CMAL (PRIVATE) LIMITED
versus
MINISTER OF LANDS, AND RURAL RESETTLEMENT N.O
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 & 28 September 2016

Opposed Application

J Samukange, for the applicant
F. Chingwere, for the first respondent

MUREMBA J: The applicant is the former owner of Teviotdale Farm measuring 186, 4600 hectares situate in the district of Salisbury. On 22 October 2000 the applicant was served with a notice of intention to acquire the land in terms of s 5 of the Land Acquisition Act [*Chapter 20:10*]. On 17 December 2001 an order of acquisition of the land was granted in terms of terms of s 8 of the Land Acquisition Act [*Chapter 20:10*] The applicant is challenging the acquisition on the grounds that the land so acquired is not suitable for agricultural purposes as the whole of it consists of a hill which is rocky. It also averred that the land consists of dwellings where the family of Michael Laing, the Managing Director resides. It is further averred that on the property there are horses which are kept for the purposes of riding. There are also dwellings for domestic workers and cottages for visitors. It is further averred that at some great expense the hill can be used for building high end homes and there is no possibility of the land being used for agricultural purposes whatsoever. The applicant averred that for these reasons the land is not suitable for use intended by the first respondent or in terms of the Land Acquisition Act. It also averred that the land is a small holding and is not suitable for agricultural purposes. The applicant further avers that the land is peri-urban and therefore it is not capable of being acquired.

The applicant states that what supports its averment that the land is not suitable for agricultural purposes is the fact that since 2001when the farm was acquired by the State, no one has been allocated this land as no one has been issued with an offer letter. The land has

never been occupied except for a short duration by illegal gold panners. It further states that after the acquisition was made the first respondent did not make an application to confirm it as the applicant had contested it. It said that as a result the acquisition lapsed.

The order that the applicant is seeking is as follows:

"**It is hereby ordered that**:

1. The acquisition of Teviotdale Farm situate in the district of Salisbury measuring 186, 4600 Hectares is hereby set aside.

2. The second respondent removes any endorsement on the title deeds in terms of the Land Acquisition Act.

3. The applicant is declared to be the owner of the property and is entitled to exercise all rights of an owner in terms of the common law.

4. If the 1st respondent does not oppose the application, applicant to pay costs of this application and in the event that 1st respondent opposes the application, it be ordered to pay costs on attorney and client scale."

In opposing the application the Minister of Lands and Rural Resettlement averred that the land in question was acquired in terms of s 16 B (2) of the Constitutional Amendment Act No.17 of 2005. He further stated that in terms of s 16 B (3) (a) thereof no person shall apply to a court to challenge the acquisition of land by the State, and no court shall entertain any such challenge. The Minister averred that in view of these provisions the applicant's application is null and void.

Initially the court application bore the Ministry of Lands, Land Reform and Resettlement as the first respondent. In the heads of argument the first respondent's counsel raised a point *in limine* to the effect that in terms of s 3 State Liabilities Act [*Chapter 8:14*] the applicant ought to have sued the Minister of Lands and Rural Resettlement and not the Ministry thereof. At the hearing of the matter Mr *Samukange* had the citation of the first respondent deleted and substituted with the 'Minister of Lands and Rural Resettlement N.O'. The amendment was done with the consent of Mr *Chingwere*. The parties then went on to argue the matter on the merits.

Mr *Samukange* argued that the jurisdiction of the court is not ousted in matters where the first respondent has erroneously acquired for resettlement, land which is not agricultural, land which is peri-urban or land which does not fit into the model of land reform exercise. On the other hand Mr *Chingwere* argued that the issue of whether or not the acquisition was done erroneously is not an issue that can be determined by the court because the legislature ousted

the jurisdiction of the courts. He submitted that the only way to correct the error, if any, is to effect a constitutional amendment which powers this court does not have.

The law and its application to the facts

In order to determine if this court has jurisdiction over this matter it is necessary to look at the provisions of the Constitutional Amendment (No. 17) Act of 2005.

On 14 September 2005 the Constitution was amended by the insertion of s 16B after s 16A. The provision reads as follows:

"**16B Agricultural land acquired for resettlement and other purposes**

(1) In this section –

'acquiring authority' means the Minister responsible for Lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section.

'appointed day' means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

(2) Notwithstanding anything contained in this Chapter –

(a) all agricultural land –

(i) that was identified on or before the 8th July 2005, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after the 8th July 2005, but before the appointed day, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purpose, including, but not limited to –

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilisation of the land referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or in the case of land referred to in subparagraph (iii) with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day and the provisions of section 18 (1) and (9) shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land –

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired."

The Supreme Court has in a number of cases examined the meaning and effect of the amendment. In the case of *Mike Campbell (Pvt) Ltd and Anor* v *Minister of National Security Responsible for land, Land Reform and Resettlement* SC 49/07 MALABA JA (as he then was) explained the amendment at p 17 as follows:

"Section 16B of the Constitution is a complete and self-contained code on the acquisition of privately owned agricultural land by the State for public purposes. Its provisions relate exclusively to the acquisition of agricultural land. By the use of the non obstante clause, notwithstanding anything contained in this Chapter at the beginning of subs (2) the Legislature gave the provisions of s 16B overriding effect in respect of the regulation of matters relating to the acquisition of all agricultural land identified by the acquiring authority in terms of s 16B(2)(a).

Underlying s 16B is the principle which is almost a universal law to the effect that every sovereign, independent State like Zimbabwe has an inherent right to compulsorily acquire private property within its territory for public purposes with an obligation to pay fair compensation for the property acquired. The makers of our Constitution proceeded from the position that as the power to compulsorily acquire private property for public purposes is inherent in the State, the duty on the legislature was to determine the restrictions or conditions under which the power was to be exercised. As a result of the operation of this fundamental principle two separate but related procedures underlie the provisions of s 16B.

The first procedure under s 16 B(2)(a) relates to the actual acquisition of the land, whilst the second procedure under s 16B(2)(b) relates to the right to payment of fair compensation. Under the first procedure, the acquisition is made to depend on the existence of a state of facts established by purely administrative acts of the acquiring authority. <u>These facts are that the Minister Responsible for Lands or any other Minister whom the President may appoint as an acquiring authority publishes a notice in the Gazette identifying the agricultural land to be acquired and stating therein the purpose for which the land is required</u>.

<u>It is to be noticed that under the new procedure for compulsory acquisition of agricultural land for public purposes a number of restrictions and conditions imposed in the process of the</u>

> acquisition have been removed. There is no requirement for a notice of intention to acquire to be given to the owner of the land before acquisition. The acquiring authority does not have to state that the acquisition is reasonably necessary for utilisation of the land for resettlement purposes. Reasonable necessity of the acquisition would have been a judicial question, the determination of which would have required the exercise of judicial power. The acquiring authority is no longer under a duty to apply to a court of law for an order confirming the acquisition. Acquisition in terms of s 16B(2)(a) of the Constitution is a lawful acquisition of the agricultural land affected. As the acquisition of agricultural land in terms of s 16B(2)(a) is lawful, s 16B(3) provides that subss 18 (1) and (9) of the Constitution, which provide the right to protection of law and appropriate remedies against unlawful interference with or infringements of fundamental rights, shall not apply to the acquisition. An application to a court of law to challenge a lawful acquisition would in effect be an abuse of the right to protection of law. The provisions of s 16B(3) would not afford protection from the application of the provisions of subss 18 (1) and (9) of the Constitution to an acquisition of agricultural land which is not in terms of s 16B(2)(a) of the Constitution. The section does not apply to an acquisition of property in any other land which is not agricultural land. The provisions of s 16(1); 18(1) and (9) of the Constitution continue to regulate the acquisition of any property other than agricultural land."(My emphasis)

What can be deciphered from the above quotation is that with the amendment it is no longer necessary for the acquiring authority to apply to court for confirmation of the acquisition. So the argument by the applicant that the acquisition lapsed because the first respondent did not apply to have the acquisition confirmed is not correct.

In *Commercial Farmers Union and 9 Ors* v *The Ministry of Lands and Rural Resettlement and 6 Ors* SC 31/10 CHIDYAUSIKU CJ had the following to say about the jurisdiction of the courts,

> "Apart from the non abstante clause, s 16B(3) of the Constitution ousts the jurisdiction of the courts to enquire into the legality or otherwise of the acquisition of land in terms of s16B(2)(a) of the Constitution. In the case of *Mike Campbell (Pvt) Ltd and Ors* v *Minister of National Security Responsible for Land, Land Reform and Resettlement and Anor* SC 49/07 MALABA JA (as he then was), who delivered the unanimous judgment of this court, had this to say at pp 36-38 of the cyclostyled judgment:
>
> "By the clear and unambiguous language of s16B(3) of the Constitution the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of the law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the Gazette in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.

> The right to protection of law under s 18(1) of the Constitution, which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislature, executive or judicial power of the State. The right is not meant to protect the individual against the lawful exercise of power under the Constitution. Once the state of facts required to be in existence by s 16B(2)(a) of the Constitution does exist, the owner of the agricultural land identified in the notice published in the Gazette has no right not to have the land acquired. The conduct and circumstances of the owner of the agricultural land identified for compulsory acquisition would be irrelevant to the question whether or not the expropriation of his or her property in the land in question is required for any of the public purposes specified in s 16B(2)(a) of the Constitution. In the circumstances there is no question of prejudice to the rights of the individual since is personal conduct or circumstances are irrelevant to the juristic facts on which the lawful acquisition depends. No purpose would be served in giving the expropriated owner the right to protection of the law under s 18(1) and (9) of the Constitution when an attempt at the exercise of the right would amount to no more than its abuse."

In the face of the clear language of s 16 B (3) of the Constitution, a litigant can only approach the courts for a review and for a remedy relating to compensation. In this regard, the learned JUDGE OF APPEAL in the same judgment had this to say at p 38 of the cyclostyled judgment:

> "Section 16B(3) of the Constitution has not however taken away for the future the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B(2)(a). This is because the principle behind s 16B(3) and s 16B(2)(a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B(2)(a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) of the Constitution a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must depend existed in a particular case as required by the provisions of s 16B(2)(a) of the Constitution."

In *Georgios Kondonis* v *The Minister of Lands Rural Settlement and 2 Ors* SC 72/11 the Supreme Court had 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 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.

The above case authorities therefore make it clear that in cases where the Minister of Lands has acquired land outside the provisions of the law, more particularly s 16B (2) (a) of the Constitution, that can be challenged in court and the court can set aside or nullify such acquisition. Therefore a person who is affected by such unlawful acquisition is entitled to approach the court. In *casu* the question is was the acquisition of Teviotdale Farm done in terms of the provisions of the law? In answering this question I will look at the notice of intention to acquire the land which was issued in terms of s 5 of the Land Acquisition Act on 22 October 2000 in respect of Teviotdale Farm. The notice notifies the applicant of the Minister of Lands' intention to compulsorily acquire the land in terms of s 5 (1) for resettlement purposes. After that the land was duly acquired. That the acquisition was not confirmed is not an issue because as I have already discussed above in terms of the amendment, confirmation is no longer a requirement. So in terms of procedure the acquisition was done properly. The only reason why the applicant is challenging confirmation is that it states that the land that was acquired is not agricultural land. The applicant's counsel argued that this factual averment was made by the applicant in its founding affidavit and it was not disputed by the first respondent and as such it should be taken to have been admitted. In making this submission Mr *Samukange* referred to the case of *Fawcett Security Operations (Pvt) Ltd* v *Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (SC) wherein it was held that it is a principle of our law that, "What is not denied is taken to be admitted." Mr *Samukange* submitted that since the land is not agricultural land it therefore means that the acquisition was erroneous and as such it should be nullified.

Although the first respondent did not specifically dispute the factual averment which was made by the applicant that the land is not suitable for agriculture in his opposing affidavit, I am not convinced that the land is not suitable for agriculture. The applicant has said it is doing horse breeding for the purposes of riding on the farm in question. I believe that horse breeding is animal husbandry which is some form of agricultural activity. Section

72 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 which Mr *Samukange* referred to in his heads of argument defines agricultural land as follows.

> (1) In this section—
> (2)
> "agricultural land" means land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including—
> (a) the keeping or breeding of livestock, game, poultry, animals or bees; or
> (b) the grazing of livestock or game;
> but does not include Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey;"

It is therefore clear that the keeping or breeding of livestock, game, poultry, bees or animals is some form of agriculture. The fact that the whole piece of land is made up of a hill and is rocky does not mean that it cannot be used for agricultural purposes. Various agricultural activities ranging from horticulture, viticulture, forestry, aquaculture and animal husbandry can be embarked on, on the rocky farm. The land in issue is 186 hectares and according to the applicant it is described as a farm which is situated in the peri-urban area. This means that it is a farm which immediately surrounds the city of Harare. In other words it is a non-urban area that is close to the city. It is situated or located at the border of the city of Harare, but it is not within the boundaries of the City of Harare nor is it communal land. I hold the view that the fact that the farm is in the peri-urban area does not disqualify it from being agricultural land.

In light of the above discussion I conclude that the farm in question is suitable for agriculture. It was lawfully acquired in terms of s 16 B (2) (a) of the old Constitution. The fact that the first respondent has not yet issued anyone with an offer letter as yet is neither here nor there. This land is now State land. How the State choses to deal with the said land is its business. If the applicant is interested in the farm there is nothing stopping it from making an application to be issued with an offer letter itself. At law the said acquisition of the farm cannot be challenged in a court of law. As correctly submitted by the first respondent, in terms of s 16 B (3) of the same Constitution this court's jurisdiction is ousted in such matters.

In the result, the application is dismissed with costs.

Venturas & Samukange, applicant's legal practitioners
Attorney General Civil Division, respondents' legal practitioners