

DISTRIBUTABLE (7)

NYAHONDO FARM (PRIVATE) LIMITED

v

(1) BRIGADIER GENERAL A.W. TAPFUMANEYI

(2) MRS TAPFUMANEYI

**(3) THE MINISTER OF NATIONAL SECURITY IN THE
PRESIDENT'S OFFICE RESPONSIBLE FOR LANDS, LAND
REFORM AND RESETTLEMENT**

**SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, SANDURA JA, CHEDA JA & GARWE JA
HARARE, NOVEMBER 6 & 25, 2008
RELEASED ON MARCH 16, 2017**

L Uriri, for the appellant

J Mlotshwa, for the first and second respondents

P Machaya, for the third respondent

CHIDYAUSIKU CJ: This is an appeal against the judgment of MUSAKWA J. After hearing submissions by counsel and considering the matter, the appeal was dismissed and the Court issued the following order:

- “1. The appeal be and is hereby dismissed in its entirety.
2. There will be no order as to costs.”

The Court indicated that reasons for judgment would follow. The file in this matter, together with a number of other similar files where judgment had been given with reasons to follow,

was inadvertently filed with the completed matters. This accounts for the delay in handing down the following reasons for judgment.

The appellant's case, and indeed also his case in the court *a quo*, is aptly set out in paras 4.2 and 5 of the notice of appeal, which read as follows:

- “4.2 Article 5 of the BIPA Agreement prohibits the expropriation of protected investments except for expropriations made in the public interest; on a basis of non-discrimination; carried out under due process of law and against prompt, adequate and effective compensation.
4. This protection and prohibition is entrenched in the Constitution of Zimbabwe by section 16(9b) thereof.”

Section 16(9b) of the old Constitution of Zimbabwe (“the Constitution”) provides as follows:

“(9b) Nothing in this section shall affect or derogate from —

(a) any obligation assumed by the State; or

(b) any right or interest conferred upon any person;

in relation to the protection of property and the payment and determination of compensation in respect of the acquisition of property, in terms of any convention, treaty or agreement acceded to, concluded or executed by or under the authority of the President with one or more foreign states or governments or international organisations.”

The learned judge in the court *a quo* concluded that the land was lawfully acquired. This is the conclusion that the appellant challenged on appeal.

It is common cause that Nyahondo Farm (“the farm”), the subject of this litigation, was acquired for agricultural purposes by the third respondent in terms of s 16B of the Constitution and allocated to the first and second respondents in terms of an offer letter.

Section 16B of the Constitution provides as follows:

“16B Agricultural land acquired for resettlement and other purposes

(1) In this section -

“acquiring authority” means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

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

(2) Notwithstanding anything contained in this Chapter –

(a) all agricultural land –

- (i) that was identified on or before the 8th July, 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or
- (ii) that is identified after the 8th July, 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], being agricultural land required for resettlement purposes; or
- (iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to -
 - A. settlement for agricultural or other purposes; or
 - B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or
 - C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose 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; ...” (my underlining)

On the face of it, s 16(9b) is in conflict with s 16B of the Constitution. However, s 16B contains a *non obstante* clause. What this means is that whenever there is a conflict between s 16B of the Constitution and any other section of the Constitution, s 16B shall prevail.

The Agreement which the appellant relies on is protected by s 16(9b) of the Constitution. However, as I have stated, the farm was acquired in terms of s 16B of the Constitution. Section 16B of the Constitution, as previously stated, contains a *non obstante* clause, which means s 16B of the Constitution overrides all other sections of the Declaration of Rights contained in *Chapter III* of the Constitution, including s 16(9b) of the Constitution, which guarantees the appellant's right to the farm. In other words when the third respondent acts in terms of s 16B of the Constitution, as he did in this case, he can lawfully abrogate any right of the appellant to the farm despite the guarantee in terms of s 16(9b) of the Constitution.

On the facts of this case, it follows that the rights of the appellant in terms of Article 5 of the Agreement, guaranteed by s 16(9b) of the Constitution, were derogated by the third respondent acting in terms of s 16B of the Constitution. In terms of the *non obstante* clause in s 16B of the Constitution, such derogation is *intra vires* the Constitution and therefore lawful.

In the result, the appeal could not succeed and was dismissed with no order as to costs.

MALABA DCJ: I agree

SANDURA JA: (Retired)

CHEDA JA: (Retired)

GARWE JA: I agree

Coghlan, Welsh & Guest, appellant's legal practitioners

Antonio, Mlotshwa & Co, first and second respondents' legal practitioners

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