AGNES TSIKIRE
versus
MR KAMUPEPU
and
MRS TAKAWIRA
and
THE MINISTER OF LANDS & RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 14 May 2015; 16 & 30 June 2015; 10 & 29 July 2015

Civil Trial

N. Maphosa, for the plaintiff
E. Mukucha, for the third defendant
First and second defendants in default

MAFUSIRE J: This judgment has been written without the benefit of closing submissions from the third defendant, the only remaining defendant at the trial. At the close of the case, the parties opted to make closing submissions in writing. A timetable was agreed upon. But none of them stuck to it. At least the plaintiff subsequently did apologise and eventually filed hers some few days out of time. There was not a word from the third defendant. I could not wait forever. So I proceeded to prepare this judgment*[1].

At the start of the trial, and throughout its duration, the first and second defendants were in default. They had been duly served with the notice of set down for trial. Neither the plaintiff nor the third defendant knew anything about why they were in default. On application by the plaintiff, their appearances to defend and pleas were struck off.

In her summons and declaration, apart from the prayer for costs, the plaintiff sought the eviction of the first and second defendants from a certain piece of land in the district of Goromonzi, called the Remaining Extent of Mariandi (hereafter referred to as "***Mariandi***" or

*[1] Even up to the time of handing down judgment on 29 July 2015 the third defendant's closing submissions had still not been received.

"***the property***" or "***the piece of land***"). She also sought an interdict to restrain the two defendants from making any kind of threats against her whatsoever.

The plaintiff was a beneficiary of the Government's land reform programme. She had, through an offer letter, been allocated the property. The third defendant, the Minister of Lands, on behalf of Government, was the acquiring authority. It was his office that had allocated the property to the plaintiff.

The problem, at least according to the plaintiff, was that after he had properly and regularly allocated her the piece of land, the third defendant had proceeded to improperly parcel out or fragment the same property into three small portions which he improperly re-allocated to her and the first and second defendants. To add salt to injury, she said she had been allocated the smallest of the three portions. She insinuated something akin to corruption or some kind of abuse of office by the third defendant. She and her witness, her husband, claimed that the first defendant was third defendant's campaign manager during the national elections of 2008. She said in breach of all known procedures and protocols in the allocation of land under the land reform programme, the third defendant had purported to withdraw her original offer letter and to re-issue her with another one, but for a third of the original size of the property, after it had been split in three. She claimed the first defendant was being rewarded for his effort in those elections. He had used his political muscle to bulldoze his way onto the property without having gone through the same pain and effort that she herself had gone through to get the property.

The details of the plaintiff's claim, as they emerged at the trial from her evidence and that of her husband, Emmanuel Tsikire, were these. Like everyone else, she sought to benefit from the land reform programme. From about 2007 she spent time, money and energy hunting for vacant land. She identified several properties. Eventually she settled for Mariandi. She informed the district lands office. On 17 July 2009 it made a recommendation to the provincial lands office. The recommendation ran like this:

> "REF R/E OF MARIANDI
>
> BACKGROUND
>
> R/E of Mariandi is + - 62,5 ha in extent. The plot is situated along Chiremba Road after Ruwa in the Epworth direction. It has sandy soils suitable for tobacco. It is in the area where there is boundary misunderstanding between Harare and Mash East.
>
> Tsikire A. ID – No 22-197813 G 22 has identified the Plot around September 2008 and had been travelling a lot to have this plot.

RECOMMENDATIONS
The district has no problem in her being considered for this plot."

The recommendation for the plaintiff to be allocated the piece of land was escalated to the national lands office at Harare. Eventually she was allocated the property. But she was advised that the formal offer letter would be long in coming because the queue was long. She said she was advised that in the meantime she could go and stay at the property pending the processing of her offer letter. She took occupation in May 2010. But immediately there were problems. The farm house was already occupied by certain individuals. They claimed they were the former employees of the previous owner. They had nowhere else to go. They needed temporary shelter. She said the lands officers told them to move off to pave way for her own occupation. The people promised they would leave. But they never did. The plaintiff was forced to install a wooden cabin for temporary accommodation.

The plaintiff said in October 2010 she was called by telephone to come and collect her offer letter. She did so on 20 October 2010. But the offer letter was only for 36.76 hectares, not 62.50 hectares. The lands office admitted there had been a mistake. It was corrected immediately. On the same day she was re-issued with another offer letter for the entire 62.50 hectares.

Armed with an offer letter the plaintiff said she demanded that those people occupying the farm house should leave. They refused. They claimed they were now employed by the first defendant. They alleged the first defendant had occupied the piece of land much earlier than herself. Another lady by the name of Joy, who claimed to be the daughter of the second defendant, had also arrived at the property and built some structure for accommodation.

There was friction. The first and second defendants claimed that they had been on the property from the onset of the land reform programme and that they had now also been issued with offer letters. Emmanuel Tsikire said the first defendant was of a violent disposition. On several occasions he had beaten him up or set up dogs on him. He and the plaintiff complained to the Minister. At some stage the Minister called for a meeting to try and resolve the impasse. Present at that meeting was the plaintiff and her husband; the first and second defendants; the Minister himself; the Resident Minister or Governor for the province in question and several land officers, including one Muradzikwa, a lands planner. Several options were considered. They included finding alternative pieces of land for the claimants or

re-parcelling out Mariandi to accommodate all three. But, according to the plaintiff, Muradzikwa discounted the option of a further subdivision. His reason was that because of certain physical features on the property, the actual arable land was minimal. Any further subdivision to anything under 62 hectares would make the land uneconomic and unsuitable for agriculture.

According to the plaintiff, the meeting was inconclusive. The parties were advised to go back and co-exist whilst a solution was being worked out. They heard nothing further from the lands offices. In October 2013 the plaintiff issued summons. All the defendants gave notice to defend, the first and second defendants in person, and the third defendant through the Civil Division of the Attorney General's Office. Eventually the defendants all filed their pleas and subsequent pleadings.

The first and second defendants' pleas were identical. In essence, they stated that they had settled on the piece of land at the onset of the land reform programme; that they had constantly applied to the third defendant to have their stay regularised but without success; that they had filed an objection against the allocation of the whole of Mariandi to the plaintiff alone; that a meeting had been held at the third defendant's offices in reaction to their objection and at which meeting the plaintiff, among others, had been present; that it was accepted at that meeting that a mistake had been made in giving the whole property to the plaintiff; that it was resolved that the plaintiff's offer letter would be withdrawn and replaced with three new ones for all the three of them, allocating 22.70 hectares to the first defendant and 19.9 hectares each to the plaintiff and the second defendant; that this had subsequently been done but that the plaintiff had declined to collect her new offer letter. As such, the pleas concluded, the first and second defendants could not be evicted since their stay had been regularised.

The third defendant's plea, in essence, was that whilst initially the first and second defendants did not have offer letters, this was subsequently rectified following their complaint; that at the meeting at his office it had been resolved that the piece of land would be subdivided to accommodate all three; that this had been done and all three had been notified; that the first and second defendants had since collected their offer letters but that the plaintiff had not; that the plaintiff did not have the *locus standi* to evict the first and second defendants. Attached to the third defendant's plea were copies of the three new offer letters to the first defendant, with 22.70 hectares; the second defendant, with 19.90 hectares and the plaintiff, also with 19.90 hectares. The offer letters were all dated 22 May 2013.

Also attached to the third defendant's plea was a withdrawal letter from the third defendant to the plaintiff. It withdrew the plaintiff's original offer letter of 62.50 hectares. The withdrawal letter was dated 16 May 2013, i.e. 6 calendar days prior to the new offer letters, or, as the plaintiff pressed home during cross-examination, a mere 3 business days, if the intervening weekend was to be excluded from the computation. The withdrawal letter read like this:

> "**RE: WITHDRAWAL OF LAND OFFER UNDER THE LAND REFORM AND RESETTLEMENT PROGRAMME (MODEL A2, PHASE II)**
>
> Please be advised that the Minister of Lands and Rural Resettlement is withdrawing the offer of land made to you in respect of Subdivision **R/E** of **Mariandi** Farm in the **GOROMONZI** District of **MASHONALAND EAST PROVINCE**. The withdrawal is in terms of the conditions of offer attached to the Offer Letter to you of **22-Oct-10**
>
> You are therefore notified of the immediate withdrawal of the offer of subdivision **R/E** of **Mariandi** measuring **62.50** hectares. You are required forthwith to cease all your operations that you may have commenced thereon and immediately vacate the said piece of land.
>
> If you wish to make any representation on this issue please do so in writing within seven days of receipt of this notification, and please direct your correspondence to the Minister."

At the trial, one Nyasha Victor Moses Mupita ("***Mupita***") gave evidence on behalf of the Minister. He was a Law Officer in the Ministry of Lands. His evidence was basically an amplification of the facts outlined in the plea. In fact, there was much convergence of Mupita's evidence with that of the plaintiff and her witness. However, one notable area of difference was whether the meeting before the Minister had been called at the instance of the first and second defendants, as he himself claimed, or at the instance of the plaintiff as she and her husband insisted. Another area of difference was whether the first and second defendants had taken occupation of the property much earlier, indeed at the onset of the land reform programme in 1999/2000, as Mupita claimed, or well after the plaintiff had already received the offer letter, as she and her husband claimed.

Mupita conceded that several mistakes had been made in the early phases of the land reform programme. For instance, some deserving cases had been overlooked in the actual granting of the offer letters. He claimed that the first and second defendants had been two such victims. He said they had managed to make out their case to the Ministry, namely that they had taken occupation of Mariandi at the onset of the land reform programme but that they had continuously been overlooked or side-lined in the actual issuing of the offer letters.

In his discretion, the Minister had decided to rectify the situation by re-allocating Mariandi to all the three claimants. Mupita denied that political connections had had anything to do with it.

Mupita also conceded that the withdrawal letter, whilst purporting to be a notice of withdrawal of the offer letter in terms of which the plaintiff would have 7 days within which to make representations, was a mistake. It was based on the old forms that had been designed at the onset of the land reform programme. Such forms had subsequently been re-designed. But in plaintiff's case, Mupita argued, the notice of withdrawal of the offer letter had been duly given at the meeting before the Minister. Neither party specified when exactly that meeting had been held. But it seemed common cause that it had been held sometime in April or May 2011. Plaintiff's letter of complaint to the Minister which she claimed had triggered the meeting was dated 5 April 2011. Emmanuel Tsikire said that the meeting had been held soon after that letter.

Mupita insisted that the decision to re-subdivide the property amongst all three was something arrived at by consensus. He denied that Muradzikwa could have discounted any further subdivision to below 62.50 hectares and pointed out that it was the same Muradzikwa who had gone on to prepare the maps and the subdivision diagrams.

Mupita also conceded that he was unaware whether the plaintiff had actually been advised formally of the withdrawal letter or how she may have been advised to go and collect the new offer letter. However, he maintained that the plaintiff would have been advised in the same way that she had previously been advised in respect of the original offer letter. Beneficiaries were being advised by telephone. They would then go and collect their offer letters in person.

Ms *Maphosa*, for the plaintiff, blasted the manner in which the third defendant had gone about the whole issue. She condemned the manifest breach of procedure in the way offer letters had suddenly been issued to the first and second defendants only after the plaintiff had resorted to litigation. She compared the manner the plaintiff had got her offer letter with the way the first and second defendants had subsequently been given theirs. For the plaintiff, it had been a tortuous journey that had started with the tedious process of land identification; endless trips to the lands offices; receiving formal recommendations from all the structures within the lands allocating system; long periods of inaction and finally the receipt of the offer letter. On the other hand, Ms *Maphosa* charged, the first and second defendants, evidently banking on their political connections, had just mushroomed from

nowhere and landed the bigger portions of Mariandi which had the farm house and a borehole. Such manifest injustice, she argued, cried out for judicial intervention.

In a nutshell, that was the plaintiff's case.

The issues for trial as agreed upon on the joint pre-trial conference minute were these:

- Whether or not the first and second defendants were lawfully occupying the property in question, and whether or not, consequently they should (or should not) be evicted; and

- Whether there had been violence, and or threats of violence, against the plaintiff and her husband by the first and second defendants, and those claiming occupation through them.

The plaintiff undoubtedly paints a picture of gross unfairness in the manner she was treated by the third defendant, particularly the way her original offer of 62.50 hectares had been whittled down to a third of the original size. Where there is a conflict between what the plaintiff and her witness said was happening, and what Mupita said was happening, the evidence of the plaintiff and her witness must prevail. The plaintiff and husband were on the ground. The first and second defendants did not come to court. Mupita's evidence was largely hearsay. Much of it though was saved by the fact that most of the material facts making out the claim and the defence were common cause. But he could not possibly dispute what the plaintiffs could have said on those aspects where the facts were not common cause. He was not on the ground. He did not even attend the Minister's meeting in April or May 2011 which the plaintiff and her husband did.

However, it seems clear to me that the areas of dispute between the evidence of the plaintiff and that of Mupita do not decide the case. For example, whether the Minister's meeting was called at the instance of the plaintiff or that of the first and second defendants does not decide the matter. The fact remains that such a meeting was held to try and resolve the dispute that had emerged. Furthermore, whether it was at that meeting that the plaintiff got forewarned of the intention to subdivide the property and share it amongst all three of them; whether or not the withdrawal of the plaintiff's original offer letter was unprocedural; whether or not there was a breach of protocol in the manner the first and second defendants had eventually landed portions of Mariandi, etc., are all, in my view, essentially matters of interpretation or points of law upon which I have to pronounce judgment on the basis of all the surrounding circumstances.

The plaintiff might feel unfairly treated. That position is not without the court's sympathy. But that is the small picture. There is a bigger picture. It was common cause at the trial that the Minister, as the acquiring authority in terms of the laws governing land re-distribution in this country, was vested with a certain amount of discretion on the best way to re-distribute the land equitably amongst the vast majority of land hungry citizens. It was common cause, or I should take judicial notice of the fact that the land re-distribution process was a mammoth exercise. Some mistakes were made in the process. Obviously the Minister's discretion was not unfettered. It had to be exercised judiciously and not whimsically. The point of difference between the plaintiff and the third defendant in this case was that, in relation to the plaintiff, the Minister had, according to the plaintiff, shown favouritism towards someone who had enhanced his political fortunes by campaigning for him in the national elections of 2008. That obviously would be an improper exercise of discretion.

However, the bigger picture in this case was that both the first and second defendants also wanted land just as the plaintiff did. Both sides looked up to the Minister to deal with their dispute. Of course, there was an allegation by the plaintiff and her witness that the second defendant had another property elsewhere. But this was never pursued, let alone proved. Mupita certainly refuted it. I discount it as fact.

The plaintiff also paints another picture of unfairness in that when the property was subdivided into three portions, despite her having been initially allocated the whole piece, the plaintiff ended up getting the smallest portion which did not have the farm house and the borehole. But it is not quite correct that the plaintiff's portion was the smallest. It was equal to that of the second defendant. And the difference with the piece allocated to the first defendant was about 2 hectares only.

In my view, a judicial officer called upon to review or judge alleged administrative breaches by functionaries should be circumspect. He should desist from adopting an armchair approach. He should resist the use of a microscope to scrutinize and judge, with the wisdom of hindsight, the conduct or decision of the administrative functionary carried out or taken in the heat of the moment as the events unfold. I consider that the approach in such situations should be as was referred to in *Affretair (Pvt) Ltd & Anor* v *M K Airlines (Pvt) Ltd*[2]. Quoting from BAXTER *Administrative Law*, at p 681, McNALLY JA said[3]:

[2] 1996 (2) ZLR 14 (S)
[3] At p 25D - F

> "The function of judicial review is to scrutinize the legality of administrative action, not to secure a decision by a judge in place of an administrator. As a general principle, the courts will not attempt to substitute their own decision for that of the public authority; if an administrative decision is found to be *ultra vires* the court will usually set it aside and refer the matter back to the authority for a fresh decision. To do otherwise 'would constitute an unwarranted usurpation of the powers entrusted [to the public authority] by the Legislator'. Thus it is said that: '[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary. In exceptional circumstances this principle will be departed from. The overriding principle is that of fairness."

In this matter, for this court to start scrutinising such minute details as, for instance, the nature, size or quality of the land one person gets under the land reform programme, as compared to the other, is, in my view, inappropriate. Such details are best left to the administrative functionaries who are equipped with the necessary information, expertise and machinery to deal with them. The courts should intervene in proven cases of flagrant or substantial breach of the law. No such breach or abuse has been shown in this matter.

Section 68 of the Constitution grants to every person the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Section 3 of the Administrative Justice Act, [*Chapter 10:28*], directs administrative authorities, in taking any administrative action that may affect other people's rights, interests or legitimate expectations, to act lawfully, reasonably and fairly. The administrative authority must, among other things, give the person affected adequate notice of the nature of the proposed action and a reasonable opportunity to make adequate representations.

Ms *Maphosa* attacked with much passion the manner in which the plaintiff's original offer letter was withdrawn, not least the fact that, according to her, no notice was given, and also, the fact that the time given the plaintiff to make representations was woefully inadequate. I disagree. I find that at the meeting before the Minister the intention to subdivide the property equally amongst the three was announced. The plaintiff cannot claim to have been taken by surprise. She must have known it was coming. I consider that there was substantial compliance with the requirements of the law.

I try and visualise the events as they unfolded. They are these. There is pressure for land. The plaintiff and the two defendants want a piece of the same cake. When they initially take physical occupation, irrespective of when they did so, none of them had a formal offer letter. The plaintiff says the district lands officers expressly permitted her to take occupation

even before the offer letter was out. Mupita says the acquiring authority actually insisted that people should physically go onto the land. Their stay on the land would be regularised subsequently. He says that that is how the first and second defendants had landed on Mariandi. According to him, they occupied Mariandi well ahead of the plaintiff.

On the other hand, the plaintiff is initially allocated 36.76 hectares of Mariandi. It turns out to be a mistake. There is no formal revocation of that first offer letter. But it stood revoked anyway. She is immediately re-allocated 62.50 hectares. She is happy. The happiness is short lived. According to her, the first and second defendants mushroom from nowhere. The parties are soon fighting. The Minister intervenes. He divides the cake almost equally amongst all three. The plaintiff cries foul. She wants all of it to herself. Among other things, she condemns the Minister for encouraging illegality and lawlessness by allowing people without offer letters to occupy gazetted land. But surely what is good for the goose must also be good for the gander? That is how she herself had got onto the land in the first place. At any rate, what illegality or lawlessness? Whilst s 3 of the Gazetted Lands (Consequential Provisions) Act, [*Chapter 20:28*], starts by prohibiting any person from holding, using or occupying Gazetted land without lawful authority (in the form of an offer letter, a permit or a lease), it ends by allowing certain exceptions to this general prohibition. Furthermore, that the Minister may have encouraged physical occupation of Gazetted lands by prospective beneficiaries pending the issuing of offer letters to them could hardly be the basis for the plaintiff, also a beneficiary herself, to seek the eviction of the other beneficiaries.

Thus, for the first ground of relief in this matter, I cannot find for the plaintiff. I cannot find fault with the way the third defendant resolved the dispute. No case for eviction has been made out.

There was no contest regarding the second ground of relief, mainly an order against the first and second defendants to keep the peace. In his cross-examination of the plaintiff and her witness, Mr *Mukucha*, for the third defendants, suggested that if the peace order was granted their problems would be solved. In the premises, the second relief sought by the plaintiff is hereby granted.

The plaintiff, by a draft order attached to her closing submissions, claimed costs of suit on an attorney and client scale against all the defendants, jointly and severally. The justification given in the closing submissions was that, in my own words, she had been compelled by the actions of the third defendant to go through the pain of the trial, yet the

same third defendant had been the author of all her woes. It was said she was indigent. She had to seek *in forma pauperis* representation to prosecute her case.

I find no justification for an order of costs against, or in favour of, any party. As far as the remedies sought by the plaintiff were concerned, the order of eviction was undoubtedly the jugular vein. But she missed it. Furthermore, given that she was proceeding *in forma pauperis*, the loss has been on her counsel, rather than herself. Counsel can bear that loss because it is a sworn duty.

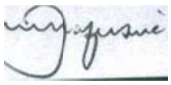
In the circumstances I make the following orders:

1. The plaintiff's claim for an order of eviction against the first and second defendants, and all those claiming occupation through them, from certain piece of land situate in the District of Goromonzi, called Remaining Extent of Mariandi, measuring 62.50 hectares, is hereby dismissed;

2. The first and second defendants, and all those claiming occupation through them, are hereby ordered and directed to maintain the peace towards the plaintiff, her family, and all those claiming occupation through her, and specifically, they shall desist from being violent and or making any threats of violence whatsoever towards the plaintiff, her family and all those claiming occupation through her.

3. Each party shall bear its own costs.

29 July 2015



Sawyer & Mkushi, plaintiff's legal practitioners
Civil Division of the Attorney-General's Office, third defendants' legal practitioners