KLODIAS HOVE
versus
NOWAB ARAM KHAN

IN THE HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 3 June & 9 September 2015

Trial Matter

L Ziro, for plaintiff
T Sengwayo, for defendant

TSANGA J: This trial matter was premised on an eviction claim in which the plaintiff, Klodias Hove, on the strength of possession of an offer letter, sought to evict the defendant Nowab Aram Khan from Subdivision 1 NETRIDGE farm situated in Masvingo. The property in question measures 700 hectares.

The plaintiff's evidence at the trial was that the farm was offered to him by the then Ministry of Lands, Land Reform and Resettlement through an offer letter dated 29 June 2006. However, his evidence was that his attempts to move onto the farm permanently at that time proved futile as he met with resistance in that whatever structures his workers attempted to put up at the farm, would be destroyed. When offered the farm, he had at the time been accompanied by the police to be introduced. However, when he met with resistance, no formal report as such, was made to the police.

What has rekindled his efforts to take occupation of the farm some eight years later is his recent awareness in 2014, of the decision of the Supreme Court in the case of *Commercial Farmers Union & Ors* v *Minister of lands & Others* SC 31/10. The gist of this case in so far as plaintiff's draws strength from it is that the holder of an offer letter, a permit or land settlement lease has the legal authority to occupy and use the land so allocated to him under any of these documents. He can rightly evict anyone from the farm unless the applicable document has been withdrawn. In his case he argues that no such withdrawal has been effected as he still holds his offer letter. Drawing on the principles set out there in, the plaintiff accordingly seeks to evict the defendant from the farm which was allocated to him by virtue of an offer letter. He also emphasises his right as a holder of an offer letter, to be assisted by the courts to assert his rights, the farm having been properly gazetted and

acquired, and an offer letter having been made to him. As such, he maintains that the defendant is an illegal occupant of the farm in question.

The matter was referred to trial on four issues: i) whether the plaintiff's claim has prescribed; ii) whether or not the defendant is entitled to occupy or possess the farm; iii) whether or not the farm was duly gazetted send acquired by the state, and lastly, iv) whether or not the plaintiff is the owner of the farm in question and can evict the defendant.

The defendant was represented at the trial by his wife through a power of attorney, due to his ill health. The defendant resisted the claim for eviction on several grounds. She highlighted that they were never aware at any time prior to the issuance of summons, that the plaintiff had been allocated the land. She stated prior to that, no demand for them to vacate the property had ever been made by the plaintiff. She argued on behalf of her husband that the plaintiff's claim has prescribed as it should have been made within a period of three years. She further argued that the plaintiff did not comply with the conditions of the offer letter which required him to take up occupation within a stipulated time frame. She further argued that the acquisition is targeted at an indigenous farmer and therefore challengeable. In her evidence in chief, she also stated that she was aware of at least two offer letters that have since been made and taken up with regards to the same property that the plaintiff is claiming, one to Dumbarimwe for 50 ha and to a Mr Chidindi for another 250 ha.

The prescription argument has been addressed in *Chirinda* v *Konrad Van Der Merwe* HH 51-13. In that case Chiweshe JP reasoned that a plaintiff's claim for eviction could not be said to have prescribed as his reason for not suing for such at the time emanated from lack of clarity from the courts regarding the status of the offer letter holder at the time to press for an eviction. He argued that the position has now been clarified by the Supreme Court in the *Commercial Farmers Union* case *supra.*

The defendant's counsel, Mr *Sengwayo*, argues that the operative date for prescription is the date of the *Commercial Farmers Union* decision which is 26 November 2010. As such his position is that the plaintiff's claim is indeed prescribed. However, I am inclined to agree with Chiweshe JP's view where he expresses doubt in any event whether the state's rights, as owner of the land and with the right to determine who occupies its property at any given time, could be curtailed, be it indirectly, by a plea of prescription against the authorised occupier. As such, all things being equal the prescription argument would not, save the defendant from eviction. But all things are not equal for the plaintiff in the matter before me. What complicates plaintiff's claim and in my view is really the nub of the matter is the averment of

facts during the trial by the defendant that the offer letter issued by the state authority to the plaintiff has been overtaken by events over the years. Following non occupation by the plaintiff as holder of the offer letter the land has been reallocated. Moreover the developments impacting on the offer letter have been put in place by the very same authority that issued the offer letter. The *locus standi* of the plaintiff is therefore in question as Mr *Sengwayo* for the defendant rightly argued.

Mr *Ziro* for the plaintiff admitted that the facts regarding the reallocation were totally novel to him and his client. With the plaintiff not having cited the Minister of Lands and Rural Resettlement in its claim so as to ensure that the full facts relating to the farm were placed before the court by the relevant authority, it became quite evident that this court was being asked to make a decision in the absence of full facts regarding the current factual situation on the ground.

In light of the above reality, and given the courts discretion to call for any evidence which will help in arriving at an informed decision, the parties agreed that a letter be written sanctioned by both parties, to the Ministry of Lands and Rural Resettlement seeking an elucidation of the exact position on the ground.

The response from the Secretary for Lands in the relevant Ministry dated 30 June 2015 reads in the relevant part as follows:

> "Netridge farm was gazetted on the 23rd of January 2004 and was acquired through the 17th Amendment to the Constitution, appearing as schedule 7 of the Constitutional Amendment as GN 49 of 2004 item 128.
>
> There are currently 4 beneficiaries on the farm namely –
> Dumbarimwe, 50 hectares
> Jameson Bishi, 262 hectares
> Kenneth Chidindi 242 hectares and
> Samuel Banda, 227 hectares
>
> There is currently a 10 hectare unallocated plot which is currently being used by Mr Khan where he has his abattoir. Mr Khan is considered an indigenous person.
>
> The four beneficiaries have valid offer letters issued by the Acquiring Authority in 2009-2011.
>
> Mr Hove was issued an offer letter with 700 hectares out of 862, 88 on the 29th of June 2006 but never took occupation citing resistance from illegal settlers since the property is close to town.
>
> The property was initially meant as a conservancy hence the large hectrage for Mr Hove. However, when he failed to take it up it was subdivided to benefit more people.

> We are unable to attach the offer letters for the 4 beneficiaries due to logistical problems but they are readily available from the beneficiaries."

From the evidence placed before the court by the plaintiff and as confirmed in the letter by the relevant Ministry, the farm was clearly gazetted so this is not an issue that calls for any decision. As such, the crux of the matter complicating the offer letter which the plaintiff has in his possession is that following his failure to take up the farm, it has since been subdivided by the relevant Ministry and allocated to several other people, some of whom have been in occupation since 2009. Against this factual reality on the ground, the question is whether the plaintiff is the owner of the farm in question and can evict the defendant. The legal position as stated in the *Commercial Union* case is indeed that the offer letter is the definitive document upon which a party can seek to take occupation of a farm that has been allocated under the and reform programme and to evict a resisting party. However, factually the plaintiff's case cannot be said to be on all fours with the *Chirinda case* or the *Commercial Farmers Unio*n case, both of which he places great reliance on. This is because there were no other offer letters in those cases and certainly no evidence of any tacit or explicit withdrawal of the offer letters. There was only one offer letter to contend with in each of these cases. *In casu* the offer letter upon which the plaintiff relies on appears to have been tacitly withdrawn following his failure to take occupation. The correspondence received suggests that four other offer letters have since replaced the plaintiff's letter. The plaintiff's claim is for the 700 acre farm whilst defendant is according to the Ministry's letter only in occupation of 10 hectares which houses an abattoir which the Ministry says he was permitted to keep as an indigenous person.

The plaintiff ought to have ascertained and addressed the situation on the ground before launching his claim. Underpinning the issuance of offer letters is the expectation that the land will be utilised hence the clear conditions that accompany the offer letters. Whether it is entirely reasonable for a party who has been offered land to sit back in the face of resistance and then cry foul when the land is reallocated is something which the court hearing any grievance regarding the tacit withdrawal will have to decide.

As regards the matter before me, it was the plaintiff's duty to have ascertained the full facts before bringing his claim as this court cannot simply be expected to act robotically when the evidence suggests a withdrawal of his offer letter. This court is unable to evict defendant on the basis of the facts provided since according to the relevant authority dealing

with land distribution, the defendant is no longer the occupant of the 700 hectare Netridge farm but is merely confined to 10 hectares. The defendant seeks costs on a higher scale for having been unnecessarily called upon to defend a matter which she need not have done had the full facts been ascertained by the plaintiff prior to bringing the action. I agree that the defendant has been put to unnecessary expense.

Accordingly, the plaintiff's claim for eviction of the defendant from Netridge farm is dismissed with costs on a higher scale.

Garikayi and Company, plaintiff's legal practitioners
Trust Law Chambers, defendant's legal practitioners