

KLODIAS HOVE
versus
MINISTER OF LANDS AND RESETTLEMENT AND
RURAL RESETTLEMENT N.O
and
NOWAB ARAM KHAN
and
JAMESON BISHI
and
KENNETH CHIDHINDI
and
SAMUEL BANDA
and
DUMBARIMWE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 18 July 2017, 22 November 2017 & 6 February 2019

Opposed Matter

L Ziro, for the applicant
P Macheka, for the 1st respondent
T Sengwayo, for the 2nd respondent

NDEWERE J: On 27 July 2015, the applicant filed a court application to set aside a decision by the first respondent to withdraw the applicant's offer letter issued to him on 29 June 2006 regarding subdivision of Netridge in Masvingo District. The applicant said he was never given notice or made aware of the decision by the first respondent to withdraw his offer letter. He said it was in June 2015 after he had issued summons for eviction of the second respondent, the former owner of Netridge that the applicant was made aware of the alleged withdrawal of his offer letter by the first respondent. The first respondent claimed to have withdrawn the offer letter from

the applicant and given offer letters for the same land to third, fourth, fifth and sixth respondents between 2009 and 2011; with second respondent remaining on the unallocated land.

The applicant attached proof that the land was compulsorily acquired from the second respondent in 2001 by attaching the appropriate Government Gazette which showed that item 523 was Deed of Transfer 7716/90, registered in the name of Nowab A Khan, in respect of Netridge, measuring 86288 hectares. The applicant attached his offer letter to Netridge dated 1 March 2002 and supporting documents from the Provincial Administrator.

Although the first respondent opposed the applicant's application; in its opposing affidavit filed by the then Permanent Secretary of the Ministry of Lands, the first respondent confirmed that the applicant had not been served with the withdrawal letter. She alleged that the applicant had relocated hence the failure to serve him.

The court noted that no efforts for substituted service of the withdrawal letter mentioned by the first respondent were ever made. Thereafter, the land was re-allocated to two other persons in 2009 and another two persons in 2010. Curiously, the first respondent's opposing affidavit did not say anything about the second respondent's continued occupation of the farm which was compulsorily acquired from him.

The applicant filed heads of argument in which he raised the following issues;

- a) whether first respondent withdrew his offer letter
- b) whether the withdrawal was procedurally and legally done
- c) whether the respondents have rights or entitlement to Netridge Farm.

He referred to the Constitution of Zimbabwe and the Administrative Justice Act [Chapter 10:28] on the right to be heard before any withdrawal was done. He further referred to case law where withdrawal letters were set aside in circumstances where the affected parties had not been given the opportunity to be heard before the withdrawal was effected. He further referred to the case of *Florence Sigudu v Minister of lands and Rural Resettlement N O and Another* HH 11/2013 where the Court held that the Minister's statutory authority was to issue the offer letter; he had no statutory authority to withdraw it.

The applicant insisted on specific performance by the first respondent in accordance with the offer letter.

When the matter came up for argument before the court, my view was that the matter could be settled after the first respondent had indicated that it was willing to find the applicant an alternative piece of land as an out of court settlement. The parties started negotiating a settlement. It took a while for the first respondent to identify the alternative piece of land and all that time, the matter was being postponed. All this while, the applicant, despite the rights he had alluded to in his papers, waited patiently till the first respondent found an alternative piece of land for him. The alternative piece of land was smaller, but he accepted it.

The above is not the type of applicant who should be penalized by way of costs. He had a very strong case which he did not pursue, in the interests of an amicable settlement as suggested by the court.

Given the first respondent's concession that the applicant was not served with the withdrawal letter, the applicant cannot be blamed for pursuing, his case. The concession of not serving him with the withdrawal letter shows that if anyone was at fault in this case, it was the first respondent. However, the court commends the first respondent for the effort it eventually made to find an alternative piece of land for the applicant.

Given the above facts, this is the type of case where each party should pay its own costs.

The court's view is that the second respondent is the one who became vexatious by insisting on costs when the matter had been settled amicably and when all the other five respondents were not asking for costs. By insisting on costs, he escalated the costs because the applicant now had to file heads of argument to convince the court that he should not be made to pay the costs, yet from the papers, the second respondent's claim was not clarified sufficiently by the first respondent since his entire farm was compulsorily acquired and gazetted in terms of the law.

The general rule is that the loser pays the costs. In the main application between the parties, HC 7034/15, there was no winner or loser since the matter was settled amicably by an offer of alternative land to the applicant. Each party should therefore pay its own costs on the main application.

But on the determination of the issue of costs, there is a winner and a loser. The winner is the applicant and the second respondent is the loser. The second respondent shall therefore pay the applicant's costs on this issue.

It is ordered as follows:

1. Each party shall pay its own costs of the main application in HC 7034/15.
2. The second respondent shall pay the applicant's costs in relation to the determination of the issue of costs.

Hungwe & Partners, applicant's legal practitioners
Trust Law Chambers, 2nd respondent's legal practitioners