BEATA EMILY CHIGWEDERE
versus
NORA DEVELOPMENTS (PRIVATE) LIMITED
and
MINISTER OF LANDS AND RURAL RESETTLEMENT
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 10 March and 29 June 2016

Opposed application

E Jera, for the applicant
S Mushonga, for the 1st respondent
No appearance by 2nd and 3rd respondents

TSANGA J: This application is made under r 449 (a) which permits the setting aside of a judgment made in error or in the absence of another party. The applicant seeks rescission of judgment made on 24 July in the matter of *Nora Development (Private) Limited* v *Minister of Lands and Rural Resettlement and Registrar of Deeds* HC 5233/13. The matter in question was dealt with as an unopposed matter in motion court on the basis that the respondent being the Minister of Lands and Rural Resettlement, who is now the second respondent in this matter, had granted his full consent to the order sought.

The order granted in that matter was for the upliftment of an endorsement on the then applicant's title deeds, (now first respondent) which was to the effect that the land in question was state land. The consent had been by way of an affidavit sworn to by one Mr Marius Dzinoreva, as Director of Acquisition in the relevant Ministry, who essentially averred that the land acquired in fact belonged to an indigenous Zimbabwean, and that it was not the policy of the land reform programme to take away such land. The intention was to rectify colonial imbalances. The effect of the order granted was to nullify the acquisition of land

described as the "Remainder of Binder measuring 1 335 3681 situated in the District of Salisbury" which had on several occasions been compulsorily acquired by the state.

The applicant in the present matter, who avers to still hold an offer letter to part of the farm in question, which letter applicant says has not been revoked, was not cited at all as a party in that matter. It is the applicant's contention that Mr Dzinoreva was well aware of her offer letter which she was granted in 2004 and yet did not make her an interested party to these proceedings. In this regard, the gist of her application for rescission is that she in fact remains the holder of an offer letter to a specified portion of this farm and that the judgment in question was granted in a matter in which her rights of occupation over the land in question were affected and extinguished because she was not advised of the order which had been sought.

The judgment is also said to have been erroneous not just on account of lack of notification to the applicant as an interested party, but also on account of the land in question having been initially itemised under Schedule 7 of the previous Constitution. It became state land by virtue of s 16 B (2) (a) (i) of that Constitution.[1] Under the present Constitution[2], applicant draws on s 72 (4) which categorically states that such land which was itemised under schedule 7 to the former Constitution or was identified under s 16 B (2) (a) (ii) or (iii) of the former Constitution continues to be vested in the state. Furthermore, no compensation is payable in respect of its acquisition. Also in terms of s 72 (3), an acquisition of land by the state for agricultural or other purposes may not be challenged on the ground that it was discriminatory and in contravention of s 56 of the constitution which provides for equality and non-discrimination.

Section 290 of the new Constitution equally recaptures the state's unfettered title to acquired land further adding that any error whatsoever contained in the notices that itemised such land under the previous constitution, does not invalidate the state's title. It is within the ambit of these constitutional provisions that the applicant argues that the order should never have been granted. In essence, she argues that consent to the delisting and upliftment of the endorsements was improper on account of the court order granted, having the effect of reversing an acquisition made through a parliamentary process. Applicant also states that the

[1] Section 16B of the old Constitution was introduced by Amendment no.17 of 2005
[2] Constitution of Zimbabwe Amendment (No.20) Act 2013

judgment was granted in error because the papers in support of the application that was granted did not support the contention that the land is indigenously owned.

The application is opposed by the first respondent whose affidavit was averred to by its Director, Jacqueline Vongai Pratt. She raises a point *in limine* being that the farm in question was in fact allocated in its entirety to her nominee Lucy Pratt in 2011. She points to the fact that applicant did not at the time and still has not challenged this allocation to date. Accordingly, she therefore argues that the applicant is bound by the doctrine of estoppel. Further, she avers that when her nominee was granted the farm, applicant was in fact allocated another farm in Macheke. Thus in her view, the reallocation to applicant and others was as good as cancellation of applicant's offer letter as well as four other offer letters which had also been granted. She therefore concludes that the applicant essentially lacks *locus standi* since her offer letter to farm was cancelled by the reallocation.

She further states that there was no need to make applicant a party to the proceedings since she was not a party to all averments in the application which she complains about as the events occurred before 2004. Applicant's offer letter which she relies on was only granted in 2004. Mrs Pratt places heavy reliance on correspondence to the Ministry in which she discussed the issue of the gazetting of the farm having been made in error as she was an indigenous woman. The farm was first gazetted in 1997 and the acquisition had been successfully challenged. It was gazetted again in 2002 and the first respondent had approached the relevant Ministry that the status quo of 1998 be retained. She also detailed the fact that she had been running an abattoir on the farm since 2000. The farm was further gazetted in 2004. In January 2005 in particular, the then Acting Secretary for Lands, Land Reform and Resettlement wrote to the provincial governor urging him to rectify the problem. It is therefore in this context that Jacqueline Pratt is adamant that there was no need to make the applicant a party to the proceedings since all averments in the application in the matter that reversed the endorsements pertained to events which took place before 2004, which was when applicant was granted her offer letter. Essentially at each instance, she states that she raised objections on the grounds that the farm was indigenously owned. She emphasised that at each turn the acquisitions were revoked or rescinded.

Whilst the final outcome of her 2005 interventions are not on record, according to her the culmination of her intercessions was the re-allocation of the farm in its entirety to her

nominee, Lucy Pratt in March 2011. It is this allocation that she says put to rest issues of ownership of the farm by the applicant and four other people who had received offer letters and who have since left the farm. Whilst Jacqueline Pratt averred that the farm was then allocated to her nominee in 2011, no evidence was placed before this court that the Applicant's offer letter was categorically withdrawn.

The applicant, denies being estopped and draws on having an offer letter which has not been cancelled. She equally denies being allocated another farm in Macheke in 2011. She emphasises that the judgment was granted in a matter in which her rights of occupation over land were affected and extinguished and that it is materially on this basis that she requests that judgment be set aside.

While the Minister of Lands and Rural Resettlement initially filed a notice of opposition again sworn to by Mr Dzinoreva who had approved the return of farm on the basis that Jacqueline Pratt had explained history of the farm and had brought documents to support her claim, the Civil Division of the Attorney General's Office representing the Minister withdrew its opposition to this application. They communicated this in writing to the Registrar on 21 July 2014 stating categorically that they would not be filing any heads of argument as they were not opposed to the application. This same position was again re-communicated 1 August 2014.

Materially, the applicant filed her heads of argument on 19 June 2014 and the first respondent filed theirs on 18 July. Therefore by 21 July 2014, the Minister's position as second respondent in the matter was well known. They were no heads filed by the second respondent. The Registrar replied that the matter was still opposed as second respondents had filed heads of argument. Reference to the second respondent having filed heads appears to have been an error as it was the first respondent who effectively thereafter remained opposed to the matter. [3] The letter sent by the Civil Division on behalf of the second respondent on 21 July and reiterated on 1 August read as follows:

> **"Re: Beata Emely Chigwedere v Nora Developments (Pvt) Ltd & 2 others Ref case HC 10973/13: X ref Case No 5233/13**
> We make reference to the above subject matter.
> We wish to have it placed on record that we have not filed any heads of argument in the application for rescission of judgment filed as case HC 10973/13 and that **this decision was consciously made on the premise that we are no longer opposed to that application**. We are of the firm conviction that the application cannot be assailed on any basis whatsoever, and nay opposition is futile, and that it in fact

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> borders on abuse of the processes of the court. In the circumstances we hereby advise that we shall soon be withdrawing the application for the condonation of the late filing of opposing papers which we had filed earlier on as part of these proceedings."

It is self-evident that the letter constituted a withdrawal of any opposition to the granting of the order sought.

Analysis of the arguments

As regards the argument that the land in question is constitutionally state land and therefore the order in question should not have been granted, the first respondent's application for delisting was equally constitutionally based. In seeking delisting the first respondent had drawn on the fact that land reform essentially aims at redressing colonial land imbalances and empowering Zimbabweans who were dispossessed of their land. This was captured under s 16 A of the previous constitution. Section 289 of the current constitution also captures the fact that principles guiding policy on agricultural land are informed by the need to redress the unjust and unfair pattern of land ownership that was brought about by colonialism.

All acquired land remains state land by virtue of the Constitution. While acquisitions made under the Land Acquisition Act [*Chapter 20:10*] may be revoked in terms of s 10 A, the provision sets out the time frame and procedures for so doing. It gives a time frame of six months from the acquisition made in accordance with s 8 of the Act for revoking such order. The revocation is to be also published by notice in the Gazette. It is also the responsibility of the acquiring authority to notify the Registrar of Deeds as soon as practicable after revocation. The process does not involve coming to court to confirm any upliftment. The revocation also does not prevent any future acquisition. The applications for upliftment of endorsements do not fall within the ambit of this provision. They relate to specified land constitutionally declared as state land regardless of its ownership by an indigenous person.

If it is the intention or operational policy of the acquiring authority to give back farms that were listed which belong to indigenous owners, then is imperative that the acquiring authority has a clear basis for so doing that is in harmony with the constitutional provision and the principles that are outlined under s 289 of the new Constitution. The overall aim is to bring about equitable access by all Zimbabweans to the country's natural resources taking into account the following principles as captured under s 289:

> "(*a*) land is a finite natural resource that forms part of Zimbabweans' common heritage;
> (*b*) subject to section 72, every Zimbabwean citizen has a right to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of agricultural land regardless of his or her race or colour;
> (*c*) the allocation and distribution of agricultural land must be fair and equitable, having regard to gender balance and diverse community interests;
> (*d*) the land tenure system must promote increased productivity and investment by Zimbabweans in agricultural land;
> (*e*) the use of agricultural land should promote food security, good health and nutrition and generate employment, while protecting and conserving the environment for future generations;
> (*f*) no person may be deprived arbitrarily of their right to use and occupy agricultural land."

In view of land being a finite resource, these principles hint strongly at redistributive justice, informed by moderation and proportionality. They are also informed by a quest for productivity and rationality in land use. The principles are evidently not just about doing away with colonial based ownership but about infusing a new ethos with respect to agricultural land. Of necessity there must therefore be clarity from the acquiring authority in terms of its legal operational framework in giving back indigenously owned in view of all applicable constitutional provisions that deal with agricultural land. It may very well be that specific legislation is called for in terms of how farms that are state land and that are indigenously owned are to be dealt with.

Since the primary thrust of this application is a challenge to the order on the basis that an interested party was not advised of the proceedings, what is clearly within the ambit of this court is to assess whether a sufficient basis exists for a retraction of the order on the grounds that there was an interested party involved. The parameters for dealing with an application for rescission of a judgment under r 449, are well established. See *Banda* v *Pitluk.*[4] What must be shown by the applicant is that no notice of the action was received as an interested party and that the judgment was erroneously sought or erroneously granted. An applicant is not required to show a *bona fide* defence to the claim. The issue for decision in this matter is whether applicant has indeed shown to this court that she was an interested party in the matter and needed to have been given notice.

In so far as she holds an offer letter then this court can do no more than observe that the task of ensuring that Minister undertakes his duties within the recognised confines of the

[4] 1993 (2) ZLR 60 at p 65

rule of law including the right to be heard has been well articulated by our courts. (See *Mike Campbell [Pvt] Ltd* v *Minister of Lands & Anor*[5]; *Vukutu [Private] Limited* v *Pride Kwinje and Minister of Lands, Land Reform & Resettlement)*[6]." The power to withdraw or cancel an offer of land must be exercised lawfully and procedurally. This necessitates giving of due notice to the holder of the offer letter". Failure to do so means that the applicant remains an interested party in all matters pertaining to the farm. See *Commercial Farmers Union and Ors* v *Minister of Lands and Rural Resettlement and Ors*[7] and *Sigudu* v *Minister of Lands and Rural Resettlement N.O. & Anor.*[8]

Furthermore, the second respondent's withdrawal of any objection to the application suggests that there was indeed an interested party who was not informed. In granting the order, the court had undoubtedly placed weight on the earlier averment that the Minister was not opposed to the upliftment of the endorsement. The order itself was not granted erroneously in the sense that there was a patent procedural defect in the application. The alleged defect has arisen upon application and detailed averments by the applicant that she is an interested party who was not made a party to the hearing. It has also arisen from the second respondent's own concession by way of a letter by those acting on his behalf, that there is no opposition to the order that is being sought. This standpoint is clearly a basis for finding that the order had indeed been erroneously sought. Having withdrawn the objection to the application in question, there is no reason why the costs should still be visited upon the second respondent.

Accordingly it is ordered that

1. The order handed down by default on 24 July 2013 in the matter of *Nora Development (Pvt) Ltd* v *Minister of Lands and Rural Settlement and Registrar of Deeds* in case No. HC 5233 /13, be and is hereby rescinded in its entirety in accordance with r 449 (1) (a) as the said judgment was erroneously granted in the absence of the applicant herein, who was a party affected by the said judgment.
2. The first respondent to bear the costs of this application.

[5] 2008 [1] ZLR 17 [S]
[6] HH 364-16
[7] SC 31/2010
[8] HH 11-2013

Moyo & Jera, applicant's legal practitioners
Mushonga Mutsvairo & Associates, 1st respondent's legal practitioners