MATTHEUS GERHARDUS WILLEMSE
and
ENHOEK ESTATE (PVT) LIMITED
versus
MINISTER OF LANDS, AGRICULTURE,
WATER, CLIMATE AND RURAL RESETTLEMENT
and
GIVEMORE TAVESURE

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 5 July & 6 October 2021

Opposed Court Application for Review

E.T Matinenga, for the applicants
No appearance for the 1st respondent
M Chapeta, for the 2nd respondent

MUZOFA J: This is an application for review of the 1st respondent's decision to withdraw the 1st applicant's offer letter in respect of 400 hectares in subdivision R/E of Enhoek Estate, Chipinge.

From the time the matter was set down for hearing it had its share of challenges. Initially the dispute presented itself as a boundary dispute. In such a case the best approach is for the parties to attend on the ground with technical support diagrams are generated and a report is filed with the court. Usually the matter resolves itself on that basis. I directed parties to visit the farm and with technical assistance file a report showing the applicants extent of the farm and the 2nd respondent's farm. The issue raised by the applicants being that the 1st respondent offered the 2nd respondent land within the applicants' farm. The ground verification did not take place. The matter was postponed for some time for the exercise. I must comment on the conduct of the 1st respondent's legal practitioner from the Civil Division of the Attorney General's Office. He was in attendance when l gave directives and undertook to attend at the farm .For some unknown reason he chose not to attend .As an officer of the court he could not even do the honourable thing and appear before the court and explain what is happening. Even

on the date of hearing the legal practitioner did not appear. Despite the difficulties in obtaining a report in the presence of all the parties. The applicant went ahead and caused a report to be made and filed it. I will revert to issue in due course.

The 1st applicant was a holder of an offer letter for 400 hectares of the remainder of Enhoek Estate .The 2nd applicant is a registered company through which the 1st applicant and family conducted their farming enterprise. The 1st respondent is the Minister responsible for the acquisition of State Land among its responsibilities. The 2nd respondent is a citizen of Zimbabwe who was issued with an offer letter over land allegedly within the 1st applicant's farm.

The facts

The brief background to this matter is as follows. The 1st applicant is the former owner of the whole of Woodbine Farm in Chipinge. At the onset of the fast track land reform programme he voluntarily gave up part of the farm. The conceded land was allocated to different persons for resettlement. Subsequently in 2015 the 1st applicant was offered 400 hectares as stated. The 1st applicant avers that of the 400 hectares only 250 hectares is arable land the rest is a catchment area for the local dams. The applicants have heavily invested in the farm. A thriving farming enterprise has been established whose products are mainly for export which include macadamia trees, eucalyptus trees, tea and avocados. In addition a tea factory, an avocado pack house, brick building yard and a macadamia nut factory have been established. The 2nd applicant has since applied for a 99 year lease and the Zimbabwe Land Commission has recommended that the 1st applicant be issued with the lease. The 2nd applicant has also received accolades in recognition of its farming excellence.

On the 6th of November 2018 the 1st respondent issued the 2nd respondent an offer letter over Subdivision 2 of Enhoek Estates measuring 117.5 hectares. The applicant believes the 1st respondent relied on an invalid map which over calculated the size of Enhoek Estate as 720 hectares. This resulted in the allocation of land to the 2nd respondent within the 1st applicant's farm. When the 2nd respondent took occupation, a dispute arose. The applicants obtained a Provisional Order to evict the 2nd respondent under HC 10926/18.Despite the order of court the 2nd respondent did not vacate from the farm. Even the Deputy Sheriff could not evict him. The applicants filed contempt of court proceedings under HC 4221/19, the matter is still pending. The applicants aver that the presence of the 2nd respondent at the farm has disrupted their farming activities.

In June 2020 the 1st respondent withdrew the 1st applicant's offer letter. Dissatisfied by the decision the applicants approached the court on review

Applicants' case

The import of the applicants' founding affidavit, the two sets of heads of argument filed of record and the oral submissions by counsel before the court is as follows. The decision was grossly unreasonable, irrational and biased because the withdrawal of the 1st applicant's offer letter was designed to assist the 2nd respondent who is an officer in the 1st respondent. The 2nd respondent was in contempt of court and the 1st respondent must not be seen to condone and encourage the 2nd respondent in his contemptuous conduct. The decision undermined pending litigation. It was also irrational in that it was made at a time when the applicants were about to start preparations for the 2020/2021 macadamia, avocado and tea crops. The applicants were productive farmers and it defies logic to withdraw the offer letter and offer the land to the 2nd respondent who is unproductive.

Further to that, the decision is said to contravene the provisions of s3(1) (c) of the Administrative Justice Act in that the 1st respondent failed to provide written reasons for the need to re plan in terms of Statutory Instrument 41 of 2020.The 1st respondent is not bound by the downsizing provision. The provision is not cast in stone .The 1st respondent was required to exercise his discretion as to which farms to downsize on a consideration of all relevant factors. Thus *Mr Matinenga* advanced the point that the downsizing provision is subject to sections 5 and 6 of Statutory Instrument 419 the principal regulations. The court was referred to cases where the court defined the term 'subject to'. In making the decision the 1st respondent did not take into account all the relevant factors like the size of the farm and its capability. Thus the decision was irrational.

The respondents' case

The 1st respondent opposed the application. It was submitted that the 1st respondent is the body vested with the power to offer land and withdraw it. It is Government policy to downsize farms in terms of Statutory Instrument 41 of 2020. The maximum farm size in the region where the applicant's farm is situate is 250 hectares. The 1st respondent was guided by the Statutory Instrument and the Administrative Justice Act in withdrawing the offer letter. There was no bias. There was no error in the allocation of land to the 2nd respondent. Enhoek Estates was properly acquired .It was 720 hectares in extent. The 1st applicant was allocated

400 hectares and the remaining 320 hectares was allocated to other beneficiaries including the 2nd respondent. The withdrawal of the 1st applicant's offer letter had nothing to do with the offer letter issued to the 2nd respondent. The 1st respondent downplayed the boundary issue with a comment that the 1st applicant must confine himself to his part of the farm.

Although the 2nd respondent also opposed the application, no relief is sought as against him. He averred that he was lawfully offered land and has occupied the farm. He denied the allegations that he literally harvested where he did not sow. He received his offer letter in 2018 well before the applicant's offer letter was withdrawn in 2020.He therefore has nothing to do with the withdrawal of the 1st applicant's offer letter.

Before addressing the merits of the case I address the boundary dispute. It is common cause that there is a dispute as to the extent of Enhoek Farm. The applicant avers that it is 400 hectares and the 1st respondent avers that it is 720 hectares. This divergence led to the dispute as to the exact location of the 2nd respondent's farm as allocated in his offer letter. The 1st applicant asserts that it is within his farm which point is disputed by the respondents. In my view the dispute as to the exact location of the 2nd respondent's farm cannot be resolved by a court in the absence of evidence. The efforts made by the court were scuttled by the 1st respondent's representatives. The non-compliance by the 1st respondent does not take away the requirement for evidence nor take away the dispute. I then considered if the determination is still relevant considering the further development of the notice of withdrawal of the 1st applicant's offer letter. I concluded that the dispute no longer falls for determination since the 1st applicant no longer holds a valid offer letter over the farm in question. The boundary issue only becomes relevant in the event the offer letter is reinstated. In any event and importantly before me is an application for review of the decision to withdraw the offer letter only and not the boundary dispute.

The law

The 1st respondent being the administrative authority, it is empowered in terms of clause 7 of the offer letter to withdraw the offer letter. Clause 7 reads:

> 'The Minister reserves the right to withdraw or change this offer if he deems it necessary, or if you are found in breach of any of the set conditions. In the event of a withdrawal or change of this offer ,no compensation arising from this offer shall be claimable or payable whatsoever."

The power vested in the Minister is an administrative function. It must be exercised judicially and follow due process. The Minister is bound by the law in the exercise of the function.

A court will only interfere with an administrative decision on review where it is shown that the decision is tainted with bias, irrationality, any procedural impropriety or any other just cause[1].The review process provides a check and balance mechanism to ensure that the administrative body does not exceed its powers and make arbitrary decisions outside the confines of the law. The point was aptly stated in *Affretair (Pvt) Ltd & Ors* v *MK Airlines (Pvt) Ltd*[2] that,

> "It seems to me, to put it in simple terms, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency. 'Fair' was Lord Denning's favourite word in his decisions on administrative matters. 'Transparency' is a more modern but equally valuable word which, I venture to suggest, could usefully be used in such decisions to connote openness, frankness, honesty and the absence of bias, collusion, favouritism, bribery and corruption, and underhand dealings and considerations of any sort.
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> The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say 'the result is so bizarre that the process by which it was reached must have been unfair or lacking in transparency'."

The provisions in s3 of the Administrative Justice Act are set out in mandatory terms as to the duty of an administrative authority. Such authority is required to act lawfully, reasonably and in a fair manner within a reasonable period and provide reasons for the decision. The section also provides for procedural rights, the affected person must be given notice of the proposed action, allowed an opportunity to make representations and has a right to take the decision on review.

It is now acceptable that a decision is said to be irrational if it is so outrageous in its defiance of logic or acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. See *Tobacco Research Board* v *Magaya*[3] where the court cited with approval the relevant cases. Thus a decision can be said to

[1] Tsvangirai & Anor v Registrar General & Ors 2002 ZLR (2)
[2] 1996 (2) ZLR 115 H
[3] SC 9/04

be irrational where the decision maker has not properly applied himself in law or where the decision has no factual basis or where the authority has taken into consideration irrelevant factors. The list is not exhaustive but there must be some conduct by the decision maker that can associated with the irrational decision.

The test for bias is whether a reasonable person would have entertained the likelihood of bias or the belief that the tribunal in question favoured unfairly one party and not the other. See *Austin & Anor* v *Chairman, Detainees' Review Tribunal*[4] .The test is objective for obvious reasons. The bias must not be remote, fanciful, flimsy or far-fetched as per G.Feltoe in *Administrative Law of Zimbabwe*. So where bias is shown the administrative decision will be interfered with on review.

Analysis

It is not in dispute that the 1st applicant was served with a notice of intention to withdraw his offer letter. The notice also stated the reason for the intended withdrawal. The withdrawal was for re - planning in terms of Statutory Instrument 41 of 2020.The applicants cannot therefore succeed in their submission that no reasons were given for the withdrawal of the offer letter. It appears the issue is that the 1st respondent did not provide detailed reasons. In my view where the reasons are given, their inadequacy according to the applicant cannot amount to no reasons unless it is clearly shown that despite the availability of the reasons they are as good as non-existent. There is no law and l was not referred to any that requires the 1st respondent to give detailed reasons. The reason given was clear and the applicants understood what it meant, that the farm would be downsized in accordance with the Statutory Instrument. The applicants were advised of the reasons for withdrawal. That no detailed reasons were provided for the withdrawal cannot be a sufficient cause to set aside the decision. The 1st respondent has to give the reason in sufficient terms to be understood .This is what happened. What is clear is that the 1st applicant did not agree with the reason for the withdrawal and the court cannot interfere with the decision on that basis.

The second issue taken on irrationality is based on the application of s3 of Statutory Instrument 41 of 2020 as read with sections 5 and 6 of the Principal Regulations. Section 3 provides,

'1.Subject to sections 5 and 6, no persons shall own a farm situated in –

[4] 1986 (4) SA 281 (ZS)

(a) Natural Region 1 if the size of the farm exceeds two hundred and fifty hectares; or
(b) ……'

Section 5 which counsel for the applicants submitted is relevant in the determination of this case provides,

'5. (1)If the Director of Agritex is satisfied that, because of-

(a) The capability ,suitability and additionally, or alternatively , the carrying capacity of the land concerned; or
(b) The climatic conditions within the area concerned

a farm in any Natural Region should be regarded as situated within a different Natural Region , he shall issue a written directive to the owner to that effect, and thereupon section 4 shall apply in relation to the farm as if it were situated in that different Natural Region

(2)…'

As correctly pointed out the term 'subject to' used in the context of s3 means except as curtailed by sections 5 and 6 thereof. It therefore means that s 5 provides a limitation in the delimitation of farm sizes. Section 5 gives the Director of Agritex, on a consideration of the factors set out in paragraphs (a) and (b) to make a decision designating a farm to be in any region which in his/her view it may fall. For instance for a farm in Natural Region I whose conditions the Director believes should fall in Natural Region III a directive can be issued to the owner advising as such. So in the exercise of the 1st respondent's duty under s3 the farm must be treated as situate in Region III. This is the import of s3 as read with s5.This then means the limitation in s5 only arises where the Director of Agritex has issued a directive to the owner. In this case the 1st applicant did not refer to any directive from the Director of Agritex. The applicants' farm therefore fell under Natural Region I. The reference to s5 was misplaced and cannot take the applicants' case anywhere. The point that the 1st respondent was required to take into account the considerations in paragraphs (a) and (b) of s5 does not apply to the 1st respondent, it applies to the Director of Agritex.

Mr Matinenga further argued that s3 is not absolute it is subject to s 5 and 6.The submission is correct. However in the circumstances of the applicants it is absolute in that no directive was issued from the Director of Agritex. The wording in s3 is mandatory and there is nothing in the applicants' circumstances to derogate from it. The court was not referred to any law that sets out what the Minister must take into account in formulating the decision to downsize farms in terms of the Statutory Instrument. The only consideration is the farm size. The 1st applicant's farm was in Natural Region I. The maximum farm size in that region is two hundred and fifty hectares. The 1st applicant's farm was 400 hectares. Even if the court maybe

of the view that the 1st respondent should have considered other factors as advanced for the applicants that alone cannot be the basis to interfere with the 1st respondent's discretion. Even if the applicant's submission that only 250 hectares is arable land the rest is a catchment area is correct, it does not necessarily mean the farm size was 250 hectares. According to the offer letter the farm was 400 hectares and beyond the maximum limit. On the facts it cannot be said the 1st respondent had taken leave of his senses when he made the decision. On the facts advanced for the applicants, l find no irrationality in the decision.

In respect of bias the point taken for the applicants is not supported by the facts. It is a fact that the 2nd respondent's offer letter preceded the withdrawal of the 1st applicant's offer letter. To that extent the litigation between the parties commenced before the withdrawal of the 1st applicant's offer letter. It then becomes difficult to accept the applicants' submission that the withdrawal was motivated by bias towards the 2nd respondent. It would seem that the applicant's point seem to suggest that although the offer letter to the 2nd respondent was issued in 2018 , the 1st respondent had to withdraw the 1st applicant's offer letter to regularise the offer to the 2nd respondent. Even if the court would accept that surmise, the fact remains that the 1st respondent had authority to withdraw the offer letter based on Statutory Instrument 41 of 2020. That the land was offered to the 2nd respondent on its own cannot be said to be biased. The farm could have been offered to anyone, in this case it was offered to the 2nd respondent. Bias cannot arise where the authority has properly discharged its duty in terms of the law.

From the foregoing the application has no merit. The following order is made.

The application is dismissed with costs.

Venturas and Samukange, Applicants' legal practitioners.
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners.
Antonio and Dzvetero, 2nd respondent's legal practitioners