FRANCIS PEDZANA GUDYANGA
versus
FIVE STREAMS FARM (PVT) LTD
and
FRANK THOMAS MARTIN
and
ANN PERASON MARTIN
and
MINISTER OF LANDS AND RURAL RESETTLEMENT NO

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 7 AND 28 AUGUST 2013

Court Application

C. Phiri, for applicant
P.C. Paul, for first, second and third respondents
Ms *Warinda*, for fourth respondent

MUSAKWA J: On 4 October 2008 the applicant was issued with an offer letter in respect of the Remaining Extent of Five Streams Farm in Mutasa District of Manicaland Province. He now seeks the following relief-

> "1. Applicant be and is hereby declared to be lawfully authorized to be in occupation of R/E of R/E of Five Streams Farm in Mutasa District of Manicaland Province in terms of the Offer Letter issued by the 4th Respondent in his favour dated 4 December 2008.
> 2. 1st, 2nd and 3rd Respondents be and are hereby ordered to forthwith give vacant occupation of R/E of R/E of Five Streams Farm in Mutasa District of Manicaland Province to the Applicant.
> 3. The Deputy Sheriff and/or his lawful assistants be ordered to give effect to terms of (2) above.
> 4. 1st, 2nd and 3rd Respondents to pay costs of suit."

In his founding affidavit the applicant states that in 2004 the entire land registered in the name of the first respondent was gazetted for compulsory acquisition. By virtue of the old Constitution the land now belongs to the state. Consequently, a person can only occupy such land subject to the authority of the fourth respondent.

In 2008 the applicant applied to be allocated with farming land under the A2 model. The applicant was duly issued with an offer letter dated 4 December 2004. He further states

that on 28 November 2012 the validity of the offer letter was confirmed by the fourth respondent.

The applicant further states that armed with the offer letter he sought to occupy the land in question. However, he met stiff resistance from the first to third respondents. In a bid to avoid self-help he pursued peaceful ways of taking possession of the land culminating in the present application.

Although the fourth respondent filed a notice of opposition, the accompanying affidavit of the director of Resettlement in the Ministry of Lands and Rural Resettlement confirms that the applicant is entitled to occupy the land in question. He concludes that the fourth respondent does not oppose the relief sought.

On the other hand the second respondent deposed to an affidavit on behalf of the first and third respondents. He contends the validity of the offer letter issued to the applicant. He believes that it is the government's wish that he remains in occupation of the land. It is also contended that the applicant was offered other land in Chipinge.

More fundamentally, it is contended that it is the government's wish that the first to third respondents remain in occupation of the land in question. Reference is made to various letters of support which were produced at the hearing of this matter. The letters comprise a recommendation by the Acting District Administrator, another letter by Chief Mutasa, a letter from ZANU P.F. Headquarters in Harare and another recommendation by the Mutasa District Administrator.

The second respondent further contends that he has sought a letter from the fourth respondent to no avail. On that score, he intimates that at the hearing of this matter 'I will request that he attends court at the hearing to give evidence." Indeed, an application to have the hearing deferred for two weeks was made by the first to third respondents. This was to enable them to secure the fourth respondent's confirmation that their application to be allocated the land in question was receiving consideration. The application for postponement was dismissed and the court gave its reasons which will not be repeated.

Though not denying the applicant's assertion that he sought to take occupation, the second respondent takes issue with the applicant's failure to particularise the specific steps he took in that regard. The applicant's capacity to institute the proceedings is put in issue. Finally, it is also contended that the applicant's right to institute the proceedings has prescribed as he has taken more than four years.

As can be noted from the fourth respondent's response, the relief sought by the applicant is not opposed. Therefore the applicant's *locus standi* cannot be in issue.

What constitutes lawful authority to occupy agricultural land without falling foul of s 3 (3) of the Gazetted Lands (Consequential Provisions) Act? Section 2 of the Act defines lawful authority as follows-

> "lawful authority" means—
> (*a*) an offer letter; or
> (*b*) a permit; or
> (*c*) a land settlement lease;
> and "lawfully authorised" shall be construed accordingly;"

Despite the clear provisions of the law it is common cause that by his own admission the second respondent has none of the above documents as proof of occupation of the farm in question. He and the other respondents are relying on recommendations of well wishers which unfortunately do not constitute lawful authority. It is also surprising that reliance is being placed on assurances given by the fourth respondent who nonetheless through the director of Resettlement in the Ministry of Lands and Rural Resettlement is not opposed to the relief sought.

As was stated by CHIDYAUSIKU CJ in *Commercial Farmers and Ors* v *The Minister of Lands and Rural Resettlement and Ors* SC 31/10 at p21-

> "Having concluded that the Minister has the legal power or authority to issue an offer letter, a permit or a land settlement lease, it follows that the holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease."

It follows then that the question of the applicant's *locus standi* does not arise. This is by virtue of the offer letter issued to him. In*Commercial Farmers And Ors* v *The Minister of Lands and Rural Resettlement and Ors supra* the learned Chief Justice further went on to say at p23-

> "An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the rights of possession or occupation on it.
> 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 the 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."

Not much persuasive arguments were advanced in support of the defence of prescription. For example, no distinction was made between extinctive and acquisitive prescription. Counsel for first to third respondents treated the issue as if it was settled that the argument was centred on extinctive prescription. A closer look at the facts will show that the issue is one of acquisitive prescription. Having acquired rights of occupation of land by way of offer letter, it cannot be argued with any conviction that the applicant's right of possession lapsed after three years. In the first place that would fly in the face of the first to third respondents' illegal occupation of the land.

The relevant starting point is s 4 of the Prescription Act [*Cap 8:11*] which provides that-

"Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for—
(*a*) an uninterrupted period of thirty years; or
(*b*) a period which, together with any periods for which such thing was so possessed by his predecessors in
title, constitutes an uninterrupted period of thirty years."

In *Msasa Lodge (Pvt) Ltd* v *Lightfoot* 2000 (2) ZLR 1 (HC) GWAUNZA J had this to say at p6-7:

"I will first consider the law, both common and statutory, on acquisitive prescription before applying it to the facts before me."

The position at common law is correctly summarised on p 1 of the applicant's heads of argument as follows:

"Any person who acquires full juristic possession, without force and peaceably, so openly and patently to the owner or another or both, and without recognising the title of the owner, becomes the true owner thereof after the passage of a period of thirty years. The Latin expression is *nec vi, nec clam, necprecario, (*see *Welgemoed* v *Kotzer* 1946 TPD 701 at p 710)."
4.Acquisition of things by Prescription
Subject to this Part and Part V, a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for -
(a)an uninterrupted period of thirty years; or
(b)a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years."

It is evident that "open possession" of the property in question by the claimant and his predecessors in title, "as if he were the owner" and "for thirty years" are the requisite

elements for acquisitive prescription, both at common law and in terms of the Prescription Act.

A perusal of relevant authorities has yielded the following further definitions of these essential elements.

D Carey Miller in *The Acquisition and Protection of Ownership 1* in discussing a similar provision of the South African Prescription Act, defines the concept "openly" in these terms:

> "The 'openly' requirement was defined in an early case as '... so patent that the owner, with the exercise of reasonable care, would have observed it ...' As this dictum indicates, the 'openly' requirement is subject to an objective test, the practical effect of which is to require the claimant to establish that the nature of his possession was such that a reasonable man would have been aware of it."

The authors of *Silberberg and Schoeman's The Law of Property 2* discuss the elements of possession as if one were the owner as follows:

"There is however, consensus that a person who acquires physical control of a thing can qualify as a possessor or for the purpose of acquiring ownership thereof only if he has the intention of an owner *animus domini* with regard thereto. Consequently, a person who wishes to qualify as a possessor for the purpose of acquiring by prescription, has to exercise physical control with the intention of an owner."

The following dictum of BROOME JP in *Pratt* v *Lourens* 1954 (4) SA 281 (N), (and cited in the applicant's heads of argument at p 1) expands on the same theme:

> "It is a mistake to suppose that prescriptive title depends solely on thirty year continuous possession *nec vi, nec clam necprecario*. In addition, such user must be adverse to the true owner ... If the possessor acknowledges the rights of the owner, his ownership ipso facto ceases to be adverse to him ... If therefore there has been any acknowledgment, the plaintiff's case must fail, notwithstanding that such acknowledgment has not been followed by any permission, express or implied."

I have already observed that the recommendations and promises made in favour of the first to third respondents amount to nothing if they are not accompanied by that which enables them to lawfully occupy the farm. In the first place, the offer letter granted to the applicant has not been withdrawn. There is not even a question of there being in existence two competing offer letters as the first to third respondents have none. It therefore follows that the defences advanced by the first to third respondents must fail.

In the result, the application is granted in terms of the draft order.

Machingura legal Practitioners, for applicant
Wintertons, first, second and third respondents' legal practitioners
Civil Division of the Attorney-General's Office, fourth respondent's legal practitioners