FUNGAI CHAERUKA
versus
MINISTER OF LANDS &
RURAL RESETTLEMENT
and
HEATHER GUILD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 19 February & 26 February 2014

Opposed Application

D. Ochieng, for the applicant
Ms *K. Warinda*, for the 1st respondent
T. Mpofu, for the 2nd respondent

MATHONSI J: The applicant was, by offer letter dated 20 March 2007, offered the whole of Lot 5 of Lot 1 of Mazonwe, Mutare in Manicaland Province, measuring 498.00 hectares, otherwise known as Mapetu Farm, by the first respondent, who is the acquiring authority. The said farm was previously held by a company known as OW Thwaites (Pvt) Ltd in which the second respondent was a director, under Deed of Transfer No. 5576/92.

The offer letter in question was withdrawn following a directive issued by the late Vice President Joseph Msika, who was then the chairperson of the National Lands Committee. It was also observed that although the applicant had taken up the offered land, he was badly under-utilising it as he was practicing horticulture on a small piece of land less than a hectare, leaving the rest of the farm lying idle.

The applicant's loss became the second respondent's gain as she was issued with an offer letter by the first respondent, dated 8 November 2010, in terms of which she was allocated the same farm, much to the chagrin of the applicant who has now launched this application seeking the following order:-

> "WHEREUPON after perusal of documents filed of record and having counsel (*sic*) it is hereby declared that:
>
> 1. First respondent's decision to cancel applicant's Offer Letter is unlawful and is accordingly of no force or effect.

2. Second respondent's Offer Letter is consequently null and void".

The applicant's approach to this court was not before he had embarked on a tryst with the chairperson of Zanu PF seeking his intervention and declaring in a letter dated 19 January 2011, that:

> "There has been a negative turn of events since November 2010, when I received a letter of withdrawal of my land offer letter from the current Minister of Lands. The farm has been re-offered to the previous white owner (Heather Guild) see annexure B and C. I have since responded to the revocation of my land offer to the Minister of Lands on the 22nd November 2010, who by now has not made any correspondence in that regard (see annexure D). I have made a professional and political stance Cde Chairman, that I will not move from the farm to give way for the reversal of the agrarian reform. In this regard I am growing impatient every day as events are turning chaotic with the white man destroying my crops……. I am therefore appealing to you Cde Chairman to invoke your political clout in assisting me to address this chaos. In my view your office and that of the Provincial Governor are my bedrock for a political solution to this matter".

The chairman may not have invoked his political clout because the political solution the applicant craved came to naught forcing him to change direction and approach this court for a legal solution aforesaid.

In his founding affidavit, the applicant surprisingly lay claim to a farm known as "Lot 5 of Lot 1 of Burma Valley situate in the district of Mutare" which is certainly not the farm previously allocated to him and now allocated to the second respondent. He stated that he seeks from this court a declarator that the purported withdrawal of his Offer Letter by the Minister is unlawful, null and void and that the allocation of the farm to the second respondent is also null and void by reason that an offer letter, once accepted becomes a binding contract which cannot be unilaterally terminated without notice or a material breach.

The applicant maintained that the termination of the contract was without notice to him. In his view there is no provision in the contract entitling the Minister to terminate it. In addition, the applicant argued that the withdrawal of his offer letter was in violation of s 3 of the Administrative Justice Act [*Cap 10:28*] which enjoins the Minister to act lawfully, reasonably and in a fair manner. Specifically the Minister should have given him notice of the intention to terminate giving him adequate time to make representations.

Having said that he was not given notice, it is surprising that the applicant accepts in para 9 of his answering affidavit that the letter from the late Vice President was read out to him in November 2007 and that the letter of withdrawal was only delivered to him 3 years later in November 2010.

The respondents have opposed the application. In his opposing affidavit the first respondent stated that he acted in terms of clause 7 of the offer letter constituting the contract between the parties which reserves to him the right to withdraw or change the offer letter if he deems it necessary. It became necessary to withdraw the offer given to the applicant after the chairman of the National Lands Committee directed that the second respondent be allowed to farm on that land, and that the applicant's offer be withdrawn. In addition, there was scarcely any farming activity taking place on the farm as the applicant was content with practising horticulture on less than a hectare of the 498.00 hectares farm, a clear sign of under-utilisation.

According to the first respondent, adequate notice was given to the applicant of the intention to withdraw the offer letter when the Vice President's letter of 8 November 2007 was read out to him at that time, a fact which the applicant concedes. He therefore had 3 years to make representations.

The second respondent also confirmed in her opposing affidavit that a meeting was held at the Governor's office on 13 November 2007 which was attended by the applicant and herself at which the Governor read out the letter authored by Vice President Msika to the effect that the applicant's offer letter was to be withdrawn and that she instead be allowed to farm the area.

Mr *Ochieng,* who appeared for the applicant, presented the applicant's case from 2 fronts namely that of contract and administrative justice. In respect of contract, he submitted that once an offer letter is accepted, it constitutes a binding contract. While conceding that clause 7 of the offer letter entitles the first respondent to withdraw the offer letter, he insisted that it must be read with clause 4 thereof which reads:-

> "You are requested to indicate on the attached form whether you accept this offer or not, within 30 days of receipt of this offer".

Clause 7 reads:-

> "The Minister reserves the right to withdraw or change this offer letter if he deems it necessary, or if you are found in breach of any of the set conditions. In the event of a withdrawal or change of this offer, no compensation arising from this offer shall be claimable or payable whatsoever".

Attached to the offer letter forming the contract between the parties are "Conditions Applying to the offer of Land Under the Zimbabwe Land Reform and Resettlement Programme (Phase II, Model A) Scheme". In terms of clause 1(b) thereof, the recipient of

land is required to undertake and initiate development on the farm in accordance with the 5 year development plan submitted. Clause 3 reiterates that the offer may be cancelled or withdrawn for breach of any of the conditions set out.

To the extent that the applicant seeks to enforce a contract arising out of an offer letter, he must certainly bring himself within the provisions of that contract. I agree with Mr *Mpofu* for the second defendant that if the applicant accepts the offer letter, he accepts it on the basis of its terms including clause 7 which gives the Minister unfettered power to cancel or withdraw the land as a result of a breach or "if he deems it necessary"; *Munyaka* v *Masakwa & Anor* HH341/12 at p2.

The relationship between the parties is governed by a binding contract which gives the first respondent unfettered authority to withdraw the land from the applicant if he deems it necessary or where there is a breach. Acting in terms of that authority, the first respondent withdrew the offer letter, as he was entitled to do. Mr *Ochieng*'s view that the first respondent's right to withdraw only subsists within the period of 30 days after the recipient got the offer letter is clearly a wrong interpretation of the offer letter. Clause 7 makes it clear that such withdrawal can be made at anytime if deemed necessary or where there is a breach. To hold otherwise would, in my view, amount to raving with the mob about the unattired Royal's beautiful attire.

I conclude therefore that the first respondent was entitled to withdraw the offer letter of the applicant if he deemed that to be necessary or where the applicant was in breach of the terms of the offer letter. I have made reference to the conditions attaching to the offer of land under the land reform programme which required the applicant to undertook development according to a 5 year plan. The applicant has not disputed that he was under-utilising the land. In fact he boldly stated in para 3 of this answering affidavit to first respondent's opposing affidavit that:-

> "The scale of one's farming operations viz the size of land does not provide a basis for the 'lawful' withdrawal of an offer letter".

This is where the applicant has gone astray. The government policy on land reform is not recreational, neither is it designed to accord beneficiaries some pastime. It is meant to benefit those willing and able to utilise land. One cannot be allowed to hold on to large tracts of land they are not using simply to baby sit an inflated ego. If a beneficiary is not using the land, that is a breach of the conditions upon which that land is offered. It should therefore be withdrawn and given to more deserving candidates. For the applicant to utilise less than a

hectare while leaving the remaining 497.00 hectares fallow, was scandalous. It entitled the first respondent to withdraw the offer as he did.

I now turn to deal with the second leg of the applicant's case relating to administrative justice. In his heads of argument the applicant relied on the case of *Masunda* v *Minister of State for Lands & Anor* 2006(2) ZLR 72 in which this court set aside the Minister's decision to withdraw an offer letter issued to a beneficiary of the Land Reform Programme and allocated the same farm to someone else on the grounds that the party whose offer letter was withdrawn had not been given an opportunity to be heard in violation of the *audi alteram partem* rule. The court ruled that once an offer letter was accepted within the stipulated time and in the prescribed manner, a contractual agreement was created which could not be withdrawn. At pp 77G-78A the court pronounced:-

> "Secondly, it is a very basic administrative procedure that before one takes a decision that adversely affects the other, the affected individual must be given an opportunity to be heard. As correctly argued by the applicant this is a very basic tenet of the rules of natural justice. In administrative law, this concept is referred to as the *audi alteram partem* rule. It is part of our law".

In *Munyaka* v *Masakwa & Anor supra*, I left the question of whether to follow that reasoning or not open because I was of the view that that case was distinguishable from the *Munyaka* case in that the applicant had not challenged the Minister's decision to withdraw the offer letter whereas *Masunda* had challenged it. In *casu* the applicant is challenging the Minister's decision to withdraw the offer letter.

Mr *Mpofu* for the second respondent urged me to depart from *Masunda*'s case on the basis that it was wrongly decided because once the court accepted that an offer letter gave rise to a valid contract binding on the parties, it was certainly applying contract law and could not, at the same time, apply administrative law rules. Significantly Mr *Ochieng,* did not advance any argument in support of the reasoning in *Masunda*'s case electing instead to anchor his case on s 3 of the Administrative Justice Act [*Cap 10:28*] as an alternative to the argument on contract law.

With due respect to BERE J, by accepting that the acceptance of an offer letter gave rise to a binding contract, the court was in fact accepting the contract as the covenant governing the relationship of the parties. Put in another way, by appending their signatures to the written contract, the parties were accepting that their relationship was to be governed by that contract and nothing else. The applicant can therefore not seek refuge outside the 4 corners of that written contract. The contract binding on the parties gave the Minister

unfettered power to withdraw the offer letter. The applicant cannot, therefore seek to defeat the imperatives of a contract he entered into with his eyes very wide open, by importing rules of administrative law alien to the contract of the parties. In saying so, I am mindful of the fact that the State is capable of concluding binding contracts: *Acting Minister of Industry and Technology & Anor* v *Takaka Power (Pvt) Ltd* 1990(2) ZLR 208(S)

I agree with Mr *Mpofu* that when the state concludes a contract, it is bound by its terms and not by rules of Administrative law which apply when it is exercising state power over the subject.

I am fortified in that view by the fact that although the State has been issuing uniform offer letters, raising the presumption that the offer letter in *Masunda* was similar to the one *in casu*, the court in that case did not address the implications of clause 7 of the offer letter.

I conclude therefore that the provisions of s 3 of the Administrative Justice Act [*Cap 10:28*] do not come into effect because the parties are governed by the terms of the offer letter creating a contract between them.

Even if I am wrong in that conclusion, I am of the view that the Act in question would not rescue the applicant because, as submitted by Ms *Warinda* for the first respondent, the applicant was given adequate notice of the intended withdrawal of his offer letter. He himself admits, having received that notice through the Governor. For Mr *Ochieng* to demand that the notice should have been in writing and addressed to the applicant, is to worry about the form and not the substance. There is nothing requiring the notice of an intention to act to be in writing. What is clear is that the applicant was notified 3 years earlier and had ample time to make representations. His argument that the notice should have been given by the first respondent and not by the Vice President or the Governor cannot be taken seriously. It ignores the fact that government operates following certain procedures and through various offices which complement each other.

Mr *Mpofu* urged of me the decision to award costs on a punitive scale in light of the applicant's disdain of the provisions of the law having elected to pursue a political solution taking advantage of the chairman of Zanu PF's political clout on a legal dispute. In addition, right up to the time this matter was argued, the applicant remained rooted at the farm even as he had no lawful authority to do so. In so doing he dirtied his hands. His conduct deserves the court's censure.

The time has come to remind citizens of this country that these courts are there to dispense justice in a country which prides itself with its strict adherence to the rule of law. To side step the due process of law in favour of something extra legal, and in the process bring the administration of justice to disrepute, will be penalised with punitive costs.

In the result, the application is hereby dismissed with costs on a legal practitioner and client scale.

G N. Mlotshwa & Company, applicant's legal practitioners
Attorney General's Office, 1st respondent's legal practitioners
Honey & Blankenberg, 2nd respondent's legal practitioners