(1) CEDOR PARK FARM (PVT) LTD

Versus

**THE MINISTER OF STATE FOR NATIONAL SECURITY, LAND,
LAND REFORM AND RESETTLEMENT IN THE PRESIDENT'S OFFICE**

And

THE CHIEF LANDS OFFICER

And

**THE OFFICER-IN-CHARGE
ZIMBABWE REPUBLIC POLICE – NYAMANDLOVU**

(2) DAVID STEWART CRAWFORD

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ZIMBABWE REPUBLIC POLICE – INYATHI**

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 12 JANUARY AND 15 JULY 2010

Advocate T. A. Cherry, for applicants
Mrs Samowah, for respondents

Urgent Chamber Applications

KAMOCHA J: The parties in these two farming matters agreed to have them consolidated and argued at the same time as the facts of both matters are identical. Both were gazetted for compulsory acquisition in terms of subsection (1) of section 5 of the Land Acquisition Act [Chapter 20:10].

Thereafter they reached an agreement with the Minister of State for National Security, Land, Land Reform and Resettlement in the President's Office – hereinafter referred to as "the Minister" whereby the respective farms surrendered part of their agricultural holdings and the Minister agreed to withdraw his application to the Administrative Court (which at that time had jurisdiction in such disputes) for confirmation of the acquisition. The agreement in each case was then taken to the Administrative Court for it to be made into a court order which was accordingly done. The effect of that was that the particular pieces of land were delisted and that ownership of the respective pieces of land reverted to the original owners i.e. the respective applicants.

After the respective agreements had been made into consent orders of the Administrative Court the farms were gazetted and both appear in the 7th Schedule of Constitutional Amendment number 17 which came into effect on 14 September 2005. Constitutional Amendment Number 17 introduced section 16B in terms of which the two farms were acquired. The relevant provisions recite as follows:

"16B Agricultural land acquired for resettlement and other purposes

(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 itemized 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) …

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 (iii) with effect from the date it is identified in the manner specified in that paragraph."

Both farms were itemized in Schedule 7 as pieces of land which constituted land referred to in section 16B (2)(a)(i) above. They were acquired through General Notice 144A of 2002 and were itemized as 44.

It accordingly admits of no doubt that the two farms were identified before 8 July, 2005, and itemized in schedule 7 and were acquired by and vested in the State with full title therein with effect from 14 September, 2005 – the appointed day.

The law is now settled that once a farm has been acquired then the rights over it vest in the State. That being the case the former owner and title holder has no *locus standi* to approach the court for an interdict because he or she cannot establish a clear right. The lack of *locus standi* prevails even if a matter is pending before the Administrative Court because the right would merely be speculative. See *Airfield Investment (Pvt) Ltd* v *Minister of Land & Ors* 2004(1) ZLR 511(5) and *Airport Game Park (Pvt) Ltd* v *Kambidza & Anor* 2004(1) ZLR 391(5).

In casu, the orders by consent were issued by the Administrative Court in 2003. The one relating to Felton Farm, for instance, was issued on 5 August 2003. The orders therefore preceded the appointed day *id est* 14 September, 2005.

However, it was strenuously argued by the applicants that their case was completely different because their pieces of land had been returned to them by orders by consent which were made into court orders by the Administrative Court. It was then contended that the Constitutional Amendments set out in section 16B(2)(a)(i) and (ii) above did not vest their pieces of land to the acquiring authority. They reasoned that, since the court orders returned their pieces of land to them, they had acquired real rights in the properties. The Minister had in fact withdrawn the applications to confirm. The properties were restored to them in terms of the law. No legislation can act retrospectively to take away acquired rights that have vested in the right holders. They went on to submit that they had worked on and improved the farms on the understanding that the pieces of land were theirs to do as they wished.

It was their belief that contrary to popular belief the recent amendment to the Constitution did not make all farming land State land. Their belief is indeed true. Not all farming land was made State land. However, the applicants were ignoring the fact that

the Constitutional Amendment, especially section 16B thereof, provides that agricultural land identified in the gazettes itemized in Schedule 7 of the Constitution, had been acquired. Their pieces of land were identified in General Notice 144A of 2002 gazetted on 5 April, 2002 and appear as item 44 in Schedule 7 of the Constitution. It, therefore, admits of no doubt that the legislature took a deliberate effort to acquire the two farms and vested rights in them to State. The provisions of section 16B(2)(a)(i) expressly stipulate that the particular farms were acquired and vested in the State with full title.

The applicants still persisted that their rights over the farms were not retrospectively affected by the provisions of section 16B(2)(a)(i) of the Constitution and cited the case of *Nkomo and Another* vs *The A.G and Others* 1993(2) ZLR 422 (5) at 429A-C and 433C. At 429A-C GUBBAY CJ had this to say –

> "It is a cardinal rule in our law, dating probably from Codex 1:14:7, that there is a strong presumption against a retrospective construction. See *Agere* v *Nyambuya* 1985 (2) ZLR 336(5) at 338G-339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in any way affecting acts and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication. … Care must always be taken to ensure that the retrospectivity is confined to the exact extent which the section of the Act provides …" Emphasis added.

The learned Chief Justice continued at page 433C as follows:-

> "This conclusion is underscored when account is taken of the well established rule that a statute should be interpreted, where possible, so as not to impair or extinguish substantive rights actually vested at the time of its promulgation. Courts will only find that such an inequitable result was intended when compelled to do so by language so clear as to admit of no other inference. … The supposition is that the legislature intends to deal with future events and circumstances and not with those pertaining to the past." Emphasis added

When discussing the fundamental rule of construction in our law in the case of *Agere* v *Nyambuya* 1985 (2) ZLR 336 (SC) GUBBAY JA as he then was stated that retrospective operation may only be given to an enactment so as to remove or in any way impair existing rights where the enactment is expressly retrospective. At page 339A-C he quoted with approval the remarks by STRATFORD JA in *Principal Immigration Officer* v *Purshotam* 1928 AD 435 at 450.

"STRATFORD JA succinctly set out this general rule as follows:

> The rule of interpretation is well established; it is that where in express terms or by necessary implication (which is much the same thing) the enactment is to have a retrospective effect, that effect must be given to it whatever the consequences maybe. If, on the other hand, the clear intention to have retrospective effect cannot be extracted from the words used in their context, then the enactment must not be taken to effect pre-existing rights. Emphasis added

These words echo what INNES CJ said many years earlier in *Curtis*' case, *supra* at 311 namely:

> "The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be interpreted as not to take away rights actually vested at the time of promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so unequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit no other conclusion." Emphasis added

The applicants also cited a recent case of *Route Toute B V and Others* vs *The Minister of National Security Responsible for Land Reform and Resettlement and Others* HH 128/2009 in which it was stated that a later statute will only be construed as affecting or taking away rights accrued in a previous statute if the later enactment expressly intends to take away the prior existing rights. It was indeed held to the effect in, *Vice Chancellor, University of Zimbabwe & Another* v *Musasah & Another* 1993(1) ZLR 162 (5), that the removal of an existing right has to be done expressly and not indirectly. Emphasis added

The Constitution of Zimbabwe recites to the same effect in section 52 thus:

> "(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." Emphasis added

What is conspicuous in all the case authorities and the Constitution of Zimbabwe is a common thread running through all of them. Where the legislature wishes an enactment to have a retrospective effect it must expressly say so.

In casu section 16B(2)(a)(i) quoted at page 2 *supra* expressly states that notwithstanding anything contained in this chapter all agricultural land 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 itemized in Schedule 7, being agricultural land required for resettlement purposes is acquired by and vested in the State with full title therein from the appointed day. Chapter III of the Constitution is The Declaration of Rights and section 16 protects property from any deprivation. But the provisions of section 16B are expressly instructing all citizens of Zimbabwe that despite the protection enshrined in the Declaration of Rights all agricultural land that was identified prior to 8 July would be compulsorily acquired for resettlement purposes. Schedule 7 contains 107 items of pieces of land that constitute the land referred to in section 16B(2)(a)(i). As has already been mentioned elsewhere in this judgment the two farms that are under consideration herein are reflected as item 44.

It therefore admits of no doubt that the provisions of 16B(2)(a)(i) were deliberately intended to take away the prior existing rights of all the owners of agricultural land itemized in Schedule 7. The suggestion by the applicants, that the legislature should have specifically stated the provisions were also meant to overrule orders of court made by consent, is clearly untenable. The applicants were just being pedantic. Their rights in those pieces of land were extinguished with effect from the appointed day which was 14 September 2005.

The effect of that was that from that date they had no rights over the said pieces of land as the rights were vested in the State. They, in the result, had no *locus standi* to approach this court for an interdict because they cannot establish clear rights.

In terms of section 3 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28], they are now occupying, holding or using gazetted land without lawful authority. They have now held, occupied or used those pieces of land more than 45 days after the fixed date. They have also remained in occupation of the living quarters for a period in excess of 90 days after their pieces of land had been identified.

However, although they are occupying gazetted land illegally they may not be ejected there from without due process of law. In order to evict them the state needs to take them before the courts for prosecution, if convicted, the courts would issue eviction

orders in addition to sentences to be imposed in terms of section 3(5) of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28]. In my view, evicting them without following the procedure laid down in section 3(5) of the Act would be improper. In *Gordon Charles Spencer and Another* v *The Minister of Land, Land Reform and Resettlement and Ors* HB-11-10 at pages 5 to 6 I had this to say,

> "Evicting them without following the procedure laid down in section 3(5) of the Act would, in my view, be improper as the law protects even unlawful possessors. The legislature was alive to this that is why it laid down the procedure to be followed in order to avoid self help and anarchy. The respondents should not take the law into their own hands as such conduct cannot be countenanced or condoned. This is a well established principle. When dealing with the principle ROBINSON J in *Mutsotso & Ors* v *Commissioner of Police & Anor* 1993(2) ZLR 329(H) at 333B to H had this to say about the general principle as stated by INNES CJ in *Nino Bonino* v *de Lange* 1906 TS 120 at 122 as follows:
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> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante,* and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."

As explained by MILLIN J in *De Jager & Ors* v *Farah & Nestadt* 1947(4) SA 28 (W) at 35, a case where demolition of premises was undertaken without legal process:

> "What the court is doing is to insist on the principle that a person in possession of property, however, unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondent's conduct that the occupation by the applicant carried with it penal consequences." Emphasis added

The learned judge went on to explain that in that case the court held that the conduct of the respondents to demolish certain premises, which were dilapidated,

verminous and generally unsanitary, without legal process in order to secure the ejectment of the occupiers, they had committed acts of spoliation and they were therefore interdicted from further demolishing those premises.

The applicants *in casu* are now illegal occupiers of the farm and the living quarters and it admits of no doubt that they would have no defence at all to an action for their ejectment there from but that does not mean that respondents can interfere with their possession without due process of law. The applicants are liable to a fine equal to level seven or to imprisonment for a period not exceeding two years. The penalty is indeed a severe one but it still does not mean the respondents, in particular the third respondent, can just occupy part of the farm thereby despoiling the applicants. The respondents should not take the law into their hands. That is forbidden by law and the court cannot condone that. ROBINSON J in *Mutsotso & Ors* v *Commissioner of Police & Ors supra* at 33H to 334A continued thus:

> "As stated by DIEMONT J in *Fredericks & Anor* v *Stellenbosh Divisional Council* 1977(3) SA 113(c) at 117C.
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> "This court is not concerned with the nature of the applicants' occupation. What it is concerned with is that the respondent should not take the law into its own hands … Such conduct cannot be countenanced or condoned."

As far as the costs are concerned I hold a view that this is a proper case for each party to bear its own costs for the following reasons. Firstly, applicants ought to have realized that the provisions of section 16B(2)(a)(i) were couched in a language so clear as to admit no other conclusion but failed to do so because they chose to be pendatic. Secondly, the respondents ought to have proceeded in terms of section 3(5) as soon as the applicants became illegal occupiers, holder or users of gazette land. In the result, I would issue the following order.

It is ordered that:-

1. the applicants shall be entitled to remain on their respective pieces of land until they are lawfully evicted pursuant to an order of a court of competent jurisdiction in terms of section 3(5) of the Gazetted Land (Consequential *Provisions*) Act [Chapter 20:28];
2. unless the applicants are ejected from the respective farms in terms of section 3(5) of the Act no new settlers shall be settled on the said farms.

3. in the event that new settlers have already been settled thereon they shall be evicted forthwith until the applicants are lawfully removed there from in terms of section 3(5) of the Act; and
4. each party shall bear its own costs.

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