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Judgment No. SC 18/04

Civil Appeal No. 369/03

(1) AIRPORT GAME PARK (PRIVATE) LIMITED (2) MBIZI GAME PARK (PRIVATE) LIMITED v (1) KENNY KARIDZA (2) THE MINISTER OF LANDS, AGRICULTURE & RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 3 & MAY 10, 2004

J B Colegrave, for the appellants

G Chikumbirike, for first respondent

E Jena, for second respondent

ZIYAMBI JA: This is an appeal against an order of the High Court dismissing an application brought by the appellants for the ejectment of the first respondent from the premises known as Mbizi Game Park and Lodges.

In support of the application, which was brought on a certificate of urgency, the first appellant alleged that it was the current registered owner of 'piece of land situate in the District of Salisbury called remainder of Rocky Farm A of Arlington Estate measuring 394, 2123 hectares held under Deed of Transfer 7611/90 ("the property") which is bonded to Zimbabwe Banking Corporation. In addition, the first appellant leases from the City of Harare an adjacent piece of land known as 'Portions and Environs of the Northern Spur of Harare Dam' measuring 30 hectares. The two properties are known as Mbizi Game Park and Lodges (Mbizi) and are managed by the second appellant.

The first respondent is Kenneth Karidza to whom the property was

offered by the second respondent in accordance with the Land Reform and Resettlement program. The second respondent is the Minister of Lands, Agriculture and Rural Resettlement who was at the time the Minister responsible for the administration of the Land Acquisition Act [*Chapter 20:10*] ("the Act") and the Agricultural Land Settlement Act [*Chapter 20:01*].

Sometime in the year 2002, a notice to acquire the property in terms of s 8 of the Act was served on the first appellant. Thereafter, by letter dated 28 June 2002, the property was offered to the first respondent by the second respondent. It is common cause that the notice lapsed and a further notice dated 26 September 2003 was issued and served on the first appellant. The first respondent, who had vacated the property because of the lapse of the notice, then reoccupied the property in accordance with the terms of the letter of offer.

The appellants alleged firstly, that the offer letter was invalid in that it was an offer of a lease which the second respondent had no power to grant since the Board, which must consider and recommend applicants for leases of land in terms of the Agricultural Land Settlement Act, had not been appointed and therefore no lease could have been offered to the first respondent by the second respondent. Secondly, that the first respondent was already a beneficiary of the land resettlement program having been allocated certain land in Goromonzi. Thirdly, following service of the notice in terms of s 8 of the Act on the first appellant, a new offer should have been made to the first respondent since the first letter of offer was no longer valid by reason of the lapse of the initial s 8 notice; and fourthly, that contrary to the provisions of s 8 (1) (b) of the Act, they had been evicted by the first respondent before the 45 days allowed by the notice had expired.

The High Court found against the appellants on all issues.

In the High Court, it was conceded by the appellants' legal practitioners that the property was properly acquired in terms of the Act. With reference to the offer of land, the Court found that the original letter of offer dated June 2002 had not been revoked. In his judgment at pages 82 – 83 of the record, the learned Judge said:

> "I am of the position that the first respondent did not need a second new offer letter. There is nothing which showed me that the original letter of 28th June 2002 had been revoked. Besides, I am of the view that the process

> of allocation of the land by the second respondent is an administrative matter, which should be resolved administratively guided by some administrative policy. Further, I notice there is no dispute on the allocation *per se.* What applicants want to see is a 'second' new letter."

The two issues raised in the notice of appeal and advanced by Mr *Colegrave* on behalf of the appellant are the validity of the offer of the property to the first respondent and the entitlement of the appellants' directors and shareholders to be in occupation of the property until 26 December 2003. It was common cause at the hearing before us that the determination of the second issue was academic but it was persisted in as, in Mr *Colegrave's* submission, it would have a bearing on costs.

The point was taken, in *limine*, by the respondents that the appellants had no *locus standi* to make this application. On behalf of the first respondent it was submitted by Mr *Chikumbirike* that the appellants, being neither the owners of the property nor the holders of a possessory claim in respect thereof, have no *locus standi* to seek the first respondent's eviction or to raise the issues contained in the notice of appeal.

On behalf of the second respondent it was submitted that since it was common cause that the property was properly acquired in accordance with the Act, the consequence of acquisition in terms of s 8(3) of the Act is that ownership of the land vests in the second respondent. This being so, the appellants have no *locus standi* to challenge the allocation of property.

Mr *Colegrave* submitted that the appellants had a reversionary right in

the property since there was a possibility that the Administrative Court, before whom an application for confirmation of the acquisition order must be brought if the acquisition is contested (which presumably it was in this case), might give a decision in favour of the appellants by refusing to confirm the acquisition. In that event, he submitted, the land would revert to the owner.

Ejectment of an occupier of land can be obtained by the registered owner of the property, (*rei vindicatio*), and by an action based on a possessory claim: See *Pretoria Stadraad v Ebrahim* 1979 (4) SA 193 (T); *Steenkamp v Mienies En Andere* 1987 (4) SA 186; *South African National Parks v Ras 2002 (2) SA 537 (C).*

The appellants do not claim *locus standi* to sue for the ejectment of the first respondent on any of the above grounds – they have agreed that the land was properly acquired and its ownership vests in the acquiring authority. It is common cause that as between the appellants and the first respondent, there is no contractual relationship by virtue of which the appellants can claim the eviction of the first respondent on the basis of a possessory claim. Their claim is based on what Mr *Colegrave* terms a reversionary interest in the land. A reversionary right has been defined as:

> "… a condition which provides that, on the happening of a prescribed event, ownership of property shall revert to a previous owner or, if so expressed, to the heirs of the previous owner if since deceased, or their successors in title…. Local authorities (as well as the state) often sell property subject to a condition that, if it is not used for certain stated purposes, ownership shall revert to that local authority, or to the state,

> as the case may be. Here again, the implications are clear cut. Failure to use the property for the purposes stated by any of the successive owners brings about the reversion. Such a condition is usually imposed, however, in conjunction with another restraining alienation without the consent of the holder of the reversionary right."

(See Jones : CONVEYANCING IN SOUTH AFRICA 3TH ED AT P 161).

Such a condition usually occurs in donations of property, or in agreements for sale of land by local authorities or the State. In the latter case, failure to use the property for the purpose stated in the agreement brings about a reversion. In *Black's Law Dictionary* 3rd Edition, a reversionary interest is described as:

> "The interest which a person has in the reversion of land or other property. A right to the future enjoyment of property, at present in the possession or occupation of another."

Thus the interest is the right to future enjoyment of the property presently occupied by another. The right must be certain and determined. It cannot be speculative or conjectural for then it is not a right but a mere hope. The hope of the appellants that, should the Administrative Court find in their favour, the land would revert to them, is merely speculative and does not in my view constitute a reversionary right or interest as this concept is understood.

Further, when in terms of s 8(3) of the Act, upon acquisition, ownership vested in the second respondent as the acquiring authority, no right in respect of the property remained with the appellants. It follows that the appellants cannot dictate the manner in which the second respondent chooses to utilize, or

exercise its rights of ownership in respect of, the property. I would therefore uphold the point raised *in limine,* that the appellants have no *locus standi* to bring this application.

The appeal ought to be dismissed on that ground alone. However even if the appellants had been found to have *locus standi*, there is no merit in the appeal as will be seen from the reasons set out hereunder.

With regard to the first issue namely, the validity of the offer of the property to the first respondent, the argument was twofold. Firstly, it was submitted that since the letter of offer was issued after the service of the first order which had lapsed, a second letter was required after the new s 8 notice was served on the first appellant. Secondly, the letter of offer constituted a lease to the first respondent which lease was invalid for non-compliance with s 9 of the Agricultural Land Settlement Act.

The learned judge found, that the property having been properly acquired in terms of the Act, a second letter of offer was not necessary since the first one was still valid; that there was no evidence that someone other than the first respondent has been allocated the property; and accordingly, that the first respondent was in occupation of the property in terms of a valid letter of occupation.

I agree with the conclusion of the learned judge. It seems to me the letter remains valid until it is withdrawn by the second respondent and this has not

happened.

With regard to the second contention, the learned judge found that the letter of offer did not constitute a lease. At page 83 of the record he said:

> "What the second respondent did was to offer land to first respondent by way of a letter dated 28 June 2003. The letter clearly says so. It does not offer a lease over the property. In fact part of the letter reads:
>
> > 'A lease agreement will only be entered into once the Minister is satisfied that all conditions have been met.'
>
> Applicants have also not shown that first respondent is a lessee. My interpretation of the conditions on which the offer of land was made to the respondent is that first respondent will be a lessee only after some conditions were met and upon entering into such an agreement of lease. As of now, the first respondent may not be regarded as a lease holder."

The learned judge was in my view correct in his conclusion. As will be seen from the following passages from *Kerr Law of Lease* second edition, payment of rent is an essential component of a lease.

> "A contract of lease is entered into when parties who have the requisite intention agree together that the one party, called the lesser, shall give the use and enjoyment of immovable property … to the other, called the lessee in return for the payment of rent." (P.1)
>
> "If a contract of lease is to be formed the parties' intention must be directed towards an agreement which the law characterises as a lease, namely one relating to the use and enjoyment of property in return for the payment of rent." (P.1)
>
> "Agreement on the rent to be paid is a requirement of all contracts of lease." (P 18).

Not only is this basic requirement of a lease lacking in the letter of offer, but the contents of the letter do not admit of the interpretation sought to be placed thereon by the appellants, namely, that the first respondent was constituted a lessee by the letter.

In support of his argument, Mr *Colegrave* referred us to the judgment of CHINHENGO J in Mgwaco Farm (Private) Limited HH 188-2003. In that judgment, dealing with a similarly worded letter of offer the learned judge said at page 18 of the cyclostyled judgment:

> "Although Clause 6 of the offer letter provides that-
>
> 'A lease agreement will only be entered into once the Minister is satisfied that all conditions have been met.';
>
> the conditions attached to the letter require the first respondent to take up personal and permanent residence on the farm, undertake to initiate development on the farm in terms of the five year development plan submitted by the applicant and refrain from ceding or assigning any right in respect of the farm. It refers to the first applicant as lessee in clauses (c) (ii) and (iii) and in clause 2 (b)(i) it reiterates that a formal lease shall be prepared and signed once it is established that the applicant has occupied and is developing the land offered. In clause (2) (c) it is provided that –
>
> " ... Irrespective of the date of signature of the lease agreement, the commencement date shall be set back to cover the actual period of occupation and you will be responsible for payment of lease rentals and council rates from the date of your acceptance of this offer".
>
> In my view, the first respondent is in effect constituted into a lessee by the offer letter."

I respectfully disagree with the conclusion of the learned judge. The letter clearly indicates that it is only if the Minister was satisfied that the conditions stated therein had been met that he would enter into a lease agreement with the first respondent. The duration of the lease and the rent payable were not set out in the

letter. Although the duration of the lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rental and when it should be paid. In the absence of any provision setting out the rental, the letter cannot be said to constitute a lease.

Accordingly no lease having been granted, the provisions of s 9 of the Agricultural Land Settlement Act did not apply and cannot avail the appellants as a basis on which to impugn the validity of the letter of offer.

With regard to the second issue raised on the notice of appeal, the appellant urged upon this Court to find that, having regard to s 9 (b) of the Act, the appellants' directors were entitled to remain in occupation of the property until 26 December 2003.

The learned judge in the *court a quo* dealt with the matter thus:-

"Section 4(b) of the Land Acquisition Amendment Act (No. 2) (Act No. 10 of 2002) provides as follows:

'Where an order made in terms of subs (1) of s 8 in relation to any agricultural land required for resettlement purposes is or becomes invalid by reason of the failure –

(a) …

(b) To apply to the Administrative Court for an order confirming the acquisition within thirty days after 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 –

(i) before the expiry of ninety 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 or his living quarters in that land, or be, before the expiry of the unexpired period of notice that would have applied if the invalid order were still in force; or

(ii) after the expiry of ninety 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 on that land seven days after the date of service of

the subsequent order on the owner or occupier. …'

In this case, the applicant was served with the subsequent s 8 order on 27 September 2003. The initial invalid s 8 order had been served on the applicants on 21 October 2002. It would be clear therefore that when the subsequent order was served on the applicants on 27

September 2003, the ninety days had expired. This means that s 4(b)(ii) of Act 10 of 2002 applies. This means that the owner or occupier should have ceased to occupy, hold or use the land in question and his living quarters on the land seven days after 27 September 2003 that is by 4 October 2003.

As a result, I do not find merit in the application."

Once again I find myself in agreement with the learned judge. Mr *Colegrave* submitted that the subsequent order (dated 26 September 2003) was not in substitution for the invalid order. It is quite clear that he is wrong in this regard. The import and intendment of s 4 (b) of the Land Acquisition Amendment (No. 2) ("Act" No. 10 of 2002) is that the service of the subsequent order will be in substitution for the invalid order. The service of the order on 27 September 2003 therefore fell within the provision of s 4(b).

Accordingly, in terms of the mandatory requirement that appellants vacate the property within seven days after the date of service of the subsequent order, the appellants were obliged to vacate the property on or before 4 October 2003.

The appeal is therefore dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Stumbles & Rowe, appellants' legal practitioners

Chikumbirike & Associates, first respondent's legal practitioners
Civil Division of the Attorney General's Office, second respondent's legal practitioners