulations that govern those with Agricultural Settlement Permits issued by the Minister of lands and Rural Resettlement in terms of occupying, holding and using allocated land. The appellant has none of these and therefore clearly has no *locus standi* to refuse to vacate the land in question or to appeal the ruling of the magistrate interdicting him from continuing his farming activities on the said land. More over the respondents acquired the land under an authorised sub division and against a background of no interest in the land having been expressed by the State. The respondents therefore have rights to the land.

As regards costs the respondent sought dismissal of this appeal with costs on a legal practitioner and client scale. The deciding factor as to whether these should be granted under the circumstances rests on whether the appellant acted frivolously in lodging this appeal. He brought the appeal fully appreciative of the surrounding circumstances under which the Respondents claim their interdict. He was also aware that he had no valid basis for insisting on being on the land as he has not been able to obtain the requisite permit since 2000. The appellant therefore acted frivolously in bringing the appeal in light of the surrounding circumstances that had been brought to his attention. The appeal appears to have been brought merely to delay the inevitable since there was no basis upon which the appellant could have resisted the interdict.

Accordingly the dismissal of the appeal with costs on a legal practitioner client scale is justified and is hereby granted.

CHITAKUNYE J agrees …….

Robinson & Makonyere, appellant's legal practitioners
Mabhundu Law Chambers, respondent's legal practitioners