GILBERT NYASHA
versus
CHIREDZI WILDLIFE INVESTMENTS
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 26 January & 7 February 2018

Opposed application

N Mugiya, for the applicant
J Mupoperi, for the 1st respondent
K Chimiti, for the 2nd respondent

TSANGA J: The Applicant seeks to evict the first respondent from a piece of land he was allocated in 2012 by way of an offer letter from the second respondent dated 24 September 2012. The land is described as 80 hectares of land being Lot 2 of Fair Ranch, Chiredzi. The first respondent who was also on the land and running a wild life sanctuary did not vacate for reasons I will elucidate. Despite the respondent's refusal to vacate, the Applicant took occupation of the portion of the farm without evicting the first respondent and has continued to be on the farm. It was more than four years down the line, being sometime in 2017, for reasons which were not explained to this court in the application, that an application for eviction of the respondent in the Chiredzi Magistrate Court under GL 263 /17 was finally made. The applicant later withdrew this application and proceeded to file the present application in the High Court.

The application is opposed and one of the first respondent's Directors, Jeffrey Howard Sommer, averred to the reasons in his representative capacity. Essentially, he is a German investor in that company which is running a wild life sanctuary. As such, he argued that his project enjoys protection under the Bilateral Investment Protection and Promotion Agreement (BIPPA). He attached his passport as a German national as well as a letter from the German

Embassy confirming the bilateral agreement. In addition, he attached a circular from the relevant Minister for Lands and Rural Resettlement highlighting the Government's policy directive on allocations of land on BIPPA farms, plantations, estates, and safari areas among others. Essentially the directive issued in 2016, confirms the position that allocations that disrupt viable operations on the so described lands should be stopped forthwith.

The second respondent, being the Minister responsible for land allocations, also deposed to an affidavit. He averred that the applicant was offered an offer letter when another beneficiary had already been allocated the same farm. Furthermore, he averred that the Applicant had already been issued with a notice of intention to withdraw the said offer letter. Significantly, he emphasised that the applicant cannot be the holder of a valid offer letter under these circumstances and specifically suggested that the proposed solution is to grant him an alternative piece of land. He equally highlighted the fact that the first respondent has invested heavily on the land and is in the business of crocodile farming. As regards the bilateral agreement protecting such investments, he confirmed that should indeed one of the investors be a German investor, a fact to be proven by the first respondent, then the property would be protected because Zimbabwe does have a bilateral Investment and Protection Agreement with Germany. Essentially, he opposed the application.

The second respondent's counsel in his heads of argument highlighted that the offer letter referred to by the Minister in his affidavit could not be located thus bolstering applicant's position that the holder of an offer letter is one that should be granted the farm. The person allocated the farm was a Mr Dube who is also a Director in the first respondent company. Since he could not produce his offer letter, applicant's counsel argued that his was therefore the only and valid offer letter.

The applicant relied on the Supreme Court case of *Commercial Farmers Union & Ors* v *Minister of Lands & Others* SC 31/10 whose gist 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 argued that no such withdrawal has been effected as he only received a notice of intention to withdraw in 2017 and that nothing has been done since then. The applicant was therefore steadfast in his quest to evict the respondent from the farm which was allocated to him by virtue of an offer letter. He was emphatic that as a holder of an offer letter he should be assisted by the courts to assert his rights. His counsel also argued that bilateral agreements cannot take precedence over his offer letter. He also argued that his

perusal of Company Registry documents revealed that the director of the second respondent, now averring to be a German national, is described therein as Zimbabwean.

With supporting documents having been produced by the first respondent's director that the farm is indeed affected by a BIPPA arrangement, the real issue is whether there is a basis at this point for interfering in view of the standpoint articulated by the Minister in terms of the intention to withdraw the offer letter and also cabinet's policy regarding the type of lands and investments in question. It is a fact that the applicant is not the holder of any permit pursuant to his offer letter and his position has never been regularised. Instead, he has been given a notice of intention to withdraw, but the withdrawal process has not unfolded to its logical conclusion for reasons which this court is not privy to. Giving him alternative land has also been suggested.

It cannot be ignored that the role of formulation of appropriate polices and the implementation of administrative measures is that of the relevant Ministries and their administrative bodies. The courts come in to apply the law against the backdrop of a full and complete understanding of the processes that will have been carried out. The relevant Ministry, through its Minister has the duty to ensure that processes are followed through to their logical conclusion so that in the event of any dispute, it must be evident to the court how that administrative process was done and why. In this case it is evident that the applicant has rushed to court on the basis that he holds an offer letter and that the other party has failed to produce its offer letter – all without insisting that the relevant body sees through its administrative role. This court is therefore in the dark as to why the notice of intention to withdraw has not progressed to whatever the next stage is. It is also in the dark if indeed an offer of another piece of land as alluded to in the Minister's affidavit has ever been made to the applicant. There would appear to be an alternative and viable remedy that was proposed by the relevant body in resolving the dispute in the form of granting the applicant an alternative piece of land in order to maintain the economic vibrancy of a going concern that the incumbents have invested in. Given constant media reports that there is plenty of land which has not been utilised by allocated farmers, there would indeed be no need to destroy a going viable concern that has been invested in by the first respondent just so that the applicant has something for free. Since the role of the court is to exercise external oversight using the law as its point of departure, it is important that aggrieved parties come to court having fully exhausted all remedies with the relevant authority responsible for administrative action in these land matters. This ensures that the court is able to utilise the law factually, contextually and more effectively, as opposed to a

robotic and mechanical application of the law as is sought to be done in this matter with regards to the offer letter. See remarks made in *Nu Aero (Private) Limited* v *Chakanyuka Karase & Anor* HH 884 /15 as regards the role of the courts when it comes to reviewing administrative action.

Equally significant to the factual circumstances of this case is that it is a cardinal principle of our law that parties approach the court with clean hands which the applicant has simply not done. It is not in dispute that the applicant occupied the land and remains occupying the land without any court order. He is asking for eviction from land which he has already unlawfully taken. As was stated in the case of *Deputy Sheriff Harare* v *Mahleza & Anor* 1997 (2) ZLR 425 (HC):

> "People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court. It is called in time honoured legal parlance, the need to have clean hands. It is a basic legal principle that litigants should come to court with dirty hands. If litigant with unclean hands is allowed to seek a court's assistance, then the court risks compromising its integrity and becoming a party to underhand transactions. If a court were not to enforce this principle, it would be washing its hands of its responsibility."

See also *JC Conolly & Son (Pvt) Ltd* v *Ndhluku & Anor* HB 43/15 which emphasises that holders of offer letters are not exempted from following the necessary procedures when seeking to evict previous owners. In any event, as detailed above, this does not appear to be proper case for eviction on the basis of an offer letter given the relevant authority's standpoint on the offer letter that is in applicant's possession. Assuming that the Minister was incorrect that an offer letter had been granted to someone else, there is no doubt that the facts averred equally point clearly to the fact that there was an ongoing concern at the time that is affected by bilateral agreements. It cannot be for the courts to simply dismiss or ignore the executive's policy and directives in protecting certain lands from acquisition. The applicant has no basis for seeking the eviction of the current occupier as the first respondent is not unlawfully on the land. Furthermore, with the sworn averment to offer applicant an alternative piece of land, there is no prejudice to be suffered. I therefore find application to lack merit.

Accordingly, the application is dismissed with costs.

Macharaga & Mugiya Law Chambers, applicant's legal practitioners
Saratoga Makausi Law Chambers: 1st respondent's legal practitioners
Attorney General's Office: Civil Division, 2nd respondent's legal practitioners