

ALAN McGREGOR  
versus  
NEHEMIAH SABURI  
and  
ATTORNEY GENERAL  
and  
COMMISSIONER GENERAL  
ZIMBABWE REPUBLIC POLICE  
and  
MINISTER OF LANDS LAND REFORM  
AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE  
CHIWESHE JP  
Harare, 8 November 2010 and 23 February 2011

Mr *A.N.B. Masterson*, for the applicant  
No appearance for the first respondent  
Mr *T. Zvekare*, for the second respondent  
Mr *J. Mumbengegwi*, for the third and fourth respondents

CHIWESHE JP: In this urgent chamber application the applicant sought a provisional order in the following terms:

**“TERMS OF THE FINAL ORDER SOUGHT**

1. The provisional order is herein confirmed.
2. The first respondent shall produce to this court the offer letter upon which he relies for his claim to be entitled to occupy any part of Nyamakari Farm in the Burma Valley area of the Mutare District and shall satisfy this court that it has been lawfully secured before he again seeks to secure occupation of any part of that Farm.
3. The second respondent is directed forthwith to inform the third and fourth respondents that any appeal against an eviction order issued by a Magistrate’s Court consequent upon convicting any person of contravening subsection (3) of section 3 of the Gazetted Land (Consequential Provisions) Act has the automatic effect of suspending the eviction order until that appeal is finally dismissed and the validity of the eviction order has been confirmed.
4. The third respondent shall issue instructions to all members of the Zimbabwe Republic Police which:-

- a) inform them that an appeal against any eviction order issued by a Magistrate's Court following a conviction of contravening subsection (3) of section 3 of the Gazetted Land (Consequential Provisions) Act has the effect of suspending the order of eviction and entitling the subjects of the eviction order to retain or resume occupation of the land in question until the appeal is finally determined so as to uphold the validity of the eviction order;
  - b) direct them to afford all protection reasonably required by the convicted person and all those using and occupying the Farm under his authority to retain and resume the use and occupation of the land in question pending the final outcome of the appeal; and
  - c) direct them that, upon conclusion of the appeal, any eviction is to be effected by the Deputy Sheriff and not by the Police save where their support is required by the Deputy Sheriff and that any variation of the terms of the eviction order ordered by the appeal court shall be observed and obeyed.
5. The fourth respondent shall issue instructions to all persons who hold offer letters and to all officials in the Ministry of Lands, Land Reform and Rural Resettlement that :-
- a) an offer letter does not itself constitute authority to occupy land or any part of any land referred to in the offer letter if the land in question is already occupied by any third persons, including a former owner, user or occupier of that land unless and until the fourth respondent has secured vacant possession of the land in question either by virtue of an order of Court or third persons from the land in circumstances which are free of all duress.
  - b) consequently such officials shall not encourage, support or assist the holders of offer letters to take occupation of land referred to in the offer letter unless and until:-
    - i.) the fourth respondent has secured a final binding eviction against existing occupier that is, free of the consequences of any appeal;
    - ii.) the eviction of the previous owner, user or occupier has been effected by the Deputy Sheriff.

**INTERIM RELIEF HEREBY GRANTED**

Pending the finalization of this application and pending the finalization of the Criminal Appeal No CA 1143/10 filed by the applicant on 18 October against the conviction and sentence imposed upon him by the Provincial Magistrate, Mutare on 15 October 2010 in Case CRB 1042/09 for contravening section 3 of the Gazetted Land (Consequential Provisions) Act:-

**IT IS ORDERED THAT:-**

1. First respondent and all those claiming authority under him are prohibited from occupying Nyamakari Farm or any part thereof and, insofar as such persons have already taken occupation of any part of that farm, they shall forthwith vacate that land together with their wives, families and all belongings.
2. Such vacation of Nyamakari shall be effected within 48 hours of the issue of this order failing which they shall be removed by the Deputy Sheriff with such Police support as he may require.
3. Applicant is authorized to re-occupy that portion of the Farm that he was using and occupying prior to 15 October 2010 and to resume his farming operations thereon.
4. Second, third and fourth respondents are directed to note the terms of this order and to issue all orders and instructions as may be necessary to ensure that first respondent does vacate the farm and that applicant is enabled to resume occupation and use of those parts of the farm that he and the workers employed through applicant are able to resume their occupation of, and farming operations, on the farm.”

The parties presented their arguments in chambers on 8 November 2010. On 3 December 2010 I dismissed the application with costs and indicated that my reasons would follow. These are they.

The applicant was the owner or occupier of Nyamakari Farm, Burma Valley, Mutare District. It is common cause that this Farm was subsequently acquired by the State in terms of the Land Acquisition Act [*Cap 20:10*]. Consequent upon the applicant’s failure to vacate this gazetted land within the prescribed period, he was on 15 October 2010 arraigned before a magistrate at Mutare charged with contravening s 3 of the Gazetted Land (Consequential Provisions Act [*Cap 20:28*]). He was duly convicted as he had no offer letter, permit or lease which constitutes lawful authority to occupy or utilize gazetted land. The sentence imposed included, as required by law, an order for the applicant’s eviction from this farm. On 17 October 2010, the applicant filed a notice of

appeal against both conviction and sentence. The next day 18 October 2010 the applicant lodged an urgent application under case number 6722/10 in which he sought confirmation that as the appeal suspends the conviction and sentence of the court “*a quo*”, he would be entitled in the interim and pending disposal of the appeal to occupy the land he was occupying at the time of his conviction. My brother HLATSHWAYO J handled the matter and I am advised that he dismissed the application on the grounds that an order such as that which was being sought was unnecessary as the natural and proper consequence of noting the appeal would be to suspend the operation of the decision of the trial court. I am informed that the Attorney General had agreed with that position indicating that the State would accordingly seek leave from the trial court to execute the eviction order pending appeal. Application for such leave is pending in the magistrate court.

On 24 October 2010 the applicant returned to the farm. He was met there by the first respondent, his son and half a dozen other persons. The first respondent advised the applicant that he had an offer letter issued in 2006 and that he had come to take occupation of the farm. It was clear that the first respondent and others would not leave the farm as they took occupation of various parts of the land and buildings. The applicant says he reported the matter to the police but to no avail. He then approached this court seeking the relief set out above.

In his heads of argument in support of this application, the applicant has raised a number of legal issues and cited several judgments of this honourable court tending to lend credence to his interpretation of those issues. The applicant gives the impression that this court has been consistent in its pronouncements in various land cases and that the court has generally granted applications of this nature. The correct position however is that there have been a number of conflicting judgments emanating from this court with some judges favouring the approach that the applicant advocates to be the correct one and other judges begging to differ. I belong to the latter group whose interpretation of the land laws of the country has since been vindicated by the Supreme Court.

The first legal point that the applicant raises in its submission is that prior to the actions of the first respondent, the applicant had been in “peaceful and undisturbed

occupation” of the land and therefore entitled to a spoliation order against the first respondent. That position is correct at common law. However it is trite that statutory provisions override the common law. Following the acquisition by the State of the piece of land in question and the provisions in terms of section 3 of the Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*] that the applicant vacates this land within the prescribed period, he cannot at law claim possession of the land he is required to have vacated, nor, if he has not vacated such land, can he claim to be in peaceful and undisturbed possession. Such an interpretation of the provisions of that Act would lead to an absurdity and subvert the clear intention of the legislature. I agree with Mr *Zvekare*, for the second respondent, when he argues that the intention of the legislature is to address colonial injustice by creating vacant possession on acquired land in order that the beneficiaries of the land reform programme may benefit through resettlement thereon. If the State does not secure vacant possession, the intention of the legislature would obviously be frustrated. Further, it is clear to me that the former owner or occupier of Gazetted Land loses all rights over such land. Ownership vests in the State and continued occupation after the prescribed period without authority is illegal and renders such owner or occupier subject to prosecution. Mr *Zvekare*’s further contention is that such an owner or occupier who refuses to vacate such land in clear violation of the law cannot seek recourse in this court. His hands are dirty and for that reason he should not be entertained. I agree with that contention

The applicant has argued that an offer letter does not give authority to evict a person already in occupation. Nothing could be further from the truth. The holder of an offer letter has authority granted by the owner of the land, that is the State, to occupy and utilize the land in question. He has a right and a legitimate interest to access the property. That right is enforceable against any other person who may seek to deprive him of it or frustrate his enjoyment of the same. The holder of an offer letter is perfectly entitled to seek an eviction order against persons who may illegally be in occupation of such property. He may not however take the law into his own hands and act without a court order. The offer letter confers upon its holder the “*locus standi*” to approach the courts for appropriate relief, contrary to the applicant’s assertions. In my view the right to evict

illegal occupiers is not limited exclusively to the State or the responsible Minister as the applicant would have us believe; it extends to the beneficiaries as well.

The applicant also submitted that he had substantial prospects of success in his appeal against the decision of the magistrate in which he was convicted for occupying gazetted land without authority and sentenced, *inter alia*, to be evicted from the farm. At the time of hearing the present application the State had lodged an application with the magistrate for leave to execute that eviction pending appeal. That application was yet to be disposed of. One of the grounds of appeal appeared to be centered on the issue whether the offence created under s 3 of the Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*] was one that required strict liability. My view is that the wording of the section is clear – a party must have an offer letter, a lease or a permit issued by the appropriate authority in order to lawfully occupy Gazetted Land. The provisions of the Act do not admit of any other form of authority, actual or implied. This view has since been confirmed by the Supreme Court. Clearly the offence is one of strict liability. The provision is clear and straight forward. The applicant raises a number of purely administrative issues to do with his dealings with Ministry of Lands officials and his expectations. These are of no legal relevance to the present application or the appeal that he has lodged. On the whole I did not see any merit in the applicant's assertion that there are substantial prospects of success in his appeal, be it on the merits of the conviction or sentence imposed by the magistrate, or, on those issues that he asked the magistrate to refer to the constitutional court.

The Supreme Court, in the case of *Commercial Farmers Union and Others vs The Minister of Lands and Rural Resettlement and Others* SC 31/10, has dealt with virtually all the legal issues pertaining to land in this country. This landmark judgment provides clear direction to this court with regards the interpretation of various land laws and the constitutional issues raised in connection with the land reform programme in Zimbabwe. The constitutional issues raised by the applicant for referral to the Supreme Court are similar to those raised, adjudicated upon and dismissed in the Commercial Farmers Union case *supra*.

The learned Chief Justice at p 27 of the cyclostyled judgment summarized the legal position as regards land matters as follows:

“In conclusion, I would summarise the legal position as follows:-

- (1) Former owners and/or occupiers whose land has been acquired by the acquiring authority in terms of s 16 B (2) (a) of the constitution cannot challenge the legality of such acquisition in a court of law. The jurisdiction of the courts has been ousted by s 16 B (3) (a) of the constitution. See also the *Mike Campbell case supra*.
- (2) The Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*], and in particular s 3 of that Act, is constitutional. See *Tom Beattie's case supra*. Accordingly all Zimbabweans have a duty to comply with the law as provided for in that Act and prosecutions for contravening the Act are constitutional and therefore lawful.
- (3) Every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon the expiry of the prescribed period (ninety days after the acquisition). See subsections 3 (2) (a) and (b) of the Act and s 16 B of the Constitution. By operation of law, former owners or occupiers of acquired land lose all rights to the acquired land upon the expiration of the prescribed period.
- (4) A former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed period commits a criminal offence. If the former owner or occupier continues in occupation in open defiance of the law, no court of law has jurisdiction to authorize the continued use or possession of the acquired land.
- (5) Litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law. See *Associated Newspapers of Zimbabwe Limited vs The Minister of State for Information and Publicity and others case supra*.
- (6) A permit, an offer letter and a land resettlement lease are valid legal documents when issued by the acquiring authority in terms of s 2 of the Act and s 8 of the Land Settlement Act. The holder of such permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated to him or her in terms of the permit, offer letter or land settlement lease.
- (7) The Minister may issue land settlement leases in terms of s 8 of The Land Settlement Act [*Cap 20:01*]. In doing so he is required to comply with other provisions of that Act.

- (8) While s 3(5) of the Act confers on a criminal court the power to issue an eviction order against a convicted person, it does not take away the Minister's right or the right of the holder of an offer letter, permit or land settlement lease to commence eviction proceedings against a former owner or occupier who refuses to vacate the acquired land. The holder of an offer letter, permit or land settlement lease has a clear right derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of an offer letter, permit or land settlement lease. No doubt the legislature conferred on the holder of an offer letter, permit or land settlement lease the "*locus standi*" independent of the Minister, to sue for the eviction of any illegal occupier of land allocated to him or her in terms of the offer letter, permit or land settlement lease.
- (9) The holders of offer letters, permits or land settlement leases are not entitled as a matter of law to self-help. They should seek to enforce their right to occupation through the courts. Where therefore the holder of an offer letter, permit or land settlement lease has resorted to self help and the former owner or occupier has resisted, both parties are acting outside the law. If either party resorts to violence, the police should intervene to restore law and order."

I am convinced therefore that to grant the applicant the relief he seeks would be tantamount to aiding and abetting an illegality.

It was for these reasons that I dismissed the application with costs.

*Coghlan, Welsh & Guest, applicant's legal practitioners*  
*Attorney General's office, second respondent's legal practitioners*  
*Civil Division of the Attorney General's Office, third and fourth respondents' legal practitioners*