LANDSCAPE ESTATES (PRIVATE) LIMITED
and
INVERANGUS (PRIVATE) LIMITED
versus
MINISTER OF LANDS AND RURAL RESETTLEMENT
and
ALICE SUNGA
and
33 OTHERS

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 8 October 2019 & 26 February 2020

Opposed Application

D. Halimani for the applicants
E. T. Muhlekiwa for the 3rd, 5th, 6th, 7th, 8th, 14th, 15th, 18th, 23rd, 28th, 29th, 31st, 32nd, and 35th respondents

ZHOU J: This is an application for a declaration that the recommendation made by the second respondent to the first respondent and the decision of the first respondent which was based on the recommendation complained of are a nullity. Both the recommendation and the decision of the first respondent are sought to be set aside. The applicants also ask that the second respondent's conduct towards them during investigations in respect of the land previously owned by the applicants be declared to be in violation of the applicants' rights as enshrined in s 68 and s 69 of the Constitution of Zimbabwe and the principles of fairness. Costs on the attorney-client scale are being sought against the respondents.

The application is opposed by some of the respondents who have been identified above as represented by Mr *Muhlekiwa*.

The applicant's founding affidavit contains a lot of argumentative material and portions which recite provisions of the law which should be in the heads of argument rather than in an affidavit. A founding affidavit must be primarily concerned with setting out the factual basis on

which an application is founded as well as the evidence to support the factual allegations made therein. Legal contentions may be indicated but should not be dealt with in a manner that effectively turns the affidavit into heads of argument. The heads of argument show that very little or no attention was given to the grounds of review which are alleged in the founding affidavit. Counsel who prepared them took shelter behind generalized epithets and unnecessarily long passages which are quoted from judgments with no effort to relate them to facts. Paragraphs 1 and 2 under the "Introduction" section of the heads of argument reveal a tendency to just list all possible terms and statements that came into the mind of counsel without considering their applicability to the basis of the application. Heads of argument are supposed to be a summary of the legal arguments and the authorities to be relied upon in argument and not a collection of long quotations regurgitated from previous judgments and the affidavits which are already before the court. There is need for legal practitioners to understand these fundamentals and, where necessary, undergo continuing legal education to re-sharpen their skills.

The background facts to this dispute are as follows. The third to thirty-fifth respondents and other settlers took occupation of what were then the applicant's immovable properties. These properties are described in the applicant's papers as a Certain Piece of Land Situate in the District of Salisbury measuring 536,8584 hectares Called Lot 2 of Sunnyside Held under Deed of Transfer Number 910/95, and Landscape Estates Held under a Certificate of Consolidated Title under Deed of Transfer Number 2491/81. Orders were granted for the eviction of the settlers from the properties. The second respondent was mandated to investigate and make recommendations to the first respondent on the fate of the properties which had been occupied. The second respondent recommended that the properties be acquired for a public purpose. According to the recommendation, it was in the public interest for the farm to be acquired so that the occupation of the farm could be regularized. The recommendation is contained in a letter dated 4 August 2017.

The applicants make allegations of bias against the second respondent which, according to them, vitiated the decision of the first respondent. The applicants allege that the shares in the applicants were acquired by the deponent to the founding affidavit but the respondents state that at the time that they occupied the farms the shareholding in the applicants vested in the Gilchrist family. They refer to statements attributable to some commissioners of the second respondent as showing bias on the part of the second respondent

The respondents state that they occupied the farm in dispute in 1999 and have remained in occupation to date. Nothing turns on the issue of when the shares in the applicants were acquired by the deponent to the founding affidavit as the shareholding of the applicant is not the basis upon which the instant application is founded. In any event, shareholding by an indigenous Zimbabwean does not excuse a property from acquisition in terms of the law. The allegations of bias are disputed by the second respondent in the affidavit deposed to by its Executive Secretary. Its position is that it made recommendations to the first respondent after taking into account all the relevant circumstances, including Government policy then which was to regularize farm occupations which had taken place at the commencement of the Land Reform Programme and the fact that the many affected persons had occupied the farm for close to two decades. The second respondent states that all communication to the applicants' representatives was for the purpose of seeking clarification on matters pertaining to the land in order to ensure fairness, transparency and accountability. The first respondent in his opposing affidavit also contests the allegations of bias made against the second respondent.

The onus is on the applicant to prove on a balance of probabilities the two grounds of review on which the application is founded, namely: (1) that the proceedings by which the first respondent's decision was made were grossly irregular; and (2) that there was bias, malice, corruption or other interest which vitiated the proceedings.

The qualification of the irregularity by the term "gross" in the context of review proceedings shows that not every alleged irregularity vitiates proceedings. The irregularity must be manifestly serious. The party concerned must also show that he or she was prejudiced by the irregularity complained of, see *Nyahuma* v *Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435(S). In the present case there is no irregularity, let alone one which is gross, which is established in the manner in which the second respondent carried out its investigations and/or the first respondent made his decision. The applicant has not pointed to, let alone established, any failure to follow provisions of any law or laid down procedure in the manner that the respondents conducted their business.

The test for bias has been set out in numerous cases in this jurisdiction; it is whether there is a real possibility of bias. In the case of *Bailey* v *Health Professions Council of Zimbabwe* 1993 (2) ZLR 17(S) at 22D-F, MCNALLY JA, citing the case of *R* v *Gough* [1993] 2 All ER 724(HL), said:

> ". . . the test for bias was set out with persuasive clarity in the speech of LORD GOFF at pp 737-738. I do not propose to set out the whole of the relevant passage beginning at the letter "g" on p 737. It is enough to set out his concluding words at the foot of that page:
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> > 'Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the Tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.'
> >
> > He stressed that by 'real danger' he meant a real possibility rather than a real probability of bias."

See also *Chiura v PSC & Anor* 2002 (2) ZLR 562(H).

The inquiries by members of the second respondent as to the applicant's position regarding those who had occupied the farms does not in any way constitute bias. The test for bias is an objective one. There must be facts from which it can objectively be determined that there is a real possibility of bias. None of the members of the second respondent had an interest in the ,matter which could compromise their impartiality in handling the investigation pursuant to which they made their recommendations to the first respondent. Allegations of arbitrariness, caprice, malice and unfairness which have been baldly made are not based on any evidence. The suggestion that the plight of the persons who had occupied the land at the commencement of the land reform programme be addressed in the public interest is not evidence of bias. The second respondent was merely relating to the reality on the ground in light of the standing policy of protecting such persons. It is clear from the use of the words "regardless of the outcome of the investigation" that it was envisaged that the recommendation might be for the farms to be excused from acquisition, in which case Government would still have the obligation to manage the situation of the occupiers. The remarks attributable to the second respondent are therefore not evidence of bias upon which its recommendations and the decision of the first respondent could be impeached. Nothing in the language used by the second respondent or any of its commissioners shows evidence of bias. Inquiries into the genuineness of the purchase of shares in the applicants by the commissioners, reference to the respondents as "a group of farmers", settlers or people who occupied the farm at the inception of the land reform programme do not in any way constitute evidence of bias.

The applicants' heads of argument raise the issue of irrationality which is not based on any evidence adduced through the founding affidavit. It is just a bald and unsubstantiated allegation.

Allegations of violations of s 68, 69 and s 297 of the Constitution are also not based on evidence. As concluded above, no evidence of bias has been furnished to this court. The mere fact that the ultimate decision went against the expectations of the applicants does not mean that those who made the decision were biased.

In all the circumstances, no evidence has been led to justify the setting aside of the decision of the second respondent.

In the result, the application is dismissed with costs.

Wintertons, applicants' legal practitioners
Mhlekiwa Legal Practice, respondents' legal practitioners