ANDREW MARINGA
versus
WINRAY ESTATE (PRIVATE) LIMITED
and
MINISTRY OF LANDS AND RURAL RESETTLEMENT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHATUKUTA J
HARARE, 11 & 23 August 2017

Opposed Application

T T G Musarurwa, for the applicant
R M Sithole, for 1st respondent
R Chanduru, for 2nd respondent

CHATUKUTA J: The applicant seeks the rescission of a judgment granted on 11 November 2015 under case number HC 9831/15 in favour of the 1st respondent and with the consent of the 2nd respondent. He further seeks to be joined in terms of *r* 87 of the High Court Rules to the proceedings in case number HC 9831/15 in the event that rescission is granted.

The following facts are common cause: The 1st respondent was the former owner of a certain piece of land called Subdivision B of Kashao situate in the District of Lomagundi (the farm). The farm was acquired by the state under the land acquisition programme in 2005. On 1 December 2006, the applicant was issued an offer letter by the 1st respondent in terms of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] (the Gazetted Lands Act). Despite the gazetting of the farm, the 1st respondent did not vacate the farm after the expiry of the periods set out in the Gazetted Lands Act. The applicant attempted to take occupation of the land as per the offer letter. The 1st respondent resisted the occupation leading to the applicant reporting the matter to Banket Police Station in 2007. He further caused the 2nd respondent to also report the violation to the police in 2009.

The 1st respondent (represented by one Fredrick Charles Mutanda, a director and the major shareholder in the 1st respondent) was charged with violating the provisions of the Gazetted Lands Act. The 1st respondent excepted to the charge on the ground that it was unconstitutional for the 2nd respondent to acquire a farm owned by an indigenous black person. The matter was referred to the Supreme Court for determination of the constitutional issue. The 2nd respondent opposed the application in the Constitutional Court under case number CCZ 84/11. He contented, among other issues, that the acquisition was constitutional and there was no law that precluded the acquisition of property owned by a black indigenous person. On 25 June 2015, the Constitutional Court dismissed the constitutional application by the 1st respondent on the basis that it did not have the jurisdiction to inquire into the issues raised in the referral. Following the Constitutional Court decision, the 1st respondent was convicted by the Chinhoyi Magistrates Court on 21 April 2015 and an order for its ejectment from the farm was granted by the court.

On 13 October 2015, the 1st respondent filed an application under case number HC 9831/15 for the delisting of the farm. The application was granted on 11 November 2015 with the consent of the 2nd respondent. The applicant became aware of the consent order in April 2016 and soon thereafter filed the present application seeking the rescission of the judgment and joinder to the proceedings in that matter.

At the commencement of the hearing, the applicant raised a preliminary issue that there was no opposition to the application by the 2nd respondent. The opposing affidavit was deposed to by Grace Tsitsi Mutandiro, the permanent secretary in the Ministry of Lands and Rural Resettlement. Mr *Musarurwa* submitted that the applicant was suing the Minister and it is the Minister who ought to have deposed to the opposing affidavit and not the permanent secretary. The minister could not delegate his authority to defend the application. Further, the permanent secretary did not aver in the affidavit that she had been authorized by the minister to depose to the opposing affidavit.

Ms *Sithole* submitted that the permanent secretary, being the administrator of the Ministry, was authorized to depose to the affidavit. Ms *Chanduru* submitted that the permanent secretary was authorized under the State Liabilities Act [*Chapter 8:14*] to act on behalf of the minister. She however did not refer to the provision of the Act she was relying on.

Ms *Chanduru* was unable to identify the relevant provisions in the State Liabilities Act because no such provision exists. The State Liabilities Act imposes liability on the State for the acts of its employees, who may be cited when a claim is instituted and incidental issues. It does provide for the authorization of any person to depose to an affidavit on behalf of the person/s who will have been cited in a claim.

The answer to the question as to who can depose to an affidavit is found in *r* 227(4) of the High Court Rules. The rule provides that only a person who is privy to facts relevant to the application may depose to an affidavit. A permanent secretary is the head of the ministry. He/she would be the custodian of the ministry's documents and ordinarily privy to the day to day running of the ministry. (See *Elias Zanondoga Mapendere & 2 Ors* v *Minister of Justice, Legal and Parliamentary Affairs & 3 Ors* HH 420-17).

The permanent secretary in the present matter deposed that she was authorized to depose to the founding affidavit on behalf of the 2nd respondent virtue of her position as head of the ministry. She further deposed that she had personal knowledge of the relevant facts. She was therefore competent to depose to the opposing affidavit. I therefore find no merit in the preliminary issue. In any event, the 1st respondent's opposition to the application was not challenged and the application would be determined on the basis of that opposition.

Turning to the merits of the application, Mr *Musarurwa* submitted that the judgment in HC 9831/15 was granted in error as material facts were deliberately excluded in the application. . Had the information been availed, the court would not have granted the order on 11 November 2015. Further, it was granted in his absence despite the fact that he has a substantial interest in the matter, being a holder of an offer letter entitling him to occupy the farm. He is therefore entitled to be joined to the application under case number HC 9831/15.

The application was opposed by the 1st and the 2nd respondents on the basis that the acquisition of the farm by the 2nd respondent was by error as the farm was owned by a black indigenous person. The application under case number HC 9831/15 sought to correct that error. The 2nd respondent, being the acquiring authority, was at liberty to consent to the order sought without involving the applicant. Whilst both respondents conceded that the applicant had rights in terms of the offer letter issued to him, it was submitted that the applicant did not have a

substantial interest in the correction of that error. Therefore there was no basis for setting aside the judgment and joining the applicant to the proceedings.

It is trite that an applicant seeking an order for rescission of judgment in terms of *r* 449(1) of the High Court Rules ought to demonstrate that the judgment was erroneous granted in his/her absence and that he/she has a direct and substantial interest in the matter which would entitle him to intervene in the application. (See *Matambanadzo* v *Goven* 2004 (1) ZLR 399 (S)). The latter requirement equally applies where a party wishes to be joined in terms of *r* 87 (2) (b) to proceedings already instituted. One must further establish that he/she may be affected by the judgment of the court. (See *Sibanda* v *Sibanda* & *Anor* 2009 (1) ZLR 64.)

The issues for determination in this application are therefore whether or not the judgment in case number HC 9831/15 was granted in error and whether or not the applicant has a direct and substantial interest warranting the setting aside of the judgment and his joinder to the application.

A perusal of the founding affidavit under case number HC 9831/15 discloses that the 1st and the 2nd respondents deliberately concealed from the court vital facts that would have assisted the court in determining the application. It is trite that litigants are enjoined to place all the material facts before the court in order to equip the court with sufficient information to arrive at a just decision. (See *Graspeak Investments* v *Delta Corporation (Pvt) Ltd* 2001 (2) ZLR 551 (H) at 554D and *Beverly Building Society* v *Rgwafa* 2005 (1) 108 (S)). Whilst these two cases relate to urgent chamber applications, the principles therein stated on the need for litigants to act in good faith equally apply in this case. The following material facts which were within the knowledge of both respondents were withheld from the court:

a) The 2nd respondent had issued a valid offer letter to the applicant on 1 December 2006 which had not been withdrawn. The applicant had failed to take occupation of the farm because the 1st respondent had refused to vacate the farm;
b) The 1st respondent had been prosecuted in the Chinhoyi Magistrates Court at the instigation of the applicant with the 2nd respondent being the complainant. It was convicted on 21 April 2015 for contravening *s* 3 (2) of the Gazetted Lands. The conviction still stands;

c) An order for its ejectment was issued by the Chinhoyi Magistrates Court on 21 April 2015. The order for ejectment is also extant;
d) The 1st respondent had unsuccessfully challenged the acquisition of the farm in the Constitutional Court. An order dismissing the application was issued on 25 June 2015;
e) The 2nd respondent had opposed the constitutional application arguing, among other issues, that the acquisition was constitutional;
f) Both the 1st respondent, through its director Fredrick Mutanda, and the 2nd respondent were aware of the applicant's interest in the farm. According to paragraph 9 of the founding affidavit, the applicant held a meeting with Fredrick Charles Mutanda in 2007 during which he advised him of the offer letter and hence his interest in the farm and consequently an interest in any matter relating to the farm.

It appears to me that the above facts been placed before the court, questions would have arisen as to why the applicant was not cited as a party to the application when he had was a holder of an offer letter lawfully issued by the 2nd respondent. The rights of a holder of an offer letter lawfully are now trite. In *CFU & Ors* v *Minister of Lands & Ors* 2010 (20 ZLR 576 CHIDYAUSIKU CJ remarked at 591 the following:

> "Having concluded that the Minister has the legal power or authority to issue a letter, a permit or a land settlement lease, it follows that the holders of those documents have legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land resettlement lease."

The learned Chief Justice further remarked at p 592G-593A that:

> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the rights of possession or occupation on it. The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. **The individual applicants, as former owners or occupiers of the acquired land, lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holders of the offer letters, permits or land settlement leases**." (own emphasis) (See also *Five Streams Farm (Pvt) Ltd & Ors* v *Francis Pedzana Gudyanga & Anor* SC 13/2016.)

The 1st respondent ceased to have any rights in the farm upon acquisition of the farm by the 2nd respondent. At the same time, whilst the 2nd respondent was now the owner of the farm, it had granted the applicant the right to occupy and use the land when it issued the over letter. The delisting of the farm, with ownership reverting to the 1st respondent, had in essence the effect of stripping the applicant of his rights under the offer letter without having been afforded an opportunity by the court to be heard.

In fact, the 2nd respondent did not give the applicant an opportunity to make submissions as is required under the Administrative Justice Act [*Chapter 10:28*]. Section 3 (1) provides that administrative action must be exercised fairly, reasonable and timeously. (See *Bennett* v *Parliament of Zimbabwe & Ors* (1) ZLR 210 (H) at 216 G.) As rightly submitted by the applicant, which submission was not controverted by either respondent, the 2nd respondent did not act fairly, reasonably and timeously. The applicant was not aware of the decision of the 2nd respondent to delist the farm and of the consent order until he made his own inquiries. According to paragraph 7 of the 2nd respondent's opposing affidavit and the oral submissions by Ms *Chandura*, the 2nd respondent has yet to withdrawn the offer letter, one year and 9 months after the consent judgment.

It was therefore necessary to place before the court the fact that applicant had an offer letter and had been vigorously pursuing the prosecution of the 1st respondent. It was equally necessary to disclose that the 1st respondent had been convicted and ordered to vacate the farm.

It defies logic that the 2nd respondent who successfully caused the prosecution of the 1st respondent and spiritedly challenged the respondent in the Constitutional Court turned would turn around to supports the same respondent in HC 9831/15 and in this application. The order by the Constitutional Court under CCZ 84/11 was granted on 25 June 2015. The application under case number HC 9831/15 was filed on 13 October 2015, barely four months after the Constitutional Court order.

What is more glaring is the misleading averment in the last sentence to paragraph 6 of the 2nd respondent's opposing affidavit in the present case that the balance of convenience favours the 1st respondent because the applicant never took occupation of the farm after having been issued with the offer letter. The deponent to the affidavit is silent on the fact that the

applicant has been frustrated by the 1st respondent. She does not mention that in fact it is the applicant who instigated the Minister to have the 1st respondent prosecuted for violating the Gazetted Lands Act and that there is an order for the ejectment of the 1st respondent. What will become of the conviction and the order for ejectment that the 2nd respondent successfully sought has not been disclosed by either the 1st respondent or the 2nd respondent. Taking into account the 2nd respondent's conflicting position, the applicant can be forgiven for suspecting that there is a possibility of collusion between the 1st respondent and the permanent secretary.

It follows from the above, that when the application under HC 9831/15 was filed, the applicant, being a holder of an offer letter, had rights over the farm which rights ought to have been considered by the court in case number HC 9831/15. The order by the court was clearly granted without the benefit of the material facts alluded to earlier and without hearing the applicant.

In light of the above, this is a proper case for me to rescind the judgment under case number HC 9831/15 and join the applicant to those proceedings.

It is accordingly ordered that:

1. The judgment granted in case number HC 9831/15 on 11 November 2015 be and is hereby set aside.
2. The applicant be and is hereby joined as the 3rd respondent in case number HC 9831/15.
3. The applicant be and is hereby granted leave to file its opposing papers to the application under case number HC 9831/15 within 10 days of the granting of this application.
4. The filling of any further pleadings in case number HC 9831/15 shall thereafter proceed in terms of the High Court Rules.
5. The 1st respondent be and is hereby ordered to pay costs of suit.

Mambosasa, applicant's legal practitioners
Mberi Chimwamurombe Legal Practice, legal practitioners for the 1st respondent
Civil Division of the Attorney General's Office, legal practitioners for the 2nd respondent