GEORGE CHIKWAVA
versus
THE STATE
and
THE PROVINCIAL MAGISTRATE (MS P MSIPA)

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 20 September 2018 & 1 November 2018

Urgent Chamber Application

D Drury, for the applicant
C. D Makoto, for the respondent

DUBE J: Our courts have time and again underscored the position that once land has been acquired by the State in terms of the Land Acquisition Act, [*Chapter 20:10*], ownership of the land immediately vests in the State. No person may occupy acquired land without lawful authority. A former farm owner or occupier who has been given notice to vacate acquired land is required to comply with the notice. Once the notice expires, he ceases to have any right to continue occupying the land and is liable to prosecution if he defies the notice. No court of law has any right to authorize the continued occupation of the said land. The fact that one is an indigenous farmer gives no right to an occupier or former owner to continue to occupy acquired land without lawful authority. The fact that one is unaware that the land he occupies was acquired by the State or that he openly occupied the land gives him no right to continue occupying the land.

George Chikwava finds himself in a predicament where he occupies acquired land unlawfully. On 2 July 2004 subdivision D of Bonnyvale Farm was gazetted for acquisition in terms of the Land Acquisition Act. The former owner vacated the farm. The applicant claims that sometime in 2014, he entered into an agreement with the former owner for the sale of his movable

assets and was given rights over the land. The former owner did not make him aware that the land was subject of compulsory acquisition and that he should not be occupying the land.

He operates a dairy on the farm. He has a permit from the Ministry of Agriculture which is an arm of the State to allow him to operate the diary in his own name. He openly occupied the farm which he ran until 2017 when he was served with a notice to vacate the farm which he protested. On 2 November 2017 Phineas Makombe was offered the farm under the Land Reform Programme. He was served with a notice to vacate the farm in terms of the Gazetted Lands (Consequential Provisions Act) [*Chapter 20:28*], the Gazetted Lands Act, and given 90 days to stop all agricultural activities. The applicant did not vacate the farm, the notice lapsed and he was prosecuted for contravening s 3 (2) (b) of the Gazetted Lands Act which makes it an offence to occupy gazetted land without authority. He was convicted and sentenced as follows,

> "$100 or 30 days imprisonment of which 3 months imprisonment is suspended for 5 years on condition accused does not within that period commit an offence involving occupation of gazetted land without lawful authority for which he is convicted and is sentenced to imprisonment without the option of a fine. Accused is hereby evicted the farm with effect from 31 August 2018. The noting of an appeal does not suspend the eviction order."

He has since appealed the decision of the trial magistrate. He contends that the trial court's unilateral determination to order his ejectment notwithstanding his prospects of appeal is fundamentally defective and no reasonable court looking at the facts of the case could have arrived at that decision. He is an indigenous Zimbabwean running a recognized and authorized dairy. He cannot simply be evicted to make way for a new individual with no proven diary experience. He seeks a stay of the part of the order directing that the noting of an appeal does not suspend the eviction order as well as a stay of the order for eviction.

The first respondent is opposed to the application. It took two points *in limine*. The first point related to the urgency of the matter was abandoned during argument. The second point relates to the dirty hands principle. The first respondent submitted that the applicant has approached the court with dirty hands as he ought to have first vacated the said land before seeking any remedies from the court. It contended that despite dismissal of an application seeking to bar the respondent from interfering with his farming activities under HH 842/17, the applicant defiantly continued occupying the said acquired land until he was prosecuted. Having been convicted and ordered to vacate the land after the criminal trial, the applicant defiantly remains in occupation of the land and continues to disobey court orders. On the merits, the first respondent submitted that the trial

court did not misdirect itself when it decided that the noting of an appeal does not suspend the eviction order in cases of this nature which are *sui generis*. The trial court cannot be faulted for such a decision as the applicant enjoys no reasonable prospects of success on appeal. The respondent submitted that the applicant is not a holder of a valid permit and has no lawful authority to occupy the land concerned.

The concept of the dirty hands principle has its origins in English law and was explained in *Hardkinson* v *Hardkinson* [1952] 2 ALL ER 567 (CA) as follows:

> "it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged.… The fact is that anyone who disobeys an order of the court …. is in contempt …."

The *locus classicus* case on the dirty hands principle in this jurisdiction is the *ANZ (Pvt) Ltd* v *Minister of State for Information* 2004 (1) ZLR 538(S), where the court stated as follows:

> "This is a court of law and, as such, cannot connive at or condone the applicants' open defiance of the law. Citizens are obliged to obey the law of the land and argue afterwards. It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination of this court."

The dirty hands principle is applicable where a litigant who has a court order against him, requiring him to act in a particular fashion, fails to comply with it and instead challenges it. The approach of the courts where a litigant is in open defiance of the law, is to decline to deal with a court challenge brought until the litigant has complied with the order, thereby purging his contempt .The concept applies only in the case of disobedience of court orders. The dirty hands principle does not apply in the case of a failure to obey an administrative notice to vacate acquired land. A litigant does not have dirty hands where there is no court order that he is required to comply with.

The applicant cannot be said to have dirty hands because he failed to comply with the notice to vacate the land within 90 days. On 10 November 2017, having been served with an eviction notice, the applicant approached this court on an urgent basis seeking to bar the second respondent and the Zimbabwe Lands Commission from interfering with his possession of the farm. The application was dismissed on 5 December 2017. The applicant defiantly continued occupying the farm resulting in his prosecution. The order dismissing his application for an interdict did not require him to comply with it. The order had no effect of evicting him. He cannot be said to have dirty hands with regards his conduct towards that particular order.

The order of the magistrate was made on 20 August 2018. The applicant was required to vacate the farm on 31 August 2018.The applicant had 10 days to vacate the land. The applicant lodged this application on 27 August 2018. At the time the applicant filed this application challenging the order of the Magistrates Court, the time given to him to vacate the farm had not run out. He cannot be said to have dirty hands. The lodging of this application has afforded him reprieve as no further action can be taken against him pending the determination of this application. A litigant has dirty hands where at the time he is required to act in terms of an order he fails to comply with the direction of a court order and goes on to challenge the direction. Where he has time within which to comply with directions of a court order and decides to challenge the order, he cannot be said to have dirty hands. The point *in limine* fails.

The applicant seeks to stay proceedings pending his appeal against the order of the trial court and hence seeks a temporary prohibitory interdict. The requirements of a temporary interdict are trite. In the case of *Setlogelo v Setlogelo* 1914 AD 221 they are listed as follows,

1. a *prima facie right*, though open to some doubt
2. a well granted apprehension of irreparable harm
3. the balance of convenience must favor the granting of the interdict
4. absence of any other satisfactory remedy.

In the court held as follows,

The general rule is that a party who has obtained an order against another is entitled to execute upon it, see *Mupini* v *Makoni* 1993 (1) ZLR 80 (SC). What this means is that a party who has obtained an order against an opponent has an entitlement to execute upon it. The court dealing with an application for stay of execution has, in determining whether to set aside or suspend a writ of execution , wide discretionary powers which it must exercise judicially. It must consider whether special circumstances exist which warrant the course of action requested. The court is ordinarily asked to suspend the operation of an order pending some course taken by the applicant. There is usually pending litigation.The court must be satisfied that the applicant has prospects of success in the litigation ahead. The court will be failing in its duty were it to stop execution of an order where the pending litigation is devoid of any merit.

In terms of the s 3 of the Gazetted Lands (Consequential Provisions) Act, a person who occupies acquired land is required to have lawful authority to occupy the land. Lawful authority is defined in s 2 as follows:

"Lawful authority" means:

(a) an offer letter, or

(b) a permit or

(c) a land settlement lease

These documents are issued by the State. The effect of these documents is to confer to the holder a right to occupy and use resettled land. A permit is defined in the act as follows,

> "when used as a noun, means a permit issued by the State which entitles any person to occupy and use resettlement land;''

In *Freeme v Snr Magistrate Chinhoi and Anor CCZ 10/14* the court emphasized the point that a permit means a permit issued by the State which entitles any person to occupy and use resettled land. The permit envisaged is one issued by the State and in particular the acquiring authority. The applicant has neither a permit, offer letter or land settlement lease as envisaged by this Act. A certificate issued by the Chief Dairy Officer in terms of the Dairy Act [*Chapter 18:08*] registering the farm as a farm diary and giving him permission to conduct diary activities on the farm does not confer on the farmer lawful authority to the land concerned. All it does is to give the dairy farmer the right to carry out a diary on the farm concerned. The land over which this certificate is issued need not belong to the dairy farmer. The certificate has no effect of conferring on the applicant a right to the land concerned . Whilst the certificate was issued by the State, it does not constitute lawful authority as envisaged by the Gazetted Lands Act. The fact that the applicant was not told by the former owner that the land had been acquired does not assist him. Although he has been using the land openly, this has no effect of conferring on him an entitlement to the land. An indigenous farmer is required to comply with the law and is not above the law. A former owner or occupier who is in occupation of a farm without lawful authority, occupies the land illegally. The fact that one runs a successful dairy farm with a big herd of cattle supplying milk to Dairiboard, a company dealing in milk products, does not confer on him legitimacy entitling the applicant to remain occupying the farm.

In a judgment dismissing his application for an interdict, CHITAKUNYE J succinctly articulated the applicant's legal position. Despite the knowledge that he has no right to remain in occupation of the land, he has stubbornly held on. His continued stay at the farm is illegal. The approach of the courts with respect to persons who refuse to vacate gazetted lands was underscored in *Commercial Farmers Union & Others* v *The Minister of Lands and Rural Resettlement & Ors*

SC 31/10 where the court held that former owners or occupiers of gazetted land have no legal right of any description in respect of the acquired land once the prescribed period (90 days) has expired. The court emphasized that the continued occupation of the land becomes illegal and a court of law has no jurisdiction to authorize the commission of a criminal offence. Once a notice to vacate acquired land has been issued, the owner or occupier of land a court of law has no jurisdiction to authorize the commission of a criminal offence by permitting continued occupation of the land. The applicant has not shown a *prima facie* right to the land.

In *Bruford* v *AG* HH 232/10 the court dealt with a challenge where a court after convicting in terms of section 3 of the Gazetted Lands Act ordered execution pending appeal. At p 8 of the cyclostyled judgment the court held as follows,

> "where the trial court is of the opinion that the appeal has no prospects of success and that it is being lodged only for purposes of delay , it may order execution of the order pending appeal"

The court went on to remark as follows,

> *"*It must also be accepted that where an appeal is lodged or indicated, the magistrate may of his own accord or upon application, order execution pending appeal if he is of the view that the appellant's grounds of appeal are frivolous and without merit"

The import of this case is that where an appeal has been indicated or in fact lodged, a trial court has a discretion where it is of the opinion that the appeal lodged or indicated has no prospects of success and that the appeal is being lodged simply to delay proceedings ,of its own accord or upon application, order execution pending appeal . In this case, the extract from the record does not indicate that an appeal had been intimated nor that an application been made by the State to proceed with execution pending an appeal. The unilateral decision of the trial court to order execution pending an appeal is incompetent at law especially when one considers that this was done without intimation and there was no appeal pending at that time. The part of the order dealing with execution of the order is superfluous. Despite this misdirection, the fact is that the applicant has no lawful authority to be on this land and the court was entitled to order his eviction from the land. His appeal regarding authority to be on the land lacks prospects of success. Even if the court on appeal finds that the trial court misdirected itself and decides to set aside the offending part of the sentence, it is very unlikely to find that the applicant has lawful authority to remain on the farm. I find no useful purpose in stopping execution of the order when it is clear that the appeal as

a whole lacks prospects of success. This court has no intention to authorize the commission of a criminal offence by permitting continued occupation of the land by the applicant.

The applicant has been aware since the notice to vacate the farm was issued that he was required to move, and more especially after the judgment dismissing his application for an interdict which spelt out his legal position. The applicant had three months within which to make alternative arrangements for his business after the issuance of the notice. He ought to have made alternative arrangements to move his cattle elsewhere. A former owner or occupier who has been given notice to vacate a farm is fore warned. Where he to comply with the notice, he cannot cry foul when he is given a short notice to vacate upon conviction in terms of s 3 of the Gazetted Lands Act. Out of folly, the applicant chose to disregard the notice. He is the author of his own misfortune. He cannot cry foul when he is given 10 days to vacate the property. The applicant has failed to show an entitlement to a prohibitory interdict.

The applicant has shown no entitlement to the relief sought.

In the result it is ordered as follows;

The application is dismissed with costs.

Honey & Blankenburg, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners