HUDSON JOSTINO ZHANDA
and
IRENE ZHANDA
versus
T J GREAVES (PVT) LIMITED
and
TJ GREAVES
and
THE HON. HERBERT MURERWA N.O.

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 26 July, 2011, 5 September 2011 & 14 September 2011

Mr Zhanda*,* in person
Mrs Zhanda, in person
Adv.*T Mpofu,* for 1st & 2nd respondents
Ms *Hove*, for 3rd respondent

MTSHIYA J: This is an urgent application wherein the applicants seek the following relief:-

"1. The applicants be and are hereby authorised, directed and empowered to execute the judgment under Case Number 6257/11 notwithstanding the appeal noted against that judgment by the respondents.

2. The first and second respondents be and are hereby restrained from vandalizing and or removing fixed assets on the land including electrical installations, water irrigation pipes and dwelling houses.

3. The Sheriff or his lawful Deputy be and is hereby directed, empowered and authorised to execute the eviction of the first and second respondents from the whole of Enondo farm, and all those claiming occupation through them, the appeal noted by the respondents notwithstanding.

4. The Deputy Sheriff be and is hereby authorized to enlist the assistance and services of the Office Commanding Mashonaland East Province of the Zimbabwe Republic Police, if need be, in the execution of this order.
5. The first and second respondents pay the costs of this application".

The application is opposed.

The brief background to this application is as follows:

On 29 November 2010 the applicants were, in terms of the Land

Acquisition Act [*Cap 20:10*] ("the Act"), jointly issued with an offer letter for the whole of Enondo Farm (Enondo). The farm is in Seke district, Mashonaland East Province, and measures approximately 763 hectares in extent. The said farm was previously owned by the respondents before being acquired by the State in terms of the Act.

On 6 July 2011 the applicants obtained a court order for the eviction of the respondents from Enondo. The eviction order (In *Hudson Zhanda and Anor v T.J. Greaves and 2 Ors,* HH 148/11) reads as follows:-

> "1. That first and second respondents and all those claiming occupation through them be and are hereby ordered to vacate a certain piece of land in the district of Salisbury known as Enondo B held under deed of transfer 5199/82 prior to the Land Reform Program within Seven (7) days of the date of this order.
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> 2. That the third respondent be and is hereby ordered to facilitate the occupation of the said farm by the applicants.
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> 3. The Sheriff or his Deputy be and are hereby authorized to eject first and second respondents from the said farm should they fail to comply with the provisions of paragraph one of this order.
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> 4. The Sheriff or his deputy be and are hereby authorized and directed to call upon the assistance of the Zimbabwe republic police should first and second respondents resist eviction.
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> 5. First and second respondents are to bear the costs of this application".

Through this urgent application, the applicants seek execution of the above order pending the determination of the respondents' appeal in the Supreme Court. The applicants argue that the appeal was noted only to delay execution of the court order. The applicants also state that the respondents have no good and sufficient cause to oppose the application on the merits.

Advocate *Mpofu,* for the respondents, argued that the matter was not urgent. He said there was no explanation as to why the application was only filed on 21 July 2011 when the appeal was noted on 11 July 2011. He also submitted that, apart from seeking final relief in terms of r 244 of the High Court Rules 1971 the applicants, as self actors, should have at least filed an affidavit of urgency.

Advocate *Mpofu* further submitted that the noting of an appeal in the Supreme Court meant that proceedings in the High Court relating to the same matter should come to a halt until the appeal is determined.

On the basis of the above preliminary points, Advocate *Mpofu* urged the court to dismiss the application.

Mr Zhanda, one of the applicants, submitted that it took 10 days to file the urgent application because he had gone to Binga for a funeral. He said 'no-one else other than himself would have facilitated the funeral'. He, however, did not deal with the other technical issues that were raised by the respondents' counsel. I take it that this was the result of him being a lay person.

In dealing with the preliminary issues raised by Advocate *Mpofu,* I take note of the fact that both applicants were not legally represented. However, both applicants have since demonstrated a keen desire to fight for what they believe to be their rights. They started the fight in the magistrate court and have continued the fight in this court. I therefore do not believe that we should read much in the 10 days delay of filing this application. The total circumstances of the case should be taken into context. I also hold the view that matters of this nature should not be clouded in legal technicalities, moreso, if so doing will prejudice a party deserving of the court's protection and the relief sought. This need becomes more necessary where the party seeking relief is not legally represented. The court should be driven by a desire to resolve the dispute which, *in casu*, I believe, is clearly defined. The case is not new and what each party wants is clearly known. I would therefore remove legal technicalities from the path of the court and deal with this application.

Having said the above, I believe the application substantially meets the requirements of urgency. In coming to this decision I also, like BHUNU J, derive comfort from r 4c of the High Court Rules 1971 which allows for departure from set rules and procedures where the interests of justice so dictate. The rule in question provides as follows:-

> "The Court or a judge may, in relation to any particular case before it or him, as the case may be –
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> (a) Direct, authorise or condone a departure from any provision of these rules, including an extension of any period specified therein, where it or he, as the case may be, is satisfied that the departure is required in the interests of justice;

(b) Give such directions as to procedure in respect of any matter not expressly provided for in these rules as appear to it or him, as the case may be, to be just and expedient".

In view of the foregoing, I am unable to uphold the preliminary issues raised by the respondents.

On the merits of the application, Advocate *Mpofu* submitted that the initial judgment of this court was granted in the absence of vital information. Part of that information is contained in the affidavit of the Minister of Lands and Rural Resettlement, who, in terms of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*] is the Acquiring Authority. The Minister's affidavit informs as follows:-

"1. I am the Minister of Lands and Rural Resettlement and also the Acquiring Authority in terms of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*].

2. I write this affidavit pursuant to a letter dated 6 July 2011 from legal representatives of first respondent who request clarity on the position regarding Enondo Farm and its occupation and use.

3. I am aware of the proceedings in HC 6257/11 in which Hudson Jostiono Zhanda and Irene Zhanda are applying for the eviction of T.J. Greaves from Enondo B.

4. The Zhandas have an offer letter in respect of the property measuring 765 hectares issued on 29 November 2010.

5. The Province has however indicated that there is need to maintain maximum farm sizes in the area and therefore recommended that the farm be subdivided and allocated to the Zhandas and the former owner which will result in maximum farm size being maintained.

6. I support the Governor's recommendation to adhere to the agreed policy of maximum farm sizes through re-planning.

7. I therefore confirm that Enondo will be subdivided to effect this position".

Furthermore and in addition to the Minister's affidavit, on 22 July 2011
the Provincial Lands Committee/The Governor in a document titled "Withdrawal Schedule For Downsized Farms – Mashonaland East Province" recommended, in relation to Enondo farm, as follows:-

> "The white farmer Mr Greaves has been recommended to stay. The farm is to be downsized in line with the maximum farm size regulations and therefore a replan will accommodate both Mr Greaves and Mr Zhanda."

It was argued that in the absence of the above documents the earlier decision of this court was based on an incomplete record. Advocate *Mpofu* further submitted that ever since Enondo was acquired by the State, the respondents had remained on the property on the basis of advice from government officials. In support of his argument that the respondents were on the property because of advice from State officials, he referred me to the criminal case of *State v Davy* 1988 (1) ZLR where GUBBAY J.A. as he then was, had this to say:-

> "It necessarily follows that in my opinion the rule that ignorance or mistake of law is no excuse which judicial officers have applied for so long in this country in conformity with both English law and the decisions of the South African courts prior to the advent of *de Blom's* case *supra* remains valid. Its strength has hardly been shaken. It is, however, subject to the exception that where the accused acted upon incorrect advice as to the law, given by a Government official who is primarily responsible for the administration of the particular statute to which the matter relates, his ensuing mistake of law is a good defence. See *S v Zemura supra* at 377 E-G. As stressed by LEWIS AJP in *S v Bledig & Anor* 1974 (1) RLR 100 (AD) at 109A.
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> > 'There is something in the nature of an estoppel present when the State prosecutes a person for certain conduct when he has been induced by advice received from a responsible representative of the State to embark on such conduct'
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> Clearly the exception is grounded in reasons of public policy. Where the State has misled a man into a contravention of the law, as a matter of public policy he should be entitled to an acquittal. But care must be taken not to extend the exception beyond the strict limits of Zemura's case, for to do so would be "extremely dangerous and would tend to frustrate the enforcement of statutory provisions". See Bledig's case *supra* at 108 in fine". (my underlining for emphasis)

Advocate *Mpofu* also referred me to the Supreme Court's decision in *Georgios Kondonis v The Minister of Lands Rural Settlement and 2 Ors* SC 72/11 where, he said on the basis of the above case authority, the Supreme Court had made the following order:-

> "1. The acquisition of applicant's land being a certain piece of land situate in the District of Salisbury being Lot 17 of Good Hope, measuring ten comma nine seven nine zero (10 9790) hectares and held under Deed of transfer 1267/85 is outside the provisions of the law more particularly s 16B(2)(a) and 16A of the Constitution of Zimbabwe and therefore invalid and is accordingly and therefore invalid and is accordingly set aside.

2. The consequential endorsement of the applicant's deed of transfer is equally set aside and the applicant's deed of title is therefore restored.

3. The offer letter granted to second the respondent on 21 February 2011 is invalid and therefore set aside".

It is important to note, as is clear from the above order, that the issue for determination in that case was whether or not the property in question had been acquired in terms of the law. The court ruled that the acquisition was "outside the provisions of the law and was therefore invalid. The acquisition was set aside.. Accordingly no offer letter could attach to an unlawful acquisition.

In citing the above cases, Advocate *Mpofu* argued that the respondents could not be regarded as outlaws. He said they had been permitted to remain on the land by State officials pending re-allocation.

With respect to the appeal filed in the Supreme Court Advocate *Mpofu* submitted that in condoning departure from rules the court had exhibited judicial bias. He also alluded to the fact that an earlier appeal could not be regarded as having been withdrawn in the absence of a tender of costs. Accordingly, he argued, the appeal from the magistrate's court filed in this court was still pending.

Advocate *Mpofu* went on to submit that the generalisations on capital outlays were not factual. He said there were prospects of success in the appeal lodged by the respondents in the Supreme Court. That being the case, he argued, it would not be appropriate for this court to grant the relief sought by the applicants.

On their part, the applicants, through Mr Zhanda, submitted that in terms of law the respondents were committing an offence by remaining on Enondo. The applicants had been stripped of their rights to remain on the property. He said the Acquiring Authority should not be allowed to break the law of the land in order to accommodate the respondents.

Mr Zhanda submited the Minister's affidavit was not an offer letter but a document merely expressing an intention.

In making his submissions Mr Zhanda relied heavily on the Supreme Court case – *Commercial Farmers Union and 9 Ors v the Minister of Lands and Rural Resettlement and 6 Ors* SC 31/10 where at pp 28 and 29 the Learned Chief Justice states, in part, as follows:-

"4. A former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed period commits a criminal offence. If the former owner or occupier continues in occupation in

open defiance of the law, no court of law has the jurisdiction to authorise the continued use or possession of the acquired land.

5. Litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law. See *Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity and Ors* case *supra.*

8. The holder of an offer letter, permit or land settlement lease has a clear right, derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit or land settlement lease. No doubt the Legislature conferred on the holder of an offer letter, permit or land settlement lease the *locus standi*, independent of the Minister, to sue for the eviction of any illegal occupier of land allocated to him or her in terms of the offer letter, permit or land settlement lease". (my own underlining)

On the basis of the above Mr Zhanda urged the court to grant the applicants the relief they are seeking. He said the earlier judgment of BHUNU J, was very clear on the law.

Ms *Hove*, for the Acquiring Authority, said she had no submissions to make and would abide by the court's decision. This was despite the court having directed her to file written submissions. However, given the legal position *in casu*, Ms *Hove's* stance was not surprising at all.

I am of the view that the law regulating the issues for determination in this application has already been clearly set out in the two cases cited above namely *Commercial Farmers Union and 9 Ors v The Minister of Lands and Rural Resettlement and 6 Ors SC 31/10* and *Hudson Jostino Zhanda and Anor v T.J. Greaves (Pvt) Ltd and 2 Ors* HH 148/11

In his judgment in HH 148/11 BHUNU J, also relied on the judgment of the Supreme Court as demonstrated at p 5 of his judgment where he quotes from the Supreme Court judgment as follows:-

"On the other hand, s 3 of the Act criminalizes the continued occupation of acquired land by the owners or occupiers of land acquired in terms of s 16 B of the constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the language of s 3 of the Act that the individual applicants as former owners or occupiers of the acquired land have no legal rights of any description in respect of the acquired land once the prescribed period has expired.

The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials

to assert their rights. The individual applicants as former owners or occupiers of acquired land lost all rights to the acquired land by operation of the law The lost rights have been acquired by the holders of offer letters, permits or land settlement leases. Given this legal position it is the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights." *(My underlining)*.

I fully agree with the above and I am of the view that the authorities cited by the respondents in trying to prove that they have not violated the law are not relevant. As already noted the Kondonis case *supra* was not dealing with a case where the Acquiring Authority had legally acquired the land in question. There was therefore no offer letter to talk about. *In casu*, there is no dispute that the land in question is now State land allocated to the applicants. The Acquiring Authority is enabled by law to allocate the land as he deems fit. The offer letter issued to the applicants is not disputed. It is on that basis that they are able to independently argue their case.

I also agree with the applicants that the Acquiring Authority's affidavit does not constitute an offer letter. The respondents have no lawful authority to remain on the land and therefore do not deserve the protection of the court.

The import of the Minister's affidavit is merely to relay to the court the Acquiring Authority's intention(s). The court's knowledge of those intentions does not change the legal position, namely that, as opposed to the respondents' position, the applicants have an instrument that renders their claim to occupy the property lawful. The Acquiring Authority has, since the dispute started, neglected or failed to do the correct thing i.e either withdraw/amend the offer letter granted to the applicants or grant an offer letter to the respondents in terms of its expressed intentions. The Acquiring Authority has the authority to do the correct thing and *in casu* what we have is lawful authority for the applicants to occupy Enondo.

Apart from arguing that State officials advised them to remain on the property, I did not hear the respondents to be challenging the lawful position of the applicants.

I agree that generally an appeal suspends the operation of the judgment appealed against.

In *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR R 149(4) SMITH J said:

> "In this country, as in South Africa, the noting of an appeal in a civil case automatically suspends the execution of any judgment or order granted by the court of first instance, In *South Cape Corp v Engineering Mgmt Svcs* 1977 (3) SA 534 (A) CORBETT JA (as he then was) said at 544:
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>> '….it is today the accepted common law rule of practice in our courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal … The purpose of the rule is to prevent irreparable damage from being done to the intending appellant'
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> An application may however be made to the trial court for leave to execute pending the appeal and in any such application the onus is on the applicant to shoe special circumstances (see *South Cape Corp supra* at 545 and 548). In *Wood NO v Edwards & Anor* 1966 RLR 336 (G); 1966 (3) SA 443 ® LEWIS J (as he then was) made it clear that the general rule, as stated above also applies in Zimbabwe and he referred with approval to *Reid v Godart* 1938 AD 511 when it was also stated that "The foundation of the common law rule …. is to prevent irreparable damage to the intending appellant".

In casu, I believe the applicants have, in their application, demonstrated that they are on the side of the law and therefore require protection from the court. The respondents are operating outside the law and therefore deserve no protection from this court. I therefore see no prospects of success in the appeal noted in the Supreme Court by the respondents. The law, in my view, dictates that the applicants must succeed. I therefore see no reason why the relief sought by the applicants should not be granted.

In the premises I make the following order in favour of the applicants:-

It is ordered that:-

1. The noting of the appeal by T.J. Greaves (Pvt) Limited and T.J. Greaves shall not suspend the execution of the order granted by BHUNU J on 6 July, 2011; and

2. The first and second respondents shall pay the costs of this application.

Mr & Mrs Zhanda
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Corner Third Street, Harare

Applicants
Munangati & Associates, 1st & 2nd respondents' legal practitioners
The Office of Attorney General, 3rd respondent's legal practitioners