HECTOR DALTON LUDICK (SENIOR)
and
HECTOR DALTON LUDICK (JUNIOR)
and
JENNIFER PATRICIA LUDICK
versus
MINISTER OF LANDS & RURAL RESETTLEMENT N.O
and
C SAMURIWO
and
THE ATTORNEY GENERAL N.O

HIGH COURT OF ZIMBABWE
MUZENDA J
HARARE, 13 September 2018

Opposed Application

F Mahere, for the applicants
Ms *R M Mutandwa*, for the 1st respondent
M.F. Chapeta, for the 2nd respondent

MUZENDA J: The first applicant is Hector Dalton Ludick (Senior) who is a farmer in the Goromonzi area, in Mashonaland East province of Zimbabwe. The second and third applicants are his son and wife respectively. They are jointly praying for the following order:

> "It is ordered that:
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> 1. It be and is hereby declared that the 1st respondent's withdrawal of 1st applicant's offer letter dated 26 September 2017 delivered up to 1st applicant on 26 September 2017 concerning the whole lot of Strathlone in the Goromonzi District of Mashonaland East province measuring approximately 432 hectare is invalid;
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> 2. 1st applicant, his representatives, employees, invitees be and are hereby entitled to the full use of the property as reflecting in 1st applicant's offer letter of 10 November 2006 and of all improvements thereon;
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> 3. 1st respondent be and is hereby estopped from taking a decision to withdrew the 1st applicant's offer letter on the same grounds as those invalidated by this Court in this matter and in the preceding matter under HC 5848/17;
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> 4. The 1st and 2nd respondents and all other persons claiming occupation and use of the property through them be and are hereby interdicted from interfering with the normal family and business operations of the applicants, their agents or invitees unless and until

applicants' right to use and to occupy the property is extinguished by an order of Court having final effect;

5. That costs of this application be paid by the respondents jointly and severally the one paying the other to be absolved."

BACKGROUND

On 1 September 2017 the first applicant was served with the first respondent's notification of intention to withdraw the offer letter dated 30 August 2017. The applicants legal practitioners and respondents exchanged correspondence about the whole process of the first respondent's intended withdrawal of offer letter but nothing came out of it. On 26 September 2017 the applicants got the notification of the withdrawal of the offer letter from the first respondent. On the same date an offer letter was granted to the second respondent. The offer letter granted to the second respondent concerned an area of 250 hectares. The remainder of the hectarage is said to have been granted to a Mr Hodzi.

Before the first respondent's decision to withdraw the first applicant's offer letter on the 26 September 2017, a previous attempt to withdraw the same offer letter had been made by the first respondent, but was invalidated by this court under case number HC 5848/17. Upon this background of the previous matter the first respondent proceeded to withdraw the first applicant's offer letter. The reason provided by the first respondent for the withdrawal was that it was for the "reinstatement of original allottee."

The first respondent advised the first applicant that the second respondent had been offered the land before the first applicant in 2006 and that by some "error" this letter had been withdrawn or not properly withdrawn.

The applicants have outlined their grounds of review on allegations of constitutional violations, administrative *res judicata,* failure to afford an opportunity to make representations, failure to provide reasons, irrationality or gross unreasonableness, procedural impropriety and bias. The grounds are numerous and all encompassing, the affidavit by the second applicant is long and meandering and also includes issues of law over and above issues of fact. It is like a hunter who will kill whatever game that will come across him. Some of the issues and citations by the deponent to the affidavits could have been best be dealt with in the heads than in an affidavit. I will examine each head of the grounds for review.

The applicants argue that once the Honourable Court in case number HC 5848/17 had declared the first respondent's withdrawal of the first applicant's offer letter to the property

invalid, the first respondent was at law no longer permitted to revisit the matter concerning the withdrawal. The first respondent reinstated the withdrawal using virtually the same reasons as in the previous withdrawal. Applicants contend that the initial order given by the court did not only relate to procedural issues dealing with the first to be heard but also involved the violation of fundamental administrative rights through bias and irrationality. First applicant alleges an abuse of process particularly when the withdrawal of the offer letter was done on 26th September 2017. To the applicants the first respondent's decision was contemptuous to this court, the reasons proferred by the first respondent for the withdrawal are weak, given the fact that the applicants are meaningfully and productively utilizing the land, the withdrawal was grossly unreasonable, the applicants contend.

The applicants are also alleging that the first respondent did not afford applicants with a reasonable opportunity to make adequate representations. This sub-heading is difficult to comprehend from the applicant's affidavits. Is it alleged that the first respondent did not give the applicants an opportunity to contest first respondent's intention to withdraw the offer letter or that the reasons given for the withdrawal of the offer letter were scanty? Maybe the ground that the withdrawal of the offer letter was premised on "reinstatement of original allotee" was not included in the correspondence between applicant's lawyer's letter to the first respondent and vice versa and only appeared in the withdrawal letter. If that is the case then its different from the allegation that the first respondent did not afford the applicants an opportunity to be heard. In this court's view such an opportunity was afforded to the applicants. The reasonableness or otherwise of the reasons or withdrawal of the offer letter is something else. The reasons for the withdrawal were given by the first respondent but whether such reasons were reasonable is again another factor to be considered by this court.

The applicants also alleged procedural impropriety and the applicant's view is that the first respondent did not follow known statutory law for the withdrawal. However, the second applicant does not elaborate this factor clearly. He merely cited the Agricultural Land Settlement Act. Having mentioned that legislation in his founding affidavit, he goes straight to cite the Administrative Justice Act and s 68 of the Constitution and then outlines the requirements of procedural fairness. This court fails to discern the relevant of all these issues when one looks at the relief sought by the applicants.

The applicants allege bias on the part of the first respondent and contend that the Minister did not treat their matter or representations impartially and in a fair manner. To the applicants the first respondent did not meet them and then preferred second respondent to

them. Having looked at the allegation of bias on the part of the first respondent, my conclusion is that the applicants failed to prove bias on the part of the first respondent.

The applicants also allege constitutional violations pertaining to the right to equality and non-discrimination especially on the ground of race, second respondent strongly contends that this is the only reason behind the withdrawal. Applicants cited s 68 of the Constitution and goes at length explaining how it was breached, virtually repeating what applicants have already stated elsewhere in their affidavits. The only positive aspect under this nubric of prompt efficient, reasonable element of administrative justice is the fact that first respondent took thirteen (13) years to revisit the allocation of land to the second respondent. Otherwise all the other averments by the applicants on this heading are of no relevancy. Other cited violations of freedom of profession, trade, or occupation, the right to human dignity, freedom from arbitrary eviction, violation of rights of the elderly and violation of rights of occupiers of agricultural land are but clutching on straws by the applicants. Those issues are peripheral to the application.

The real gravamen of the matter is whether the withdrawal of first applicant's offer letter was tainted with irrationality and gross unreasonableness; which will trigger the whole enquiry. On this point the applicants state that the first respondent has an administrative duty to act lawfully reasonably and in a fair manner. According to the applicants the withdrawal of the offer letter against the avalanche of support from the community and other stated reasons is so bizarre that the process by which this decision was reached must be unfair and devoid of transparency. The first respondent's failure to afford an opportunity to the first applicant to respond to the then set of facts in his letter of 15 September 2017 was said to be unreasonable and a clear violation of the rules of natural justice. The applicants further allege that in deciding to give second respondent his farm in view of vast pieces of land lying idle, and also advocating the remainder to Mr Hodzi were unreasonable, first respondent should have considered first applicant. even though, assuming that the second respondent was the original allotee it was unreasonable for the first respondent to disregard the first applicant's rights and further that the first applicant was fully utilizing the land to the amazement of the government and the entire community.

On the allegations of irrationality, bias and gross unreasonableness in withdrawing the applicant's offer letter, the first respondent contends that it first gave notice of its intended withdrawal and gave applicants reason. The first respondent indicated that it responded to all correspondences forwarded to it by the applicants. It goes on to explain that the reason for the

withdrawal of the offer letter was not a fabrication nor was it frivolous. The seven day period given to the applicants were adequate, it says. The first respondent also contends that the first allocation to the second respondent was done in 2004. It insists that it has powers to withdraw offer letters as long as the withdrawal was lawful reasonable and fair. The first respondent also fell into error citing case law authorities in an affidavit. This practice is not warranted at all, such a practice must be reserved for heads. The first respondent denied any wrong doing in withdrawing first applicant's offer letter in order to give the land to original allotee and it states that all due processes were adhered to. It prays for the dismissal of the applicant's application with an order of costs.

The second respondent on the other hand avers that the piece of land was legally offered to him which offer letter he accepted and took occupation. He however wonders why he was cited in the proceedings. The third respondent did not file any papers.

GUBBAY CJ (as he then was) in the matter of *Muningi* v *Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 490 F judicial review is concerned not with the correctness of the decision, but with the decision making process. In *Dube* v *Mandiona NO & Another* S-173-93 the court stated the following:

> "In order for the review to succeed it was incumbent upon the appellant to show, not that the determination was wrong, but that it was irrational, in the sense of being "so outrageous in its defiance of logic or of any accepted moral standards that one sensible person who had applied his mind to the question could have arrived at it "as per LORD DIPLOCK in CCSU v Minister for Public Service [1984] 3 ALL ER 935 (HL) at 951 a-L."

In *Zambezi Protenis (M) Ltd & Ors* v *Minister of Environment & Tourism & Anor*[1] it was found that

> "Whilst it is clear that the Minister has the discretion under the Act to issue permits and withdraw them, his discretion is not absolute but a subject to general legal limitations. In exercising his discretion, the Minister is required to do so reasonably and in good faith. He must take into account only relevant considerations and there must be no malversation of any kind. The decision must not be arbitrary or capricious. The legislature can never be taken to have intended to give anyone statutory powers to act in bad faith or to abuse his powers. Nor does the conferment of a discretionary power empower a man to do what he likes merely because he is minded to do so."
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> The discretion of a statutory body is never unfettered it is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant considerations which it ought not to have taken into account, then the decision cannot stand. No matter that statutory body may have acted in good faith nevertheless the decision will be set aside."[2]

[1] 1996 (1) ZLR 378 (H) 385H-386B
[2] Breen v Amalgamated Engineering Union (1971) 2 QB 175 at 190

In the matter of *Chaeruka* v *Minister of Lands*[3] MAKONI J (as she then was) stated at p4 of the cyclostyled judgment

> "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 onto 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 was offered. It should be withdrawn and given to more deserving candidates."

In the matter of *Guild* v *Minister of Lands & Ors*[4] the court found that:

> "The Minister of Lands is bestowed with power to withdraw an offer letter. However he is expected to exercise that power judicially and in a thoughtful and fair manner. The Minister of Lands should not willy-nilly, withdraw offer letter and at his whims. As a public authority, he is expected to act responsibly and in a respectful and fair manner. This approach is particularly important in a huge exercise as the land reform programme currently underway. There is need for good order and accountability in issues involving redistribution of land. Reallocation and redistribution needs to be done in an orderly and transparent fashion as well as in a fair manner. Failure to do so may result in anarchy and may result in bringing the program into disrepute. The Minister concerned has resorted to making unilateral and random decisions conforming to the requirements for fairness well build trust in the public administration of the programme."

The first applicant is a former owner of the very land where the first respondent now allocates to other beneficiaries. He subscribed to the land reform, applied for an offer letter which was duly granted and henceforth started to meaningfully utilizing the land. On the other hand, the second respondent was allegedly given an offer letter in 2004. Neither the first nor the second respondent produced and attached that offer letter to their opposing papers. In the absence of such an offer letter granted to the second respondent in 2004 this court finds that the second respondent cannot be termed the original allottee. The onus was on the first and second respondents to prove that very essential aspect of their case to justify the very basis why the first applicant's offer letter originally given to the second respondent, there is no other cogent reason advanced by the first respondent, there was nothing to reinstate.

The applicants have been on the farm for close to 12 years from 2006 and had a valid offer letter. The new dispensation prevailing in the country is that these former owners of land who have been favoured with pieces of land and who can produce for the benefit of the nation must be given an opportunity to freely practice farming and the first respondent took heed to that clarion call and granted an offer letter to the first applicant. The withdrawal of that offer

[3] HH 751/14
[4] HH 891/15

letter granted to first applicant in the absence of the offer letter granted to second respondent in 2004 is arbitrary, irrational and grossly unreasonable. The first respondent is duty bound to exercise his power judicially and act in a transparent way to show to the general public that he is not vindictive to anyone. I agree with the applicants that the conduct of the first respondent merits interference by this court. The second respondent from 2004 did not make any efforts to move on the land in fulfilment of the offer letter given to him and "another" offer letter in 2017 and sought to take the law into his own hands in trying to evict the applicants from the land. There is virtually no justification at the instance of the first respondent in trying to withdraw the offer letter based on flimsy unsubstantiated grounds of an earlier allotee. Although I had already found that the first respondent afforded the first applicant to present his side of the story, the basis upon which the first respondent withdrew the offer letter from the first applicant is grossly unreasonable and irrational so as to be interfered with. On 10 November 2006 the first respondent issued the offer letter to the first applicant then it takes eleven years or the alleged "error" to be "corrected." This is not prompt at all. The first applicant legitimately expected to continue with the farming operations and obviously invested on the piece of land from 10 November 2006 to 2017 and it will not be in the interests of justice to simply withdraw the offer letter and ask the applicants to go. The applicants have proved the grounds for review and their application succeeds.

Accordingly it is ordered as follows:

1. It be and is hereby declared that the first respondent's withdrawal of first applicant's offer letter dated 26 September 2017 delivered up to first applicant on 26 September 2017 concerning the whole lot of Strathlone in the Goromonzi District of Mashonaland East Province measuring approximately 432 hectares is invalid.
2. 1st applicant, his representatives employees invitees, be and are hereby entitled to the full use of the property as reflected in 1st applicant offer letter of 10 November 2006 and of all improvements therein.
3. 1st respondent be and is hereby estopped from taking a decision to withdraw that 1st applicant's offer letter on the same grounds as those invalidated by this court in this matter and in the preceding matter under HC 5848/17.
4. The 1st and 2nd respondents and all other persons claiming occupation and use of the property through them be and are hereby interdicted from interfering with the normal family and business operation of the applicants, their agents or invitees unless and until

applicant's rights to use and to occupy the property are extinguished by an order of court having final effect.

5. 1st respondent to pay the costs.

Honey & Blakenberg, applicants' legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Antonio & Dzvetero, 2nd respondent's legal practitioners