Judgment No. HB 19/2003
Case No. HC 1969/2002

NYAMANDLOVU FARMERS ASSOCIATION

Versus

**THE MINISTER OF LANDS, AGRICULTURE &
RURAL RESETTLEMENT**

And

THE ATTORNEY-GENERAL OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 5 SEPTEMBER 2002 AND 13 FEBRUARY 2003

Adv. Wernberg with J K H Stirling for the applicant

Court Application

NDOU J: In this court application the applicant seeks an order in the following terms:

> "It is ordered that:
>
> That the amendments to sections 8, 9 and 10 of the Land Acquisition Act [Chapter 20:10] made in terms of the Land Acquisition Amendment Act No. 6 of 2002, be and are hereby declared to be invalid being in conflict with section 11, 16(1)(b), 16(1)(c0, 16(1)(d), 18(5), (18(9) and 23(1) of the Constitution of Zimbabwe.
>
> That the orders issued by first respondent in terms of section 8 of the Land Acquisition Act [Chapter 20:10] as amended, be and are hereby declared to be invalid and of no force and effect.
>
> That first respondent bears the costs of this application."

The application was served on the two respondents on 7 August 2002. The respondents did not file notice of opposition and opposing papers within ten days. They only "filed" these opposing papers on 3 September 2002. They did not even take the trouble of, at least, applying for condonation. A representative of the respondents then appeared before me on 5 September 2002 and commenced

addressing me on the merits. When it was pointed out that he was not properly before the court he did not attempt to move for postponement in order for the respondents to seek the court's indulgence. I think those assigned to legally represent the Government on litigation which is generated by the land reform programme should attach the same seriousness which the Government itself does. *In casu*, the Government representation is far from being satisfactory for a Government programme that has resulted in enormous social and economic difficulties to the nation. Be that as it may, the salient facts of the case are that applicant is suing in a representative capacity. It is representing the following members: Stunula Ranching (Pvt) Ltd, Christopher Mellish Jarret, Drury Wickman (Central Africa) (Pvt) Ltd, David Gerald Hunt, William Michael Parry Wood, Dornoch Estate (Pvt) Ltd, Thoughtful Farming (Pvt) Ltd, Water Versfeld Herbert, Junpor (Pvt) Ltd, J and B Querl Ranching (Pvt) Ltd, Yvonne Sharp and Oliver Anthony Sharp, Spring Grange Farm (Pvt) Ltd and Margaret Tsobel Lewis.

The applicant is a body corporate with perpetual succession having an existence apart from its members and which is capable of suing and being sued. All these members of the applicant received acquisition of land orders issued by the Minister of Lands, Agriculture and Rural Development i.e. the first respondent. In terms of these orders they were obliged to vacate their farms by 10 August 2002 or within ninety (90) days of the subsequent service of the orders on them.

The applicant submits that section 8, 9 and 10 of the Land Acquisition Act [Chapter 20:10] are unconstitutional and therefore invalid for five reasons stated in the following terms:

> "(a) Once a Preliminary Notice of Intention to Acquire Land is given to the farmers in terms of section 5 of the Act, the Acquiring Authority may issue an order in terms of section 8 of the Act, and in terms of section 8(2)(b) such order permits an Acquiring Authority in relation to

> agricultural land required for resettlement purposes to exercise any right of ownership "… without undue interference to the living quarters of the owner or occupier of that land.
>
> Should a farmer grow a crop and then receive such an order the Acquiring Authority will have acquired ownership of his land and crop. Section 16(1)(b) of the Constitution of Zimbabwe 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 …"

In view of the fact that the section 8 order requires no notice whatsoever, it is submitted that this is in conflict with the provisions of section 16(1)(b) of the Constitution;

> "(b) Section 9 of the Amendment Act introduces a criminal penalty for any owner or occupier who fails to stop occupying, holding or using the land acquired (45) forty-five days after service on him of an order in terms of section 8. In respect of orders issued in terms of section 8 and served before 10 May 2000 when the amendment commenced no criminal sanction existed. Thus the stated retroactive effect of the legislation now has the result that such farmers have committed an offence even though at the time when the section 8 order was issued no criminal sanction existed. Section 18(5) of the Constitution provides that "No person shall be held to be guilty of a criminal offence on account of any act of omission that did not, at the time it took place, constitute an offence …"

Thus it is submitted that section 9 of the Land Acquisition Act as amended is in conflict with section 18(5) of the Constitution;

(c) The issue and service of the order in terms of section 8 of the Land Acquisition Act as amended effectively deprives the owner of his ownership of his land without any hearing which offends the *audi alteram partem* rule, a fundamental principal (sic) of natural principal (sic) of natural justice that a person must be given a fair opportunity of presenting his case before any action can be taken against him. Section 16(1)(d) of the Constitution requires the Acquiring Authority, if the acquisition is contested 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. Thus the physical acquisition of land in terms of an order in terms of section 8, without the Acquiring Authority seeking an obtaining confirmation of the acquisition in conflict with section 16(1)(d) of the Constitution.

(d) The deprivation of an ownership of his land by the issue and service of an order in terms of section 8 without any hearing to determine his right, it is submitted, is in conflict with section 18(9) of the Constitution which provides that; "… every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating

authority established by law in the determination of the existence or extent of his civil rights or obligations;"

(e) The Government stated policy is that the land reform programme is designed to take land from white farmers and given it to indigenous blacks. Thus the issue and service of orders in terms of section 8 is selectively applied on racial criteria. It is submitted that this is in conflict with section 11 of the Constitution which protects the fundamental rights of a person, and section 23(1) of the Constitution which protects a person against discrimination on the grounds of race."

I specifically requested further submissions from the applicant in respect of two issues, *viz*, (a) whether the applicant has the requisite jurisdiction i.e. the *locus standi in judicio* to obtain redress under section 24(1) of the Constitution and (b) whether the High Court has jurisdiction to entertain constitutional applications in terms of section 24(4).

In respect of the former query the applicant produced applicant's constitution in support of its case. It does not seem that the constitution does take its case any further in this regard. In respect of the latter query the applicant responded in the following terms:

"We submit that in terms of section 13 of the High Court Act[Chapter 7:06] the High Court has full original civil jurisdiction over all persons and over all matters within Zimbabwe. Section 24(2) of the Constitution of Zimbabwe provides that, in any proceedings in the High Court where the question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, if so requested by any party to the proceedings, refer the question to the Supreme Court unless in his opinion, the raising of the question is merely frivolous or vexatious. In the present case, the application is unopposed and the applicant has not requested the honourable judge to refer the matter to the Supreme Court, and therefore the matter may be determined in the High Court."

The determination of this matter lies in the enforcement of protective provisions as provided for in section 24 of the Constitution. Section 24 states –

"1. If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or in the case of a person who is detained), then without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the declaration of Rights, the person presiding in that court may and if so requested by any party to the proceedings shall, refer the question to

the Supreme Court, unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(3) Where in any proceedings such as are mentioned in subsection (2) any such question referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1).

(4) The Supreme Court shall have original jurisdiction –

(a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without hearing any such application which, in its opinion, is merely frivolous or vexatious;

(b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2) and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of this Constitution or under any other law.

(5) …."

Does the High Court have powers to give remedies to protect constitutional rights in terms of section 24(4) of the Constitution

A similar provision to section 24(4) which pertains to the Supreme Court, is not made in respect of the High Court. In the circumstances, does the High Court have jurisdiction to determine a constitutional matter? GILLESPIE J remarked that it does - See *S* v *Chikwinya* 1997(1) ZLR 109(H) at 115 and *S* v *Mavharamu* 1998(2) ZLR 341(H) at 351. DEVITTIE J also held that it does. In *S* v *Kasunganyanga* 1998 (2) ZLR 10 (H) at 13, the learned judge stated –

> "I am satisfied that where rights enshrined in the Constitution are breached, this court has jurisdiction to grant an appropriate remedy. In my view, the provisions of the Constitution which provide for reference to the Supreme Court of constitutional questions, merely provide a procedural mechanism whereby constitutional matters may be raised by the lower courts for decision by the Supreme Court. The inherent jurisdiction of the High Court is not thereby affected."

GILLESPIE J in *S* v *Chikwinya (supra)* held that section 24(4) specifically mentions the Supreme Court "*ex abundante cautela* and lest otherwise it be thought that the

Supreme Court, a court of appellate jurisdiction, has no original jurisdiction pertaining to the point at issue, *ubi ius, ibi reduedium;* and the remedy for the accused here lies in the inherent jurisdiction of this court to regulate its own proceedings and to protect the rights of those coming before it. The court has a common law power to put a stop to any wrong that has been done to an accused person in the name of the law."

This interpretation of section 24(4) by the two learned judges appeared to have been overruled by the Supreme Court in *S* v *Mbire* 1997(1) ZLR 579 (5). In this case GUBBAY CJ, in a dictum, stated on page 581 B as follows;

> "It is only the Supreme Court that is empowered to make such an order under the authority of section 24(4) of the Constitution when the application or referral comes before it pursuant to subsection (1) or (2)"

It appears to me that by using the reasoning of the learned judges in the *Chikwinya* case *(supra)* and *Kasunganyanga* case *(supra)* this court may deal with constitutional matters and grant relief on the basis of this court's inherent jurisdiction. The general rule is that superior courts, differing in this respect from the inferior courts, have an inherent jurisdiction to make orders, unlimited as to amount, in respect of matters that come before them – see *Connolly* v *Ferguson* 1909 TS 195 at 198 and *The Civil Practice of the Supreme Court of South Africa* 4th edition by Van Winsen, Cilliers and Loots at page 37. This general fundamental principle of inherent jurisdiction is, however, subject to derogation. Only in exceptional cases will the court exercise its inherent jurisdiction to follow procedures not regulated by the ordinary law of procedure – see *Krygko Pensioenfonds* v *Smith* 1993(3) SA 459(A) at 469G-J. *In casu,* the question is whether the Supreme Court has exclusive jurisdiction to make section 24 orders. Put in another way, does a High Court have concurrent jurisdiction to give an order in terms of section 24 by virtue of its inherent

jurisdiction? By way of comparison, in South Africa only the constitutional court has the power to declare Acts of Parliament unconstitutional and accordingly invalid. In our case it is clear that our Supreme Court sits as a constitutional court., When it does so, its composition is prescribed. It is only when it is so composed that it is in a position to deal with constitutional matters. In my view reference to the Supreme Court in section 24 is consistent with the latter sitting as a constitutional court. With respect to learned judges GILLESPIE and DEVITTIE reference to the Supreme Court alone in section 24 is a deliberate limitation of the inherent jurisdiction of the High Court. It is consistent with making constitutional matters the domain of the Supreme Court sitting as a constitutional court. Section 24 does not mention the Supreme Court *ex abundante cautela*. It does so by design. It is neither a procedural mechanism. The jurisdiction of this court in constitutional matters is deliberately quoted thereby. This is consistent with the creation of a special dispensation to deal with constitutional matters an envinced by the fact that these matters are considered so fundamental that they can be considered by the highest court in the country exercise original jurisdiction. When the matter ends up in the Supreme Court, there is provision for a special composition to deal with it. When the Supreme Court is faced with a constitutional issue, the Chief Justice, or the Minister of Justice, Legal & Parliamentary Affairs may direct that the court will not be duly constitutional unless it consists of at least five judges. If such a direction is given, not less than three of the five judges must be substantive rather than acting judges of the Supreme Court – see section 3(b) proviso (iii) of the Supreme Court Act [Chapter 7:13]. The number of Supreme Court judges who may determine such constitutional matters is, with respect to the two learned judges, specially designed to emphasise their fundamental nature.

It seems to me that there would be no logical explanation for creating such a

special dispensation to deal with constitutional issues when one judge of the High Court enjoys concurrent jurisdiction (via the "inherent jurisdiction" principle) with the Supreme Court sitting as a constitutional court. The dictum by GUBBAY CJ in the *Mbire* case *(supra)* has to be understood in this context. In the circumstances, I hold that this court can only grant interim relief pending the reference to the Supreme Court, in terms of section 24, the constitutional matters raised by the applicant. A section 24 order is a distinct legal redress established by the constitution itself, to have important constitutional issues decided directly by the Supreme Court without protracted litigation.

In *Mandirwhe* v *Minister of State* 1981(1) SA 759 (ZA) BARON JA stated;

> "The purpose of section 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and consequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal and sometimes very lengthy judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the [Supreme Court] without protracted litigation."

In such circumstances, the objective of section 24 is to provide a mechanism for speedy enforcement of constitutional rights. According to GUBBAY CJ in *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General and Ors* 1993(1) ZLR 242 (S) at 250 section 24(1) –

> "enjoins the Supreme Court to examine challenged legislation, or a particular practice or action authorised by a state organ, in order to determine whether or not it infringes one of the entrenched fundamental rights and freedoms of the individual. The Supreme Court is empowered to measure the effect of the enactment or action against the particular guarantee it is claimed it offends. Clearly, it has jurisdiction in every type of situation which involves an alleged breach or threatened breach of one of the provisions of the declaration of Rights and, particularly, where there is no other judicial procedure available by which the breach can be prevented."

The *Movement for Democratic Change and Ano* v *Chinamasa and Ano* SC-7-

2001 GUBBAY CJ stated on pages 10-11 of the cyclostyled judgment –

> "The purpose of section 24(1) is to afford every person the opportunity to obtain expeditious redress, even where it is alleged that the declaration of Rights is likely to be contravened. The ability of a representative to allege a contravention in relation to a detained person underlines recognition that certain applications brought under section 24(1) require to be dealt with as a matter of urgency. Secondly, the principle that a litigant should exhaust domestic remedies before approaching courts, unless there are good reason for not doing so, is of no application to the present case."

Section 24 envisages a situation in which the constitutional issue is referred to the Supreme Court before a determination and not after otherwise it would mean that the Supreme Court would not be deciding on the question at first instance – see *Muchero and Ano* v *Attorney General* SC-107-00 at page 3 of the cyclostyled judgment. Reference to the Supreme Court in section 24 should be understood in this context. We are after all dealing here with the problem of majoritarianism in constitutional law. Thus counter majoritarian character of judicial review has been raised a lot of controversy in the academic arena because the unaccountable nature of judicial invalidation of statutes is not easily reconciled with democratic tradition – see article by Philip Zyberberg in the *McGill Law Journal*, 1992. This probably, *inter alia*, explains why such constitutional matters enjoy the status of being determined by the Supreme Court at first instance. Further, the Supreme Court, in constitutional matters renders its decisions largely in declaratory form. The court normally confines itself, however, to declaring laws null and void or incompatible with some particular provision of the Constitution. Limiting constitutional matters to the highest court is consistent with the situations in those jurisdiction where there are specialised constitutional courts like South Africa and Germany. In America, although the Supreme Court actively declared the right of the judiciary to review acts of the other branches of Government, in fact the judiciary has been reluctant to find statutes, and

especially federal statutes unconstitutional. Perhaps it is a consciousness of the nature and purpose of democracy. Until the Judiciary Act 1875 which, by statute, explicitly gave the right to the lower federal courts, the lower federal courts did not exercise such right – see also *Marbury* v *Madison*, 5 US 137 (1803).

***Legitima Persona Standi in Judicio* of the applicant**

It is important to determine whether the applicant has jurisdiction to bring this application. As previously stated the applicant is suing in representative capacity. It is common cause that the Acquisition of Land orders farming subject matter of the application were not served on the applicant. Individual Acquisition of Land orders were served on different farms as outlined above. The founding affidavit was deposed to the chairman of the applicant. The relevant section reads:-

> "6. The applicant is aware that the following association members have received orders issued by first respondent in terms of section 8 of the Act …
>
> Copies of orders attached (annexure "A" to "JJ")"

There are no supporting affidavits from those served with the orders confirming that they are indeed members of the applicant as that they authorised applicant to act on their behalf. Neither is this a class action pursuant to the provisions of Class Action Act [Chapter 8:17] It is trite that the capacity to participate in legal proceedings is technically described by the phrase *locus standi in iudicio*. Such right to sue or liability to be sued depends in the first place on capacity. Persons who are wanting in that capacity cannot be parties to any civil action unless that want of capacity has been implemented. In all cases an applicant must alleged sufficient facts in his founding affidavit to indicate that he has the necessary *locus standi* to institute proceedings – see *Introduction to South African Law and Legal Theory* (2nd edition) by W J Hosten, A B Edwards, F Bosman and J Church; *Wilson* v

Zondi 1967(4) SA 713(N) and *Pheto* v *Minister of Home Affairs and the Registar General of Citizenship* HH-22-01 at page 6.

A person who approaches the court for relief must at least have an interest in the sense of being personally adversely affected by the wrong alleged – see *Patz* v *Greene & Co* 1907 TS 427 at 433-5; *Dalrymple and ors* v *Colonial Treasurer* 1910 TS 372 at 386; *Wood and Ors* v *Ondangwa Tribal Authority and Ano* 1975(2) SA 294 A; *Shifridi* v *Administator-General for South West Africa and Ors* 1989(4) SA 631 (SWA); *Roodepaart – Maraisburg Town Council* v *Eastern Properties (Pty) Ltd* 1933 AD 87 and *Cabinet for the Transitional Government for Territory Government for Territory of South West Africa* v *Eins* 1988(3) SA 269 (A) at 389.

In constitutional matters a person will not have *locus standi* under section 24(1), except in respect of detained persons unless he is able to allege that a provision of the Declaration of Rights has been, is being or is likely to be, contravened in respect of him – see *Constitutional Law of Zimbabwe* by Greg Linington at page 231 paragraph 1.7.2.2 and in Re Wood and Hansard, 1995(2) SA 191 (ZS) at 195. Section 24 is contained in Chapter III of the Constitution and is therefore part of the Declaration of Rights. In *United Parties* v *Minister of Justice, Legal and Parliamentary Affairs and Ors* 1998(2) BCLR 224 (ZS) at page 227 GUBBAY CJ stated –

> "Section 24(1) affords the applicant *locus standi in judicio* to seek redress for a contravention of the Declaration of Rights only in relation to itself (the exception being where a person is detained). It has no right to do so either on behalf of the general public or anyone else. The applicant must be able to show a likelihood of itself being affected by the law itself being affected by the law impugned before it can invoke a constitutional right to invalidate that law"

See also *Law Society of Zimbabwe* v *Minister of Finance*; *Moffat* v *Minister of Finance* (Attorney-General Intervening) 2000(2) BCLR 226 (ZS). In America

constitutional cases only come before courts if there is really controversy. The courts in no instance, issue advisory opinions.

In casu, the provisions in issue affect the rights and interests of the individual farms or farmers served with the land acquisition notices. The applicant, as a legal *persona*, is not affected by the said provisions. Further, it appears that not all its members are affected. The affected have not authorised applicant to act on their behalf. If they did so, there is no document filed to prove this fact. Even the applicant's own founding affidavit does not contain an averment of such authorisation by the affected farmers. It seems, at least from the papers filed, that the applicant decided on its own to institute these proceedings when it became "aware" that some of its members were served notices by the first respondent. As alluded to above, there is an exception to the application of the *locus standi* rule requiring that a person who approaches the court be personally adversely affected by the wrong complained of and be entitled to claim only relief which is in that person's own interest. This exception is in terms of the Class Action Act [Chapter 8:17]. This exception is of no application to the facts of this case.

As pointed out above the applicant is an association of farmers, whose members, though not necessarily all of them, are recipients of the section 8 orders. It is they, and not the applicant itself, who have the right to challenge the constitutionality of section 8.

In the circumstances I find that the applicant does not have the necessary legal standing to bring this constitutional matter. I, accordingly, dismiss the application. There is no order as to costs.

Coghlan & Welsh applicant's legal practitioners