REPORTABLE (43)

Judgment No. SC 49/07
Const. Application No. 124/06

(1) MIKE CAMPBELL (PRIVATE) LIMITED
(2) WILLIAM MICHAEL CAMPBELL v

(1) THE MINISTER OF NATIONAL SECURITY RESPONSIBLE FOR LAND, LAND REFORM AND RESETTLEMENT
(2) THE ATTORNEY-GENERAL

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA, MALABA JA, GWAUNZA JA & GARWE JA
HARARE, MARCH 22, 2007 & JANUARY 22, 2008

J Gauntlett SC, with him *A P de Bourbon SC,* for the applicants

Ms E Mwatse, with her *N Mutsonziwa,* for the respondents

MALABA JA: This is an application for redress in terms of s 24(1) of the Constitution of Zimbabwe ("the Constitution") on the allegation that the enactment of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 ("the Amendment"), which introduced s 16B into the Constitution, and the acquisition of agricultural land belonging to the first applicant and on which the second applicant resides, violated the Declaration of Rights in relation to the applicants contained in ss 11, 16(1) (the right not to have private property compulsorily acquired without the authority of a law), 18(1) (the right to protection of law), 18(9) (the right to a fair hearing and determination of civil rights or obligations by a court of law) and 23(1) (the right not to be treated in a discriminatory manner on the grounds of race and colour).

The relief applied for by the applicants is an order in these terms:

"1. THAT the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 that introduced s 16B into the Constitution of Zimbabwe, in its effect and implementation with particular regard to the provisions of s 16B(3)(a) thereof constitutes an abrogation of the applicants' fundamental rights to protection of the law (the rule of law) and to due process (the right to a hearing). To that end the section violates the essential features or core values of the Constitution insofar as the Constitution's provisions as to security and protection of fundamental rights as contemplated for under section 11 as further read with section 16(1), 16A, section 18(1), section 18(9) and section 23 of the Constitution are concerned. To that end the 'Amendment' is inconsistent with the essential features of the Constitution as to the right to due process and protection afforded every person in Zimbabwe and accordingly the 'Amendment' is null and void.

2. THAT it be and is hereby declared that the applicants' right to protection from deprivation of property and to the obligation on the State through the acquiring authority to 'pay fair compensation for the acquisition (of property) before or within a reasonable time after acquiring the property, interest or right' as provided for under section 16(1)(c) of the Constitution of Zimbabwe has been violated.

Accordingly to the extent of such declared violation, the acquisition of the applicants' property is declared null and void and of no force and effect.

Alternatively:

THAT it be and is hereby declared that the applicants' right to the payment of 'fair compensation' for improvements on the property and as provided for under section 16(1)(c) of the Constitution of Zimbabwe as further read with sections 29B and 29C of the Land Acquisition Act [*Cap. 20:10*] has been violated.

Accordingly the State through the acquiring authority is forthwith and in any event not later than thirty (30) days of the date of this order directed to attend to complying with the provisions of section 29 of the Act subject to the applicants' right and entitlement to challenge such compensation as may be fixed by the Compensation Committee and further subject to the applicants' further rights at law.

3. THAT the first respondent pay the costs of this application."

The granting of the relief in terms of para (1) of the order depends on an affirmative determination of the question whether there is anything in the provisions of the Constitution, including those relating to fundamental rights, which debarred the Legislature, in the exercise of the powers conferred on it under s 50 and in compliance with the manner and form for the making of fundamental laws prescribed under s 52(1) of the Constitution, from providing under legislation for the taking away of the right of property in agricultural land by compulsory acquisition for public purposes as well as the right to the remedies provided for its protection.

The granting of the relief sought under para (2) of the order depends on an affirmative answer to the question whether failure by the acquiring authority to pay fair compensation within a reasonable time from the date of acquisition of the agricultural land required for resettlement purposes has the effect of invalidating the acquisition.

The alternative relief is based on the presumed affirmative answer to the question whether there has been a violation by the acquiring authority of the right of the applicants to be paid compensation for the land acquired to justify the issuing of an order of *mandamus* directing the acquiring authority to perform its duty within thirty days of the date of the order.

I now set out the facts and provisions of the Constitution, the interpretation of the terms of which is material to the determination of the questions raised.

I start with s 11 of the Constitution, which is a preamble at the beginning of *Chapter III* headed "DECLARATION OF RIGHTS". It provides:

> "**11 Preamble**
>
> Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this *Chapter*, and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons."

By the use of the word "Whereas" the makers of the Constitution intended that two things be considered to have been in existence as a matter of fact at the time of the enactment of s 11. The first was the fact that persons in Zimbabwe were entitled to fundamental rights and freedoms of the individual specified in *Chapter III*. The second was the fact that every person has the duty to respect and abide by the Constitution and the laws of Zimbabwe. Section 11 does not, in my view, give to persons in Zimbabwe the fundamental rights and freedoms of the individual specified in *Chapter III*. The section presupposes the existence of those rights and freedoms and simply reinforces the fact that persons in Zimbabwe were already entitled to the specified fundamental rights and freedoms. The section goes on to explain why the provisions of *Chapter III* were

enacted. They were enacted for the purpose of affording protection to the fundamental rights and freedoms specified in *Chapter III* to which the persons in Zimbabwe were already entitled. It is explained under s 11 that the protection shall be subject only to those limitations contained in *Chapter III* of the Constitution. It is further explained that the limitations are designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons. The provisions relating to the fundamental rights and the limitations thereof are then enacted in confirmation of the fact that what is contained in *s* 11 was set out by way of a preamble.

It is important to note that s 11 provides that the entitlement of persons in Zimbabwe to the fundamental rights specified in *Chapter III* and to the protection afforded to them by the provisions of that Chapter are "subject to the provisions of" the Constitution. One of the provisions of the Constitution to which the entitlement to fundamental rights specified in *Chapter III* and the protection afforded to them under the provisions of the *Chapter* are subject is s 52(1) of the Constitution. That section gives the Legislature the power to "amend, add to or repeal any of the provisions" of the Constitution, provided it complies with the special procedure prescribed thereunder.

The fundamental right to property is specified in s 16 of the Constitution. Before the Amendment, the right of property in agricultural land was protected by the provisions of s 16(1), which prohibited any compulsory acquisition of agricultural land, right or interest in the land by the State except under the authority of a law. No

agricultural land could be acquired on the orders of the Executive acting without the authority of a law. Compulsory acquisition of agricultural land had to be on terms prescribed by the Legislature. Further protection was afforded to the fundamental right of property in agricultural land by the requirement that the Legislature had to enact the law authorising the acquisition in the prescribed terms.

Section 16(1) of the Constitution provides as follows:

"**16 Protection from deprivation of property**

(1) Subject to *section sixteen A*, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that –

(a) requires –

(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilisation of that or any other land –

A. for settlement for agricultural or other purposes; or

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

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

(ii) …

(b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition; and

(c) requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; and

(d) requires the acquiring authority, if the acquisition is contested, to apply to the High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and

(e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court."

It will be noticed that s 16(1) of the Constitution proceeds upon the basis that the power to compulsorily acquire private property exists and that it can be exercised.

In enacting the Land Acquisition Act [*Cap. 20:10*] ("the Act") the Legislature complied with these requirements which were designed to afford protection to the fundamental right of property in agricultural land. It required the acquiring authority to give to the owner of the land or any person having a right or interest in the land a preliminary notice of intention to acquire the land and an opportunity to submit written objections to the proposed acquisition. The acquiring authority was obliged to show that the acquisition was reasonably necessary for utilisation of the land for resettlement purposes. It was also required to apply to the Administrative Court for an order authorising the acquisition or confirming the acquisition where it was contested.

Section 16 of the Act, which falls under *Part V*, provides that the acquiring authority has a duty to pay fair compensation within a reasonable time to the

owner of the agricultural land acquired for resettlement purposes or to a person having a right or interest in the land acquired.

Section 29A, which falls under *Part VA* of the Act, establishes a committee to be known as the Compensation Committee ("the Committee"). The duty of the Committee is to assess and fix the amount of compensation payable to the claimant for improvements on or to the land acquired, provided that compensation shall be payable for the land or interest or right therein where an adequate fund for that purpose is established in accordance with subs (1) of s 16A of the Constitution. The factors and principles to be taken into account by the Committee in the assessment of the amount of compensation payable to the claimant are laid down under subs (2) of s 16A of the Constitution and Part II of the Act.

Section 16A of the Constitution was inserted by the Constitution of Zimbabwe Amendment (No. 16) Act 2000. It prescribes the factors which must be regarded as of ultimate and overriding importance in regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform. These factors are that under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation and that consequently the people took up arms in order to regain their land and political sovereignty resulting in the independence of Zimbabwe in 1980. It declares that the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land. The section declares further that the former colonial power has an obligation to

pay compensation for agricultural land compulsorily acquired for resettlement purposes through an adequate fund established for the purpose and if the former colonial power fails to pay compensation through such a fund the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement purposes.

Further protection of the entitlement to the fundamental right of property in agricultural land from compulsory acquisition was provided under subss 18 (1) and (9) of the Constitution. Section 18(1) gave the owner of agricultural land or any person having a right or interest in the land the right to the protection of the law of compulsory acquisition of land contained in s 16(1) of the Constitution and the Act. It also gave them the right to remedies such as access to courts of law for the enforcement of that right. The right to protection of law which the expropriated owner or any person having a right or interest in the land acquired could claim or enforce against the State included the right to have his or her case heard and the existence of his or her rights or obligations determined within a reasonable time by an independent and impartial court established by law.

The provisions of the Constitution in *Chapter III* relating to fundamental rights and their protection form part of the fundamental law of the land. They form part of the supreme law of the land by which the validity of ordinary laws such as Acts of Parliament is measured. Section 3 of the Constitution provides that any law inconsistent with the supreme law of Zimbabwe shall, to the extent of the inconsistency, be void.

Dicey in his book *The Law of the Constitution* (1889) at pp 22-23 defines constitutional or fundamental law as including "all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the State". Fundamental law is thus mainly concerned with the creation of the three great organs of the State, that is to say, the Legislature, the Executive and the Judiciary, and the distribution of governmental power among them according to their spheres. A fundamental law, being a supreme law, cannot have any other law above it by the authority of which its validity may be tested.

Zimbabwe has a controlled Constitution. Its provisions cannot be amended, added to or repealed without compliance with the prescribed special formality. Dicey *supra* at pp 118-119 says that a controlled constitution "is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same manner as ordinary laws". The fact that the provisions of the Constitution relating to the fundamental right of property in agricultural land, and the protection of it afforded by the provisions under ss 16(1), 18(1) and 18(9) of the Constitution, could not be taken away or diminished with the same degree of ease and in the same manner as changes to ordinary law could be made was an additional protection for the fundamental rights.

Zimbabwe, like many other nations with controlled Constitutions, has, in the Constitution, a section which prescribes with meticulous precision the special procedure for the alteration of its fundamental laws. That section is s 52(1) of the Constitution to which s 11 makes the provisions relating to fundamental rights subject.

Section 52 of the Constitution provides:

"**52 Alteration of the Constitution**

(1) Parliament may amend, add to or repeal any of the provisions of this Constitution;

Provided that except as provided in subsection (6) no law shall be deemed to amend, add to or repeal any provision of this Constitution unless it does so in express terms. [the underlining is mine for emphasis]

(2) A Constitutional Bill shall not be introduced into Parliament unless the text of the Bill has been published in the *Gazette* not less than thirty days before it is so introduced.

(2)(a) A Constitutional Bill shall not be deemed to have been duly passed by Parliament unless, at the final vote thereon in Parliament, it received the affirmative votes of not less than two-thirds of the total membership of Parliament.

(3) - (4) …

(5) Subject to the provisions of subsection (8) a Constitutional Bill shall not be submitted to the President for assent unless it is accompanied by a certificate from the Speaker that on the final vote thereon in Parliament the Bill received the affirmative votes of not less than two-thirds of the total membership of Parliament."

Section 50 of the Constitution gives the Legislature, consisting of the President and Parliament, full power to make laws for the peace, order and good government of Zimbabwe. This means that the decision as to the matters which require legislative control is for the Legislature alone to make. It also means that no law made by the legislature can be declared repugnant to an international instrument on the fundamental rights unless a provision of the Constitution or an Act of Parliament has incorporated it into the law of the country as required by *s* 111B(1) of the Constitution.

The circumstances which gave rise to the enactment of the Amendment are these.

The acquiring authority showed interest in compulsorily acquiring the farm known as Mount Carmel of Railway 19, situated in the District of Hartley measuring 1200.6484 hectares ("the land") for resettlement purposes under the provisions of the Act in 1997. The land was then registered in the second applicant's name. It was transferred into the first applicant's name in 1999 under Deed of Transfer No. 10301/99. Commercial farming activities undertaken on the land included horticulture, fruit-growing and ranching. The second applicant is a director and shareholder in the first applicant.

On 28 November 1997 the acquiring authority served on the second applicant a preliminary notice of intention to acquire the land for resettlement purposes in terms of subs (1) of s 5 of the Act. The preliminary notice had been published in the *Gazette* and the *Herald* newspaper. A written objection to the proposed acquisition was lodged with the acquiring authority on the ground that the acquisition was not reasonably necessary for utilisation of the land for settlement for agricultural purposes. The preliminary notice was withdrawn by the acquiring authority on 15 March 1998.

On 22 June 2001 another preliminary notice was served on the applicants. The proposed acquisition of the land was opposed on the same ground, namely, that it was not reasonably necessary for the purposes of utilisation of the land for settlement for

agricultural purposes. An order for compulsory acquisition of the land was nonetheless made by the acquiring authority in terms of subs (1) of s 8 of the Act on 4 April 2002. An application for an order of confirmation of the acquisition was made by the acquiring authority to the Administrative Court on 10 May 2002. On 11 December 2002 the preliminary notice issued on 22 June 2001, on the authority of which the order of acquisition made on 4 April 2002 had been made, was declared invalid and set aside by the High Court.

On 23 July 2004 a fresh preliminary notice of the intention to compulsorily acquire the land was published in the *Gazette* and the *Herald* newspaper as required by s 5 of the Act. A written objection to the proposed acquisition was served on the acquiring authority on the same day. No order of acquisition was made in terms of subs (1) of s 8 of the Act, nor was an application made by the acquiring authority to the Administrative Court for an order authorising the acquisition.

It appears from the opposing affidavit deposed to by the first respondent, who is the acquiring authority, and from Schedule 7 to s 16B of the Constitution, that owners or occupiers of at least one hundred and fifty-seven pieces of agricultural land in respect of which the acquiring authority issued preliminary notices of the intention to acquire them during the period extending from 2 June 2000 to 8 July 2005 submitted written objections to the proposed acquisitions. The litigation in the Administrative Court was viewed as obstructive of the land reform programme. The first respondent alleges in the opposing affidavit that litigation was being mounted by the owners of the

pieces of agricultural land earmarked for compulsory acquisition for purposes of delaying the finalisation of the land reform programme in the hope that it could be reversed.

To stop what was considered obstructive litigation and secure finality in cases of compulsory acquisition of agricultural land for public purposes, the Legislature enacted the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 on 14 September 2005. After stating that its purpose is to amend the Constitution, it provides as follows:

"**2 New section inserted in Constitution**

The Constitution is amended by the insertion after section 16A of the following section –

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.

(4) As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as

case may be, the person responsible under any law providing for the registration of title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.

(5) Any inconsistency between anything contained in –

(a) a notice itemised in Schedule 7;

(b) a notice relating to land referred to in subsections (2)(a) (ii) or (iii);

and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision.

(6) An Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in this section or other State land.

(7) This section applies without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that was acquired for resettlement purposes."

Schedule 7 contains a list of one hundred and fifty-seven preliminary notices published in the *Gazette* or *Gazette Extraordinary*, on the basis of which the pieces of agricultural land to which they related were acquired by and vested in the State with full title therein with effect from the appointed day, that is to say, 14 September 2005. Mount Carmel was acquired by the State on the appointed day in terms of s 16B(2)(a)(i) of the Constitution by virtue of the preliminary notice published in the *Gazette* on 23 July 2004. At the time of the hearing of the application by the Supreme Court, the amount of compensation payable for the land acquired had not been fixed. It must be stated at this stage that the law as embodied in the provisions of s 16(B)(2)(a)(i) of the Constitution and the acquisitions of the pieces of agricultural land which resulted

from its operation had no reference at all to the race or colour of the owners of the pieces of land acquired. There was no question of violation of s 23 of the Constitution to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution.

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 16B(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. 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.

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 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.

The provisions of s 52(1) of the Constitution empower the Legislature to enact any law the effect of which is the taking away of any of the fundamental rights specified in *Chapter III*, provided the restrictions or conditions of the exercise of that power prescribed thereunder are complied with. In enacting s 16B of the Constitution, the Legislature complied with all the requirements of the special procedure for making fundamental law prescribed under s 52(1) of the Constitution. The Constitutional Bill which became s 16B was published in the *Gazette* thirty days before it was introduced into Parliament. It contained express terms to the effect that its purpose was to amend the Constitution. The subject matter of the Constitutional Bill, that is to say, acquisition of agricultural land by the State for public purposes is a matter in respect to which the Legislature has power to make law. At the final reading the Constitutional Bill received the affirmative vote of two-thirds of the total membership of Parliament. When it was presented to the President for his assent, the Constitutional Bill was accompanied by the requisite certificate of the Speaker of Parliament.

It is important to appreciate the fact that the Constitution does not have a section, the provisions of which entrench any of the provisions of fundamental rights beyond the reach of the exercise of the legislative power "to amend, add to or repeal any of the provisions of the Constitution". The ultimate protection afforded fundamental rights specified in *Chapter III* is the requirement that the provisions of the Constitution relating to them cannot be altered or repealed by ordinary law-making process and that the Legislature must comply with the requirements of the special procedure prescribed under s 52(1) of the Constitution. Section 11 provides that the entitlement of persons in Zimbabwe to the fundamental rights specified in *Chapter III*, including the right to the protection of law, is subject to the provisions of s 52(1) of the Constitution. In other words, the fundamental rights are not immutable. They are subject to being amended, added to or repealed by the Legislature in the exercise of the legislative power, provided there is strict compliance with the requirements of the special procedure for the making of fundamental laws prescribed under s 52(1) of the Constitution.

I now turn to consider closely the contentions advanced on behalf of the applicants. The first is based on the doctrine of essential features or core values of a Constitution. The doctrine established and expounded by the Supreme Court of India in the case of *Kesavananda v Kerala* [1973] Supp. SCR 1 is to the effect that certain provisions of the Constitution of India constitute essential features or core values or basic elements of that Constitution, so that they are unchangeable by the exercise of the amending power conferred on the Legislature under Article 368 of that country's Constitution. In my view the doctrine is irrelevant to the determination of the question of

what limitations there are to the scope of the legislative power conferred on the Legislature under s 50 and its exercise under s 52(1) of our Constitution. It appears to me that the proviso to s 52 (i) of the Constitution is a rule of construction directed to the courts to assist them in applying the law so that they do not rely on the doctrine of necessary intendment or implied limitation which is not different from the doctrine of essential features or core values of a Constitution.

The doctrine of essential features or core values of a Constitution was expounded by the Supreme Court of India as an aid to the construction of the language used in Article 368 of the Indian Constitution to find the intention of the makers of that Constitution. The power conferred on the Legislature in terms of Article 368 was "to amend the Constitution by way of addition, variation or repeal" of any provision of the Constitution. The question which arose for determination was due to the language used, which was unfortunately not so clear and unambiguous. It was whether or not the Legislature could in the exercise of the power so conferred on it by the terms of Article 368 annihilate the whole Constitution.

It was in the course of grappling with the difficult question of the construction of Article 368 that six of thirteen learned Judges held that provisions of the Constitution of India relating to fundamental rights constituted essential features or core values of that Constitution and as such were unchangeable by the Legislature in the exercise of the constituent power. KANNA J and six other learned Judges, whilst accepting the proposition that there was a basic structure or framework of the

Constitution which could not be destroyed by the exercise of the amending power as defined under Article 368 of the Indian Constitution so as to annihilate the entire Constitution, did not accept the proposition that fundamental rights specified in Part III constituted essential features or core values of the Constitution so as to be unchangeable by the Legislature in the exercise of the constituent power. It is a controversial doctrine which has not received much support outside India for the simple reason that its application depended upon the construction of the language used in that country's constitution and over which the learned Judges failed to agree.

RAY J, at p 409 of the judgment, said that the petitioner's submission that the fundamental rights were unamendable was "a baseless vision". He went on to state at pp 409-410:

> "To find out essential or non-essential features is an exercise in imponderables. When the Constitution does not make any distinction between essential and non-essential features it is incomprehensible as to how such a distinction can be made. Again, the question arises as to who will make such a distinction. Both aspects expose the egregious character of inherent and implied limitations as to essential features or core of essential features of the Constitution being unamendable."

PALEKAR J at p 600 said:

> "Whatever one may say about the legitimacy of describing all the rights conferred in Part III as essential features, one thing is clear. So far as the right to property is concerned, the Constitution, while assuring that nobody shall be deprived of property except under the authority of law and that there shall be a fair return in case of compulsory acquisition [Article 31(1) and (2)], expressly declared its determination, in the interest of the common good, to break up concentrations of wealth and means of production in every form and to arrange for redistribution of ownership and control of the material resources of the community. That is the central issue in the case before us, however, dexterously it may have been played down in the course of an argument which painted the

> gloom resulting by the denial of the fundamental rights under Article(s) 14, 19 and … in the implementation of that determination."

The restrictions or conditions imposed on the exercise of a power of the State conferred on any of the three organs of State must be ascertained from the language of the Constitution. The language used in the provisions of ss 11, 50 and 52(1) of the Constitution is clear and unambiguous. The question of construction which would have required the application of the doctrine of essential features or core values as an aid to the ascertainment of the intention of the makers of the Constitution does not arise in this case. The words used in these provisions define with express precision the only restrictions and conditions which the Legislature has to comply with in the exercise of the power conferred on it. There is no room for implied limitations.

Maxwell in *The Interpretation of Statutes* 12 ed at pp 1-2 states that:

> "If there is one rule of construction for statutes and other documents it is that you must not imply anything in them which is inconsistent with the words expressly used. … If the language is clear and explicit, the court must give effect to it for in that case the words of the statute speak the intention of the Legislature."

At p 29 the learned author states:

> "Where the language is plain and admits of but one meaning the task of interpretation can hardly be said to arise. Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be."

There is nothing in the provisions of *Chapter III* and s 52(1) of the Constitution to indicate that a limitation, other than the special and explicit restrictions and conditions prescribed thereunder, was intended on the power to amend or repeal when it is exercised to take away or diminish fundamental rights. To the contrary, s 11 makes the entitlement to the fundamental rights specified in *Chapter III* and the rights to remedies thereto, subject to the provisions of s 52(1) of the Constitution. The effect of s 11 is that there is nothing in the Constitution which confers on the Legislature any power to amend, add to or repeal any of the provisions of the Constitution otherwise than in such manner and form as is provided in s 52(1). If the intention was to immunise the fundamental rights specified in *Chapter III* from the reach of the exercise of the legislative power to amend, add to or repeal conferred in terms of s 52(1) of the Constitution, it would have been easy for the makers of the Constitution to express that intention in language of equal clarity.

The language used is that which gives the Legislature full power to amend, add to or repeal <u>any</u> of the provisions of the Constitution. Nothing can be more mischievous than an attempt to cut back power given by the Constitution in so wide language. The use of the word "any" shows that all the provisions of the Constitution, including those relating to fundamental rights, share one common feature of being liable to alteration or repeal.

In *Isle of Wight Railways Co v Tahourdim* (1883) 25 Ch.D. 320 it was said that the word "any" is a word which ordinarily excludes limitation or qualification.

In *George Divisional Council v Ministry of Labour and Anor* 1954 (3) SA 300 at 307D HERBSTEIN J said that the word "any" in its natural and ordinary meaning is an indefinite term which included all of the things to which it relates.

In *R v Hugo* 1926 AD 268 at 271 the word "any" was described as a word which is, upon the face of it, a word of wide and unqualified generality.

The word "provisions" does not refer to the formal statements set out in sections of the Constitutional document only, but refers mainly to the particular matters, that is to say, rights or powers and obligations provided for by the words used in the formal statements.

It would be improper for the Court to create by construction its own limitations, restrictions or conditions in addition to those imposed in express terms by the makers of the Constitution under s 52(1) of the Constitution. So in deciding the question whether fundamental rights guaranteed to individuals in a Constitution can be diminished, modified or abolished, one must look not so much at the Courts as at the nature of the power to alter the Constitution and in particular the limitations embodied in it.

In *The Queen v Burah* [1878] 3 AC 881 LORD SELBOURNE stated at pp 904-905:

> "The established courts of justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question and the only way in which they can properly do so, is by looking to the terms of the instrument by which affirmatively the legislative powers were created and by which negatively they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power and if it violates no express condition or restriction by which the power is limited … it is not for any court of justice to enlarge constructively those conditions or restrictions."

Section 52(1) of the Constitution gives the Legislature the power by law to take away or diminish any fundamental rights specified in *Chapter III* and amend or repeal the provisions of the Constitution relating to them provided it complied with the requirements of the prescribed special procedure.

Section 16B of the Constitution, which makes provision for the valid acquisition of agricultural land by the State, is legislation which falls within the general scope of the affirmative words by which the power is given under s 52(1) of the Constitution and in its enactment the Legislature did not violate any of the conditions by which the power is limited.

The proposition that the duty of the Court in the circumstances is limited to the determination of the question whether in enacting s 16B the Legislature complied with the prescribed procedural and substantive requirements under s 52(1) of the Constitution also finds authority in the case of *Minister of the Interior and Anor v Harris and Ors* 1952 (4) SA 769 (A). The Appellate Division of the Supreme Court of South Africa in that case had to decide the question whether Act 35 of 1952, which had established a High Court of Parliament consisting of all senators and members of the

House of Assembly with power to review decisions of the Appellate Division of the Supreme Court of South Africa and altered s 152 of the Constitution of South Africa was valid, as it had not been passed in the manner prescribed by the second proviso to s 152. CENTLIVERS CJ at 779 D-G said:

> "Section 152 of the Constitution enacts that 'Parliament may by law repeal or alter any of the provisions of this Act'. There are two provisos, the first of which is irrelevant. The second proviso, insofar as it is material to this case, enacts that:
>
> > 'No repeal or alteration of the provisions contained in this section … or in secs 35 and 137 shall be valid unless the Bill embodying such repeal or alteration shall be passed by both Houses of Parliament sitting together and at the third reading be agreed to by not less than two-thirds of the total number of members of both Houses.'
>
> It is clear from secs 35, 137 and 152 of the Constitution that certain rights are conferred on individuals and that these rights cannot be abolished or restricted unless the procedure prescribed by sec 152 is followed.
>
> In construing these sections it is important to bear in mind that these sections give the individual the right to call on the judicial power to help him resist any legislative or executive action which offends against these sections or, to put it another way, these sections contain constitutional guarantees creating rights in individuals the duty of the Courts, where the question arises in litigation being to ensure that the protection of the guarantee is made effective, unless and until it is modified by legislation in such a form as under the Constitution can validly effect such modification." (the underlining is mine for emphasis)

It is clear from the above statement that the *ratio decidendi* of the case was that compliance with the requirements of the prescribed procedure for the enactment of legislation repealing or altering especially entrenched provisions of the Constitution was the only measure of the validity of the exercise of the affirmative legislative power the court had to consider.

The case of *Bribery Commissioner v Ranasinghe* [1964] 2 All ER 785 is also illustrative of the application of the principle of law under discussion. The voting and legislative powers of the Ceylon Parliament were dealt with under s 18 and s 29 of the Constitution of Ceylon. The sections provided that:

> "18 Save as otherwise provided in subsection (4) of section 29 any question proposed for decision by either Chamber shall be determined by a majority of votes of the senators and members, as the case may be, present and voting …
>
> 29 (1) Subject to the provisions of this order, Parliament shall have power to make laws for the peace, order and good government of the Island.
>
> (2) No such law shall –
>
> (a) prohibit or restrict the free exercise of any religion."

There followed subss (b), (c) and (d) which set out further entrenched religious and racial matters, which were not to be the subject of legislation. They represented the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which *inter se* they accepted that Constitution, and were therefore unalterable under that Constitution. Section 29 then continued:

> "29 (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void.
>
> (4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this order, or of any other order of Her Majesty in Council in its application to the Island.
>
> Provided that no bill for the amendment or repeal of any of the provisions of this order shall be presented for the royal assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of members of the House (including those not present).

> Every certificate of the Speaker under this subsection shall be conclusive for all purposes and shall not be questioned in any court of law."

The Bribery Amendment Act 1958 was not endorsed with the Speaker's certificate. There was nothing to show that it had been passed by the requisite majority of two-thirds of the whole number of members of the House. There was a conflict between s 41 of the Act of 1958 and s 55 of the Constitution.

The Judicial Committee of the Privy Council held that where an Act involves a conflict with the Constitution, the certificate of the Speaker is a necessary part of the Act-making process and its existence must be apparent. Where the certificate is not apparent, there is lacking an essential part of the process necessary for amendment.

LORD PEARCE, delivering the Board's opinion, remarked at 792 D-I that:

> "… a legislature had no power to ignore the conditions of lawmaking that are imposed by the instrument which itself regulates its power to make law. Such a constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. … In the present case … the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29(4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions …"

The *ratio decidendi* of the *Bribery Commissioner Case supra* was that if the legislature of Ceylon intended to effect an amendment to that country's Constitution by the exercise of legislative power it was "compelled to operate a special procedure in order to achieve the desired result". See also *Hinds v The Queen* [1977] AC 195 at 213.

The clear indication is that the makers of the Constitution did not intend to make the fundamental rights and freedoms specified in *Chapter III* immune from the exercise of legislative power to effect constitutional amendments in compliance with the special procedure prescribed under s 52(1) of the Constitution. The fundamental rights bind the three organs of the State, that is to say, the Legislature, the Executive and the Judiciary and are directly enforceable by law until the Legislature in the exercise of legislative power acts in terms of s 52(1) of the Constitution.

As for s 16B of the Constitution, it is clear that in prescribing the requirements for the acquisition by the State of agricultural land owned by individuals for resettlement purposes, the makers of the Constitution definitely refused to accept the doctrine of essential features or core values with regard to the fundamental right to property where the land was required for public purposes. The form taken by s 16B of the Constitution is not uncommon. The wording of s 16B(2)(a) is similar to the wording of s 3 of the Wheat Acquisition Act 1914 of the State of New South Wales, which provided that the Governor might:

> "… by notification published in the Gazette declare that any wheat therein described or referred to is the property of His Majesty, and that upon such publication the wheat shall become the absolute property of His Majesty, and the proprietary rights of every person in the wheat at the date of publication shall be

> taken to be converted into a claim for compensation in pursuance of the provisions of the Act relating to compensation."

Section 15(2) of the Lands Acquisition Act 1906-1936 of Australia was in similar terms with regard to compulsory acquisition of land by the State for public use. See *The State of New South Wales v The Commonwealth* 20 CLR 54 at 65-66; *Grace Brothers (Pty) Ltd v The Commonwealth* 72 CLR 269. *Pretoria City Council v Modimola* 1966(3) SA 250(a).

Section 16B of the Constitution is a legitimate exercise of the legislative power to determine the conditions under which the power inherent in the State to compulsorily acquire private property in agricultural land for public purposes can be validly exercised.

The next point on the relief sought under para (1) of the order was that the taking away of the fundamental rights under subss 18 (1) and (9) by the enactment of s 16B(3) of the Constitution is not an exercise of the power to amend the provisions of those subsections.

I do not agree. The argument is based on an unnecessarily restrictive interpretation of s 52(1) of the Constitution. Section 113(1) of the Constitution provides that, unless the context otherwise requires, the word "amend", as used in the Constitution, "includes vary, alter, modify or adapt". A material alteration of the substance of a provision such as the taking away of a right granted thereunder would *protanto* have the effect of amending the provision within the meaning of that concept in s 52(1) of the

Constitution. The amendment is effected by way of providing for the taking away from an individual the rights of property in agricultural land only and denying him or her the rights under s 18(1) and (9) in respect of the acquisition of agricultural land whilst leaving the same provisions of the Constitution unchanged in respect of all other cases of compulsory acquisition of property.

The provisions of s 16B were not part of the Constitution until that section was inserted after s 16A. It is clear that the provisions of s 16B are an addition to the provisions of the Constitution. That makes the provisions of subs (3) of s 16B an addition to the provisions of the Constitution. The clear intention of the Legislature in enacting s 16B(3) was to modify the provision of subss 18 (1) and (9) of the Constitution with respect to any challenges of the acquisition of agricultural land effected in terms of s 16B(2)(a) of the Constitution. The fact that s 16B(3) has the effect of taking from the expropriated owner of the land referred to in s 16B(2)(a) of the Constitution the fundamental right in question does not detract from the fact that its provisions were added to the other provisions of the Constitution. There is in fact no contextual amendment of the provisions of subss 18 (1) and (9) by the provisions of s 16B(3).

In *Zainal bin Hashim v Government of Malaysia* [1979] 3 All ER 241, Article 135(1) of the Federal Constitution of Malaysia provided that no members of the police force should be dismissed by an authority subordinate to that which at the time of the dismissal had power to appoint a member of that service of equal rank. The Malaysian Police Force Commission, under power conferred on it by the Constitution

delegated to chief police officers the power to dismiss constables but not the power to appoint them. On 20 January 1972 a chief police officer made an order dismissing the appellant from the police force, with effect from the date of his conviction. The appellant brought an action against the Malaysian Government, claiming a declaration that his dismissal was void and inoperative. On 21 March 1975 the trial Judge gave judgment in favour of the appellant on the ground that his dismissal contravened Article 135(1) because the chief police officer had no power to appoint constables. On 27 August 1976 a proviso to Article 135(1) was inserted by the Constitution (Amendment) Act in these terms:

> "And provided further that this clause shall not apply to a case where a member of any of the services mentioned in that clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a commission to which this Part applies …".

It was accepted by the Judicial Committee of the Privy Council that the proviso was an addition to the provisions of the Constitution despite the fact that its effect was to render Article 135(1) by referential operation inapplicable through the use of the device of the words "shall not apply to".

Referring to *Zainal's* case *supra* in *Nkomo and Anor v Attorney-General and Ors* 1993 (2) ZLR 422 (S) for purposes of the illustration of the application of the rule on the presumption against the retrospective construction of statutes GUBBAY CJ accepted at p 430B as a fact that the proviso to Article 135(1) was an addition to the provisions of the Federal Constitution of Malaysia and *ipso facto* that the effect it had on

the substance of Article 135(1) by referential operation through the use of the exclusionary words "shall not apply to" was a reduction of rights.

Section 16B(3) also affects the provisions of subss 18 (1) and (9) of the Constitution by referential operation by providing that they "shall not apply in relation to land referred to in subsection (2)(a)" of s 16B. The terms of the provisions of s 16B(3) are express and directed specifically at the operation of s 18 (1) and (9) of the Constitution with respect to the institution of proceedings in any Court of law to challenge the acquisition of agricultural land secured in the prescribed manner.

The effect of s 16B(3) on the provisions of subss 18 (1) and (9) of the Constitution, is the taking away of the right to protection of law afforded to the right of property in agricultural land acquired in terms of s 16B(2)(a), just as the effect of the proviso on the provisions of Article 135(1) of the Federal Constitution of Malaysia was the taking away of the right of a member of the police force not to be dismissed from the force by a police officer with no power to appoint members of his rank. In other words, the effect of the added proviso was to deprive a constable dismissed for misconduct by a chief police officer, to whom power to dismiss him had been properly delegated, of the right to maintain that his dismissal was invalid owing to the omission to delegate to the chief police officer power to appoint constables.

So s 16B(3) may be regarded as an amendment of subss 18 (1) and (9) of the Constitution. As it forms part of s 16B, it may also be regarded as an addition to the

provisions of the Constitution. The enactment of s 16B(3) was in compliance with the requirements of s 52(1) of the Constitution. It is a legitimate expression of the exercise of the power to amend or add to any of the provisions of the Constitution.

The last point taken on the relief sought in para (1) of the order was in respect of the ouster of the jurisdiction of courts of law under s 16B(3) of the Constitution from cases in which the acquisition of land in terms of s 16B(2)(a) would have been sought to be challenged. The contention advanced by Mr *Gauntlett* on behalf of the applicants was that the right of access to a court of law and the right to be heard by such a tribunal in the determination of rights or obligations are fundamental to the protection an individual has under the Constitution against the demands of the Government. The contention was that any law having the effect of taking these rights away from an individual must be declared invalid for interfering with essential features or core values of the Constitution. The essential features or core values referred to were the principles of the separation of powers of the State and rule of law.

The question whether the Legislature had power to take away the right of access to courts of law and the right to be heard from an expropriated owner or a person having a right or interest in the agricultural land acquired by ousting the jurisdiction of courts of law from a case in which he sought to challenge the acquisition is of great importance, as are all other questions which run along the line of the validity of the exercise of legislative power to interfere with the protection the individual has under the Constitution against the demands of Government.

The question what protection an individual should be afforded under the Constitution in the use and enjoyment of private property is a question of a political and legislative character. In other words, what property should be acquired and in what manner is not a judicial question. The general principle is that provisions of the Constitution should not be construed so as to take away the jurisdiction of courts of law. It is however subject to the first of all principles of construction that when in clear and unambiguous language the Legislature in the proper exercise of its powers has provided that courts of law shall not have jurisdiction in a specific class of cases not pending before the courts at the time the ouster is made operational the intention of the Legislature must be respected and enforced.

In *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) at 884 OGILVIE THOMPSON CJ said:

> "The Legislature's competence to enact a statutory provision ousting the jurisdiction of the courts in respect of certain matters (however undesirable in itself) is indisputable."

See also *Smith v East Elloe Rural District Council* [1956] AC 756 at 750-751.

By the clear and unambiguous language of s 16B(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 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 legislative, 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 his 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

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.

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.

Taking into account the narrow ambit of the application of the provisions of s 16B(3) of the Constitution, I do not find attractive the argument that the provision undermines the balance of powers of the State between the Legislature and the Judiciary. The taking away of the functions of judicial power and giving them to a tribunal which is not a court of law is as valid an exercise of legislative power as the taking away of the

functions and letting them lie dormant without giving them to any other body to discharge. What is objectionable as being in violation of the principle of separation of powers is for the Legislature to take the functions of judicial power and exercise them itself under the guise of a legislative judgment over facts and circumstances of a particular case. See *Liyanage v The Queen* [1967] AC 259 at p 291.

It appears to me that without the misconception of its enactment as a violation of the principle of separation of powers of the State the ouster of the jurisdiction of court in the limited circumstances prescribed in s 16B(2)(a) of the Constitution does not have the obnoxious effect on the principle of the rule of law which was suggested in the course of the argument against the ouster provision.

The relief sought under para (2) of the order depended upon an affirmative answer to the question whether failure by the acquiring authority to pay compensation for the agricultural land acquired in terms of s 16B(2)(a)of the Constitution within a reasonable time after the acquisition invalidates the acquisition. The acquisition of land referred to in s 16B(2)(a) of the Constitution is a lawful acquisition. It takes place by operation of the law on account of the existence of the state of the specific facts prescribed under that subsection. The right to fair compensation moves with title in the sense that, upon the acquisition of private property in the agricultural land for public purposes having taken place, the acquiring authority assumes the obligation to pay the expropriated owner or the person having a right or interest in the land acquired fair compensation for the improvements effected on such land before it was acquired.

The right to fair compensation arises by operation of the law on the state of the facts on the existence of which the validity of acquisition depends. The ability to pay the amount of compensation within a reasonable time after the acquisition is not however one of the juristic facts upon which the law operates to effect the acquisition. The duty on the acquiring authority is to pay the amount of compensation payable, which means that the determination of the question whether a reasonable time has expired must take into account all the circumstances bearing upon the question of assessment and the fixing of the amount of compensation payable.

The legal consequences of an acquisition in terms of s 16B(2)(a) of the Constitution, such as the right in the State to demarcate, allocate and without delay register full title in the land acquired, are consistent with the view that payment of fair compensation for improvements effected on such land within a reasonable time after the acquisition is not a pre-condition for the acquisition. If authority is required for this statement of law, it is provided by the case of *Attorney-General v De Keyser's Royal Hotel* [1920] AC 508. In his speech at p 542 LORD ATKINSON said:

> "… the legal obligation to pay for the land or its use, temporarily or permanently acquired, is not a restriction upon the acquisition of either or a condition precedent to its acquisition."

At p 581 LORD MOULTON said:

> "The duty of payment of compensation cannot be regarded as a restriction. It is a consequence of the taking but in no way restricts it."

LORD SUMMER at p 558 also said:

> "The obligation to pay compensation to the dispossessed owner which that Act provides for is, however, not a restriction on the acquisition of his land. It might discourage the exercise of the power of acquisition but it does not limit that power. The power is complete independently of payment and it is fully exercised before the obligation to pay arises."

The lawfulness of the acquisition of the land by the State is founded upon a state of facts which does not change, whether or not compensation has been paid to the expropriated owner or a person having a right or interest in the land acquired within a reasonable time. The requirement that compensation be paid within a reasonable time after the acquisition is based on provisions of the Constitution and the Act relating to compensation for property lawfully acquired. What would have happened would not be described as an acquisition of agricultural land by the State unless it would have happened in accordance with the provisions of s 16B(2)(a) of the Constitution. It is clear from the wording of s 16B(3) of the Constitution that the intention of the Legislature is that the acquisition of agricultural land in terms of s 16B(2)(a) must not be put in the category of justiciable controversies. Although Mr de Bourbon argued that failure by the acquiring authority to pay fair compensation within a reasonable time after acquisition invalidates the acquisition he failed to point at any provision of the Constitution or the Act to that effect.

The right of the owner of the land acquired or any person having a right or interest in the agricultural land acquired to fair compensation is legally guaranteed. It is an absolute right, the conferment of which on the owner of the land acquired or a person having a right or interest in the land is not reversible upon failure by the acquiring

authority to pay the amount of compensation within a reasonable time. Like any other legal right its enforcement upon established violation may be secured by legal remedies ordinarily available in a court of law. To hold that failure by the acquiring authority to pay the amount of compensation for the land acquired within a reasonable time after the acquisition invalidates the acquisition would defeat the clear intention of the Legislature to define the acquisition as a political and legislative question on the one hand and the payment of fair compensation which arises after acquisition has taken place as a judicial question on the other. The contention is rejected.

The alternative relief sought raises the question whether this Court has the legal basis of granting the order of *mandamus* sought in the terms directed to the acquiring authority. Ordinarily an order of *mandamus* will be made to compel the performance of a public legal duty which the person who is subject to the duty has refused to perform in a case where the performance of the duty cannot be enforced by any other adequate legal remedy.

The duty to pay the amount of compensation to the owner of agricultural land acquired or to any other person whose right or interest in the land has been acquired in terms of s 16B(2)(a) of the Constitution is imposed on the acquiring authority under s 16(1) of the Act. The acquiring authority can only discharge that duty once the amount of compensation payable to a claimant has been assessed and fixed by the Committee established in terms of s 29A of the Act. It is the duty of the Committee to determine the

compensation payable. The procedure the Committee has to follow in the discharge of its duties is set out under s 29B of the Act.

The duty of the Minister who is the acquiring authority is to appoint members of the Committee in terms of the power conferred on him/her by s 29A of the Act. He/she does not have a direct influence on the discharge by the Committee of its functions under the Act. Under s 29D the Minister can appeal to the Administrative Court against an assessment by the Committee of the compensation payable to a claimant if he or she considers that in assessing the compensation the Committee did not observe any of the principles prescribed under ss 21 or 29C of the Act.

There is nothing in the application to show that the Minister refused to perform his duty to appoint members of the Committee. It was not argued that the Committee does not exist. The Committee has not been cited as a party to these proceedings and no order of *mandamus* directed to it to compel it to perform the public legal duty imposed on it under s 29A of the Act has been sought from the Court. As the acquiring authority is not subject to the duty imposed on the Committee, he cannot be found to have refused to perform the duty to assess and fix the amount of compensation payable to the applicants within a reasonable time after the agricultural land was acquired by the State. There is no basis on which an order of *mandamus* may be made against the acquiring authority in this case. This last contention also fails.

The respondents did not seek costs should the application be unsuccessful, perhaps because this was a constitutional matter raising questions of national importance. It appears to me that under the circumstances the proper order to make is that each party bears its own costs.

The application is accordingly dismissed. Each party should bear its own costs.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

Gollop & Blank, applicants' legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners