Judgment No. HB 96/2003
Case No. HC 1319/2003

VOLUNTEER FARMS (PVT) LTD

Versus

FATTY MPOFU & 5 OTHERS

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 18 SEPTEMBER 2003

Ms P Dube for the applicant
C Dube for the respondents

Interdict

CHEDA J: On 3 July 2003 applicant filed an urgent chamber application seeking the eviction of 3rd , 4th, and 5th respondents from Volunteer Farm (Pvt) Ltd hereinafter referred to as "the property".

The brief history of this matter is that applicant is the owner of four units which are held under a consolidated title under Volunteer Farms (Pvt) Ltd. The Government of Zimbabwe through the Ministry of Agriculture, Lands and Resettlement issued a preliminary notice and subsequently a section 8 order in terms of the Land Acquisition Act chapter 20:10 (as amended) against applicant. The effect of a section 8 order was to stop applicant from actively carrying out agricultural activities on "the property".

Ms *P Dube* for applicant raised three issues which I will deal with below:

1. Legitimacy of the Land Reform Process

It is her argument that this process is legally not complete yet, as the matter is pending before the Administrative Court by virtue of an objection lodged by applicant. It is for this reason that applicant should be allowed to carry on with its agricultural activities.

In my view this question requires the examination of whether the acquiring authority being the Ministry of Lands, Agriculture & Rural Resettlement, though not cited in this case, has complied with all the requirements for the acquisition of applicant's land. A preliminary notice was issued and served on applicant and a section 8 order was also issued which effectively prevents applicant from actively continuing with its agricultural activities. Subsequent to that confirmation of the section 8 order and objection of the acquisition of their property with the Administrative court respectively.

2. **Whether or not respondents are tenants**

First to fourth respondents are newly resettled farmers although applicant queries their status. Sixth respondent is the Officer-in-Charge of Lupane police under which the applicant's administration falls under. I agree with Ms *Dube* that no lease agreement was filed by either the acquiring authority or respondents themselves to prove their rights. However, to insist on that proof, to me does not take the matter any further because 1st , 2nd, 3rd, 4th and 5th respondent derive their right of occupation from the acquiring authority. They have been selected and settled in that property and if the acquiring authority is not happy with that settlement it should evict them or will evict them The tenancy in my view will be a matter between themselves and the acquiring authority.

3. The effect of section order

Ms *Dube'*s argument is that section 8 of the Act should not be read in isolation but must be read in conjunction with sections 5 and 7 which deal with the issuing if preliminary notice and the confirmation or otherwise by the

Administrative Court. It is also her argument that section 8 as amended gives the acquiring authority the right to ignore the fact that the matter is pending before the Administrative Court and that on its own deprives applicant's right to be heard which of cause offends against the principles of natural justice.

Mr *C Dube* on the other hand has argued that the enquiry should be whether the acquiring authority has complied with all the legal requirements in terns of the Act or not.

It is common cause that the acquiring authority served applicant with a preliminary notice in terms of section 5 of the Act on 1 June 2001, with the acquisition order on 12 January 2002 and subsequent applications for confirmation were issued and served on applicant on 19 March 2002. This matter is therefore awaiting a hearing at the Administrative Court. Applicant, despite the stage, which this dispute is at, wants to be allowed to continue actively with its agricultural activities.

The pertinent question therefore is whether it should be allowed to do so. Ms *Dube* has argued that the constitutionality of section 8 of the Act is being challenged before the Supreme Court, not by applicant, though, but by some interested parties facing the same dilemma in the on going land disputes. Mr *C Dube* on the other hand has argued that applicant is not party to those proceedings and therefore should not use that argument. I agree with Mr *Dube*, applicant is indeed not party to those proceedings and can not therefore seek to be incorporated by reference to matters which do not relate to it. There is nothing in the papers before me that it is part

thereof. The court has a discretion in deciding whether or not it should grant an interdict. That discretion must be exercised upon consideration of all the circumstances surrounding the case at hand. The acquiring authority has in my view legally acquired applicant's property following all the legal procedures as laid down in the Act. Respondents have been settled on the property. This has to be taken into account too.

The intention of the legislature can not be ignored when dealing with the effect of section 8. Ms *Dube* argues that, interpreted as it is (amended) it tends to deprive applicant's right to be heard. Her argument is that while applicant has a right to object to the acquisition, which objection lies with the Administrative Court, section 8 gives the acquiring authority the right to evict applicant and this therefore tends to finalise the matter. It is this scenario which results in absurdity. If I understood her correctly she meant that while the matter is pending before another court of competent jurisdiction in this case, the Administrative Court, the acquiring authority is given a right to resettle people on its land which becomes a final process.

The Act gives applicant the right to object to the acquisition which was what has been done. But applicant is also entitled to approach the Supreme Court on the basis of the unconstitutionality of any Act of Parliament. It is trite that an appeal against an order of court or tribunal, or *quasi*-judicial bodies or executive authority suspends the execution of the said order or decision. This point was ably stated in *Vengesai & Others* v *Zimbabwe Glass Industries Ltd* 1998(2) ZLR 593(H) at 598E-F where GILLESPIE J stated:

> "In stating the common law, CORBETT JA referred to the automatic stay of execution upon noting of an appeal as a rule of practice. That is not a rule of law, but a long established practice regarded as generally binding, subject to the court's discretion. The concept of a rule of practice is pending appropriate

> only to superior courts of inherent jurisdiction. Any other court, tribunal or authority is a creative of statute and bound by the four corners of its enabling legislation."

The cardinal rule of interpretation is that words should be given a meaning which expresses the intention of the legislature – GUBBAY CJ in S v *Nottingham Estates P/L* 1995(1) ZLR 253 at 256D-E eloquently stated,

> "The primary rule of interpretation is, of course to endeavour to ascertain the intention of the law maker from examination of the provision under consideration, placed in proper context. A court will commence its enquiry by giving the word its grammatical signification, unless it is clear that the lateral sense, when so applied, defeats the legislative intendment. In such an event a deviation from the ordinary meaning is justified provided always that the word is sufficiently flexible to admit another meaning by which such intention can be better effected."

In *casu*, the legislature in my view deliberately and clearly provided for an objection to the Administrative Court. It is my view therefore that the intention of the legislature was to have all matters related to the dispute arising from the Land Reform Process be dealt with by the Administrative Court. Those matters related to the constitutionality of the said process will be dealt with by the Supreme Court.

This application being one for an interdict the requirements for an interdict should be examined in relation to this application. These are clearly laid down in the *Law of South Africa* Vol II, 1998 at paragraph 3/6 as follows:

(a) a *prima facie* right;

(b) a well grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy.

I will deal with these requirements in relation to the facts of the matter as follows:

(a) *Prima facie* right

Applicant is indeed the registered owner of the property which is a clear right. However, that right in my view has now been interfered with by the statute in the form of a section 8 order which it is now challenging and is therefore a subject of dispute before the Administrative Court. That right therefore in my view is no longer a clear right.

(b) A well grounded apprehension of irreparable harm

No argument has been advanced as to the apprehension of irreparable harm and as such nothing turns of this argument.

(c) The balance of convenience

The acquiring authority's intention is to settle settlers like the 1st, 2nd, 3rd, 4th, and 5th respondents and it has already done so. This exercise has been carried out in terms of the Act. In my view to remove them from the property will no doubt cause inconvenience to them and therefore the balance of convenience favours their settlement and not the applicant who has been lawfully removed. I say so because there is always a presumption of constitutionality in a statute.

(d) The applicant has no other satisfactory remedy

Again no argument by applicant has been advanced. In my view, therefore, the fact that the matter can still be determined at the Administrative Court stands to reason that there is still room for a satisfactory remedy.

The requirements of an interdict have not been met in this case.

The fact that the requirements of an interdict have not been met and that applicant has not appealed to a higher court but merely objected to the Administrative Court is not enough for this court to find in its favour. In my view an appeal and objection have entirely two different meanings. While an appeal is to a higher authority, an objection as provided for in the Act relates to the Administrative Court which court is of a lower jurisdiction than the High Court. In my opinion therefore the fact that applicant has objected to the confirmation of the acquisition of the property can not and should not prevent the acquiring authority from pursuing its land reform programme as long as it is carried out legally. The Land Reform Program has been declared lawful, see *Minister of Lands, Agriculture & Rural Resettlement & Others* v *The Commercial Farmers Union* SC-111-01 I hold the view that as long as all the legal requirements laid down under the Act are complied with, respondents have a right to remain on the property in terms of the acquiring authority's procedure until the matter is determined by the Administrative Court.

The duty of the court in my view is to give effect to the meaning of the language in a statute if the language is clear and unambiguous. Our courts consistently apply the time honoured principle that judges are to state the law and not make it (*judices est jus dicere non facere*), see *Union Government (Minister of Mines)* v *Thompson* 1919 AD 404 at 425.

It is my opinion that section 8 as amended is quite clear, applicant should cease its operations while awaiting the determination by the Administrative Court. I hasten to point out that in *M & T Mylne P/L* v *Minister of Lands & Ano* HC 2051/02, I ruled that applicant should remain on its property pending the determination of the

Administrative Court. In that case respondents had not opposed the application and therefore the court did not have the benefit of both arguments and the fact that they did not oppose meant that they probably were no longer interested in the said property.

The application is therefore dismissed with costs.

Coghlan & Welsh applicant's legal practitioners
Paradza, Dube & Partners respondents' legal practitioners