FLORENCE SIGUDU
versus
MINISTER OF LANDS AND RURAL RESETTLEMENT N.O.
and
PHINEAS CHIHOTA

HIGH COURT OF ZIMBABWE
PATEL J

Opposed Application

HARARE, 20 November 2012 and 22 January 2013

I. Ndudzo, for the applicant
T. Mashiri, for the 1st respondent

PATEL J: The applicant in this matter seeks an order declaring the legality of her occupation of a piece of farm land in Seke District and the nullification of the consolidation of that land with an adjoining farm. She also seeks the eviction of the 2nd respondent and an order for costs against him. The 1st respondent (the Minister) resists the application on the ground that the applicant's right to occupy the land was withdrawn.

The 2nd respondent has not filed any notice of opposition and is accordingly in default. The 1st respondent was required to file his heads of argument in March 2012 and, having failed to do so, was automatically barred. However, there being no objection from the applicant, the bar imposed upon the 1st respondent was uplifted by consent and his failure to file heads timeously was also condoned. Any costs incurred by reason of his late filing of heads of argument are to be borne by the 1st respondent.

Background

In 2002 the Minister allocated Subdivision 2 of Denby Farm to the applicant through an offer letter dated 2 June 2002. Thereafter, the applicant took occupation, prepared the land, moulded bricks for farm buildings and purchased equipment in anticipation of commencing farming activities. In 2005 the Provincial Lands Committee held a meeting chaired by the 2nd

respondent. The meeting took a decision to consolidate the applicant's farm (Subdivision 2) with the farm allocated to the 2nd respondent (Subdivision 9) and further resolved that the applicant should vacate her farm.

The Minister's position is that the consolidation in dispute was procedurally effected and that the applicant's offer letter was automatically withdrawn because she had failed to comply with the conditions attaching to the offer of land. It is common cause that there was no formal communication of the withdrawal to the applicant, even after a written request by her lawyers. The applicant asserts that her right to occupy the farm has not lapsed or been legally terminated and therefore still subsists. She also challenges the legality of the consolidation process as being tainted by bias and corruption, having been influenced by the 2nd respondent for his own benefit. Additionally, she contends that any offer letter or lease issued to the 2nd respondent is not superior to her offer letter and cannot override her right to occupy the farm.

Issues for Determination

At the hearing of this matter, applicant's counsel did not persist with his point *in limine* contesting the authority of the deponent to the opposing affidavit. Consequently, the following issues emerged for determination:

(a) Whether the applicant had duly complied with the conditions attaching to her offer letter.
(b) The legality of the process consolidating Subdivisions 2 and 9 of Denby Farm.
(c) Whether the 1st respondent was entitled or empowered to withdraw the offer letter.
(d) Whether the applicant's offer letter was duly withdrawn or cancelled.
(e) Whether the applicant's right to occupy still subsists and whether it is accordingly recognisable and enforceable.

Compliance with Conditions

The conditions applying to the applicant's offer letter required her to take up personal and permanent residence on the holding upon acceptance of the offer which was to be communicated to the Minister within 30 days of receipt. The applicant avers that she took occupation of the farm soon after it was allotted to her and confirmed her acceptance of the offer by notice dated 29 June 2002. The Minister's deponent simply states that the applicant failed to take up residence or to occupy the land, without addressing her detailed averments as to the manner in which took occupation. On balance, I am satisfied that the applicant's evidence is to be preferred over the Minister's bare denial. I accordingly find that she did comply with the conditions of occupation stipulated in her offer letter.

Legality of Consolidation

According to applicant's counsel, which position was not questioned by counsel for the 1st respondent, every Provincial Lands Committee is ordinarily chaired by the appropriate Provincial Governor. The applicant's unchallenged evidence is that the relevant 2005 meeting of the Committee *in casu* was chaired by the 2nd respondent, who at that time was a Deputy Minister. That meeting decided to consolidate the applicant's farm with the farm allocated to the 2nd respondent and further resolved that the applicant should vacate her farm. The applicant contends that the 2nd respondent abused his influence in the Committee to push for the consolidation of the two farms. The only response by the Minister's deponent is that "the 2nd respondent is best placed to answer these averments". The 2nd respondent himself has failed to oppose this application and has simply not bothered to deal with the serious allegations against him.

On the undisputed facts before me, the only inference that can reasonably be drawn is that the 2nd respondent did use his position to influence the consolidation process and the consequent allocation of the consolidated land to himself. There is no explanation as to why he chaired the

meeting in question. Even if such explanation were to be availed, there is no doubt whatsoever that he simply should not have chaired that particular meeting of the Committee.

The basic tenet of our common law is that *nemo debet esse judex in propria sua causa* – no one should be an arbiter in his own cause. (This time-honoured precept is codified in section 27(1)(b) of the High Court Act [*Chapter 7:06*] and in section 3(1)(a) as read with section 5 of the Administrative Justice Act [*Chapter 10:28*]). This is so for the obvious reason that the proceedings of a public body or committee should be free from the possibility of bias and the attendant risk of its incumbents serving their own personal interests.

It follows that the decision of the Provincial Lands Committee in 2005 to consolidate the applicant's farm with the 2nd respondent's farm was vitiated by a fundamental irregularity. It was tainted *ab initio* and must therefore be declared a nullity. See *McFoy* v *United Africa Co. Ltd* [1961] 3 All ER 1169 (PC) at 1172; *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 157.

Power to Withdraw Offer Letter

One of the conditions attaching to the applicant's offer letter (and indeed all offer letters issued by the Minister) states that the offer may be cancelled or withdrawn for breach of any of the conditions set out therein. The applicant's position in this regard, as elaborated by her counsel, is that the Minister can only exercise powers stipulated by statute. He cannot withdraw the offer in the absence of an explicit statutory power to that effect.

In principle, where the power to create, grant or do anything is conferred by statute, the administrative authority endowed with that power can only terminate, revoke or undo that thing by or under that or another statute. In any such case, any administrative action entailing the termination or variation of statutory rights that is not expressly or impliedly authorised by statute is *ultra vires* the enabling statute and consequently unlawful. Powers may be presumed to have been impliedly conferred because they constitute a logical or necessary consequence of powers which have been expressly

conferred or because they are ancillary or incidental to those powers. As regards implied powers generally, see Baxter: *Administrative Law* (1984) at pp. 404-407.

What arises for determination herein is the existence or otherwise of a statutory basis for the creation and termination of rights granted by offer letters. The standard offer letter in use under the Land Reform and Resettlement Programme (Phase II) states that the offer is made in terms of the Agricultural Land Settlement Act [*Chapter 20:01*]. However, no specific provision of the Act is cited in this regard.

Turning to the Act itself, Part III thereof regulates the settlement of agricultural land owned by the State. Section 7 broadly enables the Minister of Lands to establish schemes or make other provision for, *inter alia*, the settlement of persons on and the alienation to such persons of agricultural land. In terms of section 8 and subject to the Act, the Minister may for this purpose issue leases to applicants in respect of holdings of land. By virtue of section 9, no such lease may be issued to any applicant until the application has been referred to the Agricultural Land Settlement Board for its consideration and report under section 10. Thereafter, section 11 provides for the issuance of a lease on such terms and conditions as may be fixed by the Minister. Section 17(2) specifically empowers the Minister to cancel the lease if the lessee fails to comply with any term or condition of his lease.

It is evident from these provisions that the settlement of land under the Act is to be effected through the issuance of leases following investigations and reports by the Board. The Act clearly does not contemplate the allocation of land for settlement through offer letters, either on their own or as precursors to formal leases. By the same token, the Act does not entitle the Minister or any other authority to cancel offer letters or to terminate rights conferred thereunder.

The only statutory reference to offer letters is to be found in the Gazetted Lands (Consequential Provisions Act) [*Chapter 20:28*]. The principal object of this Act is spelt out in its long title, *viz.* to make certain provisions

that are consequential to the enactment of section 16B of the Constitution. That section was introduced by Act No. 5 of 2005 (Amendment No. 17) and provided for the compulsory acquisition of all Gazetted Land. More particularly, section 16B(6) envisages an Act of Parliament making it a criminal offence for any person, without lawful authority, to possess or occupy Gazetted land or other State land. In keeping with this constitutional injunction, section 3(1) of the Act stipulates that no person may hold, use or occupy Gazetted land without lawful authority. The term "lawful authority" is defined in section 2(1) to mean an offer letter or permit or land settlement lease, and the phrase "lawfully authorised" is to be construed accordingly, while "offer letter" means a letter issued by the acquiring authority that offers to allocate to the offeree any Gazetted land described in that letter. Section 6 of the Act validates any offer letter issued on or before the fixed date (*i.e.* the date of commencement of the Act) that is not withdrawn by the acquiring authority.

The object of all of these provisions is quite clear. It is to endow the holder of a valid offer letter with the requisite lawful authority to hold, use and occupy Gazetted land and thereby shield him or her from being prosecuted, convicted and evicted under section 3 of the Act. Beyond this, the Act does not provide for the actual allocation or settlement of Gazetted Land, whether by offer letter, permit or lease. Nor does it provide for the cancellation or withdrawal of any such offer letter, permit or lease.

It follows from all of the foregoing that there is no proper statutory basis for the creation or termination of rights granted by offer letters in general. Their basis is essentially administrative and their existence or otherwise is consequently subject to purely administrative rules and discretion – which must, of course, be exercised lawfully, reasonably and fairly, but which are unavoidably open to the possibility of abuse and malpractice. (This is precisely what appears to have happened in this case).

I am constrained to add that this is not an entirely satisfactory basis for the implementation of the Land Reform Programme generally. It seems to me

that the administration and allocation of land for resettlement purposes, whatever the modality or form of allocation, should be properly and effectively regulated, so as to create a land allocation regime that is clear, transparent and accountable, and susceptible to judicial scrutiny to ensure due process and compliance. This could be achieved by way of regulations framed either under the Agricultural Land Settlement Act [*Chapter 20:01*] or under the Rural Land Act [*Chapter 20:18*].

I am fortified in this view by the general proposition that there can be no power without the requisite authority. As is explained by Baxter (*op. cit.*) at pp. 386-387, citing *Municipality of Green Point* v *Powell's Trustees* (1848) 2 Menzies 380 at 380-381 and *Roberts* v *Hopwood* [1925] AC 578 (HL) at 602:

> "Except in the case of an exercise of power under the prerogative, a public authority has no powers other than those which have been conferred upon it by legislation".

As regards administrative practices evolved through directives, circulars and the like, but without specific statutory authority, the learned author observes, at p. 399, that they are:

> "permissible – even desirable – for so long as they do not conflict in any way with the empowering legislation under which the public authority acts nor infringe legally protected rights and interests. Such practices cannot themselves constitute authority for the infringement of rights and interests; the notion that the administration could constitute a self-generating source of authority is completely alien to the principle of constitutional legality. It is true that administrative practice may shape the procedures adopted by public authorities, and this has been recognised by the courts. As such, however, customary practices do not constitute a source of authority which justifies the infringement of rights and interests; at best they may be construed as necessary or incidental to the proper functioning of the public authority concerned and therefore impliedly authorised by the empowering legislation anyway. The claim that custom might constitute a source of administrative power in itself is unacceptable and has been at least since *Entick* v *Carrington* (1765) 19 St Tr 1029, and there is no judicial authority to support it".

Whether Offer Letter Withdrawn or Cancelled

In terms of paragraph 3 of the conditions attaching to the applicant's offer letter, the offer may be cancelled or withdrawn for breach of any of the conditions set out in the letter. In view of my earlier finding that the applicant did comply with the requisite conditions, there does not appear to have been any valid ground entitling the Minister to cancel or withdraw the offer made to the applicant.

Even if any such ground did exist, it is abundantly clear that the Minister did not take any specific steps to cancel or withdraw the offer. The undisputed facts are that the offer was never formally terminated. The applicant was not given any notice of any alleged breach of the conditions of offer. Nor was there any formal notice or communication of the offer having been withdrawn. And there is absolutely nothing in the opposing papers to suggest otherwise. The Minister's argument that the offer was automatically withdrawn simply cannot be accepted. As I have already stated above, the power to withdraw or cancel an offer of land must be exercised lawfully and procedurally, and this quite obviously necessitates the giving of due notice to the holder of the offer letter. It follows that the procedure for cancellation or withdrawal in accordance with the conditions set out in the applicant's offer letter was never followed.

Whether Right to Occupy Subsists and is Enforceable

The ineluctable conclusion from all of the foregoing is that the applicant's right to occupy the farm allocated to her has not lapsed or been lawfully terminated and therefore still subsists. It is accordingly duly recognisable and fully enforceable. See in this respect the remarks of Chidyausiku CJ in *Commercial Farmers Union & Others* v *Minister of Lands and Rural Resettlement & Others* SC 31-2010, at p. 23, highlighting the duty of the courts to assist the holders of offer letters, permits and land settlement leases. At the end of her submissions, counsel for the Minister quite correctly

conceded that there was no basis for resisting the declaratory and consequential relief sought by the applicant.

Disposition

As regards costs, the applicant claims costs on the ordinary scale as against the 2nd respondent. Given the latter's highly questionable and irregular role in the consolidation of his farm with that of the applicant, there appears to be no reason for declining the applicant's claim for costs against him.

In the result, it is hereby declared that:

(a) The applicant is lawfully authorised and entitled to be in occupation of Subdivision 2 of Denby Farm in Seke District of Mashonaland East Province in terms of the offer letter issued to her by the 1st respondent on the 2nd of June 2002.

(b) The purported consolidation of Subdivisions 2 and 9 of Denby Farm in Seke District of Mashonaland East Province by the 1st respondent's officials is null and void.

Furthermore, it be and is hereby ordered that:

(c) The 2nd respondent shall give vacant occupation of Subdivision 2 of Denby Farm in Seke District of Mashonaland East Province to the applicant, failing which the Deputy Sheriff is hereby authorised and directed to evict the 2nd respondent and give possession of the farm to the applicant.

(d) The 2nd respondent shall pay the costs of this application.

Mutamangira & Associates, applicant's legal practitioners
Civil Division of the A-G's Office, 1st respondent's legal practitioners