MARK MASINYAZANA MBAYIWA

Versus

MINISTER OF LANDS, AGRICULTURE, WATER & RURAL RESETTTLEMENT

And

ATTORNEY GENERAL OF ZIMBABWE N.O.

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 4 JULY 2022 & 1 JUNE 2023

Opposed Application

T. Mpofu with M. Tshuma for the applicant
Advocate P. Kunaka for 1st respondent

MOYO J: This is an application wherein the applicant seeks a declaration of constitutional invalidity of the laws relating to land acquisition and the ones that put the state in a privileged position in the buying and selling of rural land in Zimbabwe. The applicant says he has *locus standi* as a citizen of Zimbabwe and as a potential land owner and purchaser he has property rights to protect and that he seeks an order declaring the unnecessary and unconstitutional impediments to acquisition of rural land invalid. Specifically the applicant seeks the following:

> 5. This is an application that seeks a determination of constitutional invalidity. I seek the following relief being that:
>
> 1. Section 47 of the Land Acquisition Act contravenes section 71 (2) of the Constitution of Zimbabwe for the reason that it constitutes an irrational, unfair and unreasonable limitation of the right to acquire and dispose of any property (and the fruits of one's investment) as guaranteed by section 71 (2) of the Constitution of Zimbabwe Amendment (No. 2) Act 2013. For that reason, it is a validation of the protection of the law guarantee as encapsulated in section 56 (1) of the same Constitution.
>
> 2. Sections 3 and 4(1) of the Land Acquisition (1) Disposal of Rural Land) Regulations, 1999 contravene section 71 (2) of the Constitution of Zimbabwe

for the reason that they constitute an irrational, unfair and unreasonable limitation of the right to acquire and dispose of any property (and the fruits of one's investments) as guaranteed by section 71 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013. For the foregoing reasons, the provisionS constitute a violation of section 56 (1) of the Constitution.

3. Section 41 (1) of the Land Acquisition (Disposal of Rural Land) Regulations, 1999, is invalid as it violates section 134 (1) of the Constitution. For that reason the provision necessarily violates section 56 (1) of the Constitution.

4. Consequently, section 10 of the Land Acquisition (Disposal of Rural Land) Regulations, 1999 that gives effect to the provisions set out above is consequently invalid and of no force or effect for being in violation of section 71 (2) and 56 (1) of the Constitution.

The applicant chronicles the historical context to the land reform in Zimbabwe, the need for the State to acquire land soon after independence, the various laws that were enacted to achieve this purpose and the reasons why the state had to be in an advantageous position vis-à-vis the allocation and alienation of rural land. He further submits that the law is not just irrational and unreasonable but that in fact it has outlived its usefulness and purpose.

He further submits that a lot of agricultural land has been acquired by the State and that a lot of previously disadvantaged Zimbabweans have since benefited from the land reform programme. He further submits that it has been hailed a success by a number of government officials. He attached annexures A and B to the affidavit but unfortunately he did not specify the relevant paragraph where it is stated as such. He further submits that the government is in the process of compensating white farmers as evidenced by annexure B to the founding affidavit. He further submits that government no longer needs to be in a privileged position as far as the acquisition of agricultural land is concerned. He further submits at paragraph 48 of the founding affidavit that:

> "whichever way one looks at it, <u>the conditions that prevailed when the need to protect the State was mooted, are no longer in existence.</u> The protection accorded the state has now become both arbitrary and irrational. By definition, it has now become unconstitutional." (emphasis mine)

He further submits at paragraphs 49 – 52 as follows:

"49. In view of the foregoing the constitutionality of the laws which purport to interfere with the freedom to dispose of or acquire agricultural land has now arisen.

50. It has not bothered the authorities that the laws have outlived their usefulness and that the conditions which they were designed to address, are no longer in existence. (emphasis mine)

51. It is in this regard important that I turn to the provisions and establish why they cannot be considered valid, the constitutional provisions impacting on the matter considered."

At paragraph 65 of the founding affidavit applicant further states as follows:

"I submit that this is irrational, unfair and unreasonable within the context of the 2013 Constitution and especially because the land reform programme has been carried out successfully as far as government is concerned. Therefore, the objects of such a law no longer exists. At any rate, there is no longer any rational object that attends upon granting the state such protection. The state does not need it given that even after the land has been sold, nothing bars it from still acquiring land." (emphasis mine)

He further states in paragraph 66:

"66. The objects of the law was to ensure that the state did not compete with private persons in the acquisition of rural land for the purpose of fulfilling government purpose of land reform.

67. That objective ceased to exist with the successful carrying out of the land reform program under the repealed Constitution."

In paragraph 68 he further states that:

"Even without a successful land reform programme, the object would have ceased to exist up to the lifting of the embargo upon the State which imperiled its right to acquire agricultural tenements."

(I have to comment here that I do not understand the import of this submission as the lifting of the embargo has not been explained in full).

Before I even proceed to look at the laws complained about, the applicant's cause of action, clearly from the paragraphs quoted above, hinges on the completion of the land reform programme. In essence the applicant submits that the laws are no longer necessary and they should be declared unconstitutional on the basis of irrationality and unreasonableness, considering that the land reform program has ceased therefore they have outlived their purpose.

In their opposition the 1st respondent avers the following in paragraphs 34 – 36.

"34. This is denied, the land reform program is ongoing. There are many citizens who are still landless today, rural land must continue to be regulated until such a time when the state deems it fit that the regulation has to be stopped. (emphasis mine)

35. With respect this is the job of either the executive or legislature. The judiciary ought to be slow to intervene with such regulation. It is the State's position that the conditions that pertained when the regulations were mooted are still in existence, hence rural land must continue to be regulated. The protection is still rational. (emphasis mine)

36. The land reform process is still ongoing. No one knows when the program will end but that it not in the foreseeable future. As long as the land reform program is there, the Regulations must continue to exist. It is not correct to state that the land reform program was completed. It is an ongoing process which is refined and revisited each day until its objectives are met." (emphasis mine)

Turning back to applicant's case, in the answering affidavit applicant does not refute that the land reform program has not been completed as stated by 1st respondent in the afore-mentioned paragraphs. In paragraphs 25 and 26, applicant avers in response to paragraph 34 of the opposing affidavit that it was never the goal of the war of independence to give land to all but rather to reverse colonial era race based politics which prevented black indigenous Zimbabweans from owning land.

Applicant further states in paragraph 26 of the answering affidavit that the vast majority of Zimbabweans will not own agricultural land. That will never be feasible as there is a finite amount of land and that it can thus not be the State's goal to ensure that all Zimbabweans have agricultural land.

Applicant does not insist in his answering affidavit that in fact land reform has been wrapped up as a matter of fact.

The difficulty I have is that applicant premises his application upon the completion of the land reform program by the State. He annexes 2 annexures wherein I have not found confirmation as a matter of fact that land reform has been finalized. I believe applicant seeks to use these annexures as a matter of inference. Unfortunately he has not taken the court to the precise wording of these documents where the finalization of the land reform program can be inferred.

In annexure "A" I have found at page 23 where land re-distribution is mentioned but I have not seen anything about its completion. I have also read through annexure B spanning across pages 29-46 of the application, I have not found therein any statement about the completion of the land reform progamme. 1st respondent has denied that the land reform programme is over, 1st respondent is the authority empowered to conduct land reform and redistribution by the relevant laws. It is in my view, only the 1st respondent who is in a position to tell the court that land reform is either finalized or pending. I do not think that such a conclusion cam come from any other person who is not seized with the program and that includes applicant and the court. I have not been favoured with the facts and the necessary tools to make a finding that the land reform has been finalized by the government. 1st respondent being the government representation refuted this in their opposition.

Applicant did not supply any further information in the answering affidavit. In fact applicant does not insist that 1st respondent is not being truthful in his assertions that land reform is still ongoing. I am thus unable to impose a finding on the 1st respondent that in fact government has completed land reform and therefore there is a need to re-look at the laws that were crafted as a matter of necessity (to applicant's own admission) to facilitate land reform.

I will thus not proceed to assess the laws being complained about for the sole reason that per applicant's cause of action, what brings them into question (that is, the successful completion of the land reform program) has not been shown to be a fact that exists, in fact it is contested by the party privy to the conduct of the land reform program and I cannot make such a finding either on the basis of the assumptions being made by the applicant.

It is for these reasons that I find that applicant has not made a case for the relief that he seeks, and I will accordingly dismiss the application with costs.

Webb, Low & Barry, applicant's legal practitioners
Civil Division of the Attorney-General's Office respondents' legal practitioners