

JUSTIN MUPAMHANGA  
versus  
SAUL GOMWE  
and  
JUSTICE DHLIWAYO  
and  
BLESSING DOMBOJENA  
and  
MINISTER OF LAND AND  
RURAL RESETTLEMENT (N.O)

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 21 January 2015

**Opposed Matter**

*C. McGown*, for the applicant  
*I. Ndudzo*, the 1<sup>st</sup> to 3<sup>rd</sup> respondents  
No appearance for the 4<sup>th</sup> respondent

MAKONI J: The applicant approached this court seeking an order in the following terms:-

“IT IS HEREBY ORDERED THAT:-

1. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents be immediately and forthwith evicted from Lot 1 of Argyle Park held in terms of an endorsement made in terms of section 16B of the Constitution on Title Deed number 1038/63 dated 6 August 1963 situated in the District of Bindura in Mashonaland Central Province.
2. 1<sup>st</sup> to 3<sup>rd</sup> Respondents jointly and severally with one paying and the other to be absolved pays costs of suit on attorney and client scale”.

A reading of the draft order will show that there is a typographical error in respect of para 1 which neither the court nor the litigants legal practitioners picked up. It is clear from the papers that the applicant seeks the eviction of all 3 respondents and not the first and third respondent. This is confirmed by para 2 where he seeks costs from all the respondents. Moreover the case against the second respondent was fully ventilated before me. I will therefore proceed to make a determination in respect of the second respondent in respect of the relief being sought by the applicant in para 1.

In para 6 of his founding affidavit the applicant states the following:-

“6. This is an application for a declaratory order in respect of my lawful right as the person lawfully entitled to occupy and conduct farming activities at Lot 1 of Argyle Park held in terms of an endorsement made in terms of section 16B of the Constitution on Title Deed number 1038/63 dated 6 August 1963 situated in the District of Bindura in Mashonaland Central Province. The consequential relief of an eviction order against 1<sup>st</sup> to 3<sup>rd</sup> Respondent and all other unlawful occupiers is also being sought in this application”.

As can be seen from the draft order the applicant is only seeking for the eviction of the first to third respondents. No Declaratory order is being sought. This issue was raised by the respondents in their opposition of the application. The applicant does not relate to this in his answering affidavit. At the hearing of the matter Mr *McGown* sought to apply for the amendment the draft order to incorporate the issue of the declaratur. It was opposed on the basis that the issue was raised in the first to third respondent’s opposing papers. The applicant did not deal with this in its answering papers. It was further submitted that the amendment would seriously prejudice the first to third respondents in their case. The first to third respondents prepared their case on the papers which related to a different order. The applicant did not give the respondent notice to make the application.

Mr *McGown* later withdrew the application to amend the draft order after conceding that the answering papers did not relate to that point despite it being mentioned in the opposing papers.

The applicant’s basis for seeking the eviction of the respondents can be seen from paras 7 to 8. In para 7 he outlines the position of the law relating to occupation of State land. He states that it can only be occupied or used by people who have been given authority in the form of an offer letter, permit or lease. He is in possession of lawful authority in the lease agreement in respect of the property.

In para 8 he avers that he has explored all diplomatic efforts and amicable ways in a bid to take over the property from the respondents. These efforts have been abused by the respondents.

In para 9 he states:

“Respondents have no right to be in occupation of the piece of land which they are occupying”.

He concludes his founding affidavit by averring that the respondents are in open defiance of the law and cannot seek the audience of the court to present any argument.

In their opposition the respondents make the point that the applicant deliberately concealed pertinent facts known to him from the court. These facts can be summarised as follows:

- (i) That the respondents have lawful authority in the form of offer letters issued to them by the 4<sup>th</sup> respondent in 2003 to occupy subdivision 3 and 4, subdivision 2 and subdivision 5 of Argyle Park.
- (ii) That they have been in occupation of their respective pieces of land as described in their offer letters since 2003 and that they have been co-existing with the applicant whose farm shares boundaries with the respondents. They attached the map which confirms this position.
- (iii) That the applicant has on numerous occasions attempted to illegally expropriate communal State land near the farm. The respondents have sought administrative remedies against the applicant's patently illegal conduct. They attached various correspondence addressed to various administrative authorities constituting complaints by the respondents against the applicant.
- (iv) That the applicant obtained his lease based on a forged map which purportedly extends the boundaries of his farms into the farm of the respondents and the communal State land.

The respondents also make the point that there are material despite of fact which cannot be determined on the papers. These relate to the boundaries of the applicant's farm. The respondents aver that this dispute has been alive since 2003. The nature, extent and seriousness of the dispute makes it impossible for the court to properly discharge its functions to determine the matter without hearing oral evidence from all the parties including a physical inspection of the farm.

What is emerging from the above, which the applicant had conveniently not disclosed to the court is that all the parties were settled through offer letters at the same time in 2003. They were given maps which clearly defined each party's boundaries. Subsequent to that the Surveyor General came up with another map which is different from the original one. Using that map, the applicant applied for and was granted a 99 year lease. The new map appropriates parts of land already allocated to the respondents. There are two maps. One was attached by the applicant and the other by the respondents. Although the respondents are correct regarding the issues of material disputes of facts, my view is that I can adopt a robust approach and

determine the matter on the papers based on the summation that I made in this paragraph.

The respondents submitted that the applicant deliberately concealed the material and very important fact that he is aware that the respondents have lawful authority, in the form of offer letters, entitling them to occupy their respective plots. They argue that the application must fail on account of the deliberate non-disclosure of material facts by the applicant. They made reference to *Graspeak Investments (Pvt) Ltd v Delta Corporation (Pvt) Ltd & Anor* 2001 (2) ZLR 551 and *G. A. Palmer (Pvt) Ltd v Minister of National Security & Ors* HH 60/07.

What comes out in *Graspeak supra* is that the court has discretion even if the non-disclosure is material, to grant or dismiss the application. In *casu* I will exercise my discretion not to dismiss the application on the basis of material non-disclosure of facts by the applicant. This is mainly due to the nature of the dispute before me. My view is that there is need for the dispute to be resolved on the merits rather than on technicalities. The court will consider the issue when determining the issue of costs.

Going to the merits of the matter, in my view the issue for determination is:- What happens where a party, in lawful occupation of land, is approached by another also purporting to have lawful authority to encroach onto land already alienated to him. The above issue has already been dealt with by this court in *Florence Sigudu v Minister of Lands Rural Settlement N.O and Anor* HH 11/13, *Tendayi Mberi v Simon Nyabadza and Ors* HH 241/13.

In both matters the courts make reference to the remarks of CHIDYAUSIKU CJ in *Commercial Farmers Union & Ors v Minister of Lands and Rural Resettlement & Ors* SC 31/10 p 23 where he stressed on the duty of the courts to assist the holders of offer letters, permits and leases. The Chief Justice remarked.

There was no appearance for the fourth respondent on the day of hearing. However their Notice of Opposition, in the last paragraph, the fourth respondent confirms the position taken by the court in the *Commercial Farmers Union supra*. He stated:-

“The holder of an offer letter or 99 year lease has the right to the undisturbed use, occupation and possession of the land and infrastructure which falls within their boundaries as prescribed either by a map approved by the Acquiring Authority or a survey diagram approved by the Surveys General with the letter taking precedence”.

In his Heads of Arguments the fourth respondent states that it is common cause that the applicant and the first – third respondents all have a right to occupy land that was issued by the fourth respondent. However the bone of contention is on the boundaries of the said

pieces of land.

The fourth respondent is confirming the position adopted by the first – third respondents. Land has been allocated to them through their offer letters. The fourth respondent cannot abolish such rights without the due process of the law or the consent of the respondent. Granting the applicant the relief that he seeks is tantamount to alienating the rights conferred on the first – third respondents by lawful authority without the due process of the law being followed by the fourth respondent. Mr *Mcgown* for the applicant, in his reply to the submissions by Mr *Ndudzo*, conceded that due process of the law should be followed if the fourth respondent intends to appropriate parts of the first – third respondents' right pieces of land.

In my view the concession was properly made. The first – third respondents to occupy their pieces of land, as per their offer letters, has not been lawfully terminated and still subsists. They cannot be evicted from the land that the fourth respondent appropriated to the applicant through the new map without due process of the law being followed.

The first to third respondents prayed for costs on a higher scale. I have no difficulty in granting the prayer taking into account that the applicant deliberately concealed material facts to the court.

In view of the above finding I will make the following order.

1. The application is dismissed.
2. The applicant to pay the 1<sup>st</sup> to 3<sup>rd</sup> respondents costs on a legal practitioner client scale.

*Venturas and Samukange*, applicant's legal practitioners  
*Mutamangira and Associates*, 1<sup>st</sup>, 2<sup>nd</sup>, & 3<sup>rd</sup> respondents' legal practitioners