THE TRUSTEES OF THE MERLACH TRUST
and
DIANA VALERIE PUZEY
versus
THE MINISTER OF SPECIAL AFFAIRS IN THE PRESIDENT'S OFFICE IN CHARGE OF LAND REFORM AND RESETTLEMENT

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 23rd June and 7th July 2004

**Unopposed Application**

Mr R.H. *Wood*, for the applicants
No appearance for the respondent

BHUNU J: The first applicant is the registered owner of a certain piece of land being subdivision "D" of Binder measuring 122, 0751 hectares held under deed of transfer 3787/98.

The 2nd applicant lives on the property where she has set up home after being granted permission to do so by the 1st applicant.

On the 16th January 2003 the respondent issued a preliminary notice to compulsorily acquire the property in terms of section 5(1) of the Land Acquisition Act [*Chapter 20:10*].

The preliminary notice was followed up by an acquisition order in terms of section 8(1)(iii) of the Act published in the Zimbabwe Gazette Extraordinary of the 26th April 2004 under General Notice 256/2004 (item No. 10).

Aggrieved by the preliminary notice and acquisition order the applicants lodged this application in the High Court seeking a declaration that both were of no force or effect.

The application was served on the applicant but not on the Attorney General as is the normal practice in cases of this nature. When I queried this apparent departure from the norm counsel for the

applicant's response was that it was not legally necessary to serve a copy on the Attorney General.

Section 76 of the Constitution of Zimbabwe provides that:

> "(1) There shall be an Attorney General who shall be the principal legal advisor to the government and whose office shall be a public office but not form part of the Public Service."

In my view the above provision constitutes notice to the whole world, all and sundry that the Attorney General is the principal legal practitioner for the government of Zimbabwe. That being the case I consider it improper for a lawyer to serve a litigant with legal process deliberately by-passing his lawyers who are well known to him. While this might not constitute an irregularity in the strict sense of the word it is certainly undesirable.

In a proper case the court may be inclined to insist that service be effected on the litigant's lawyers before litigation may proceed.

In this case I have decided not to direct that service be effected on the Attorney General because the legal issues pertaining to this application appear clear to me.

The applicant's complaint is simply that the property is not suitable for both urban and rural resettlement. Second applicant states in paragraph 6 of her founding affidavit that:

> "the property is not suitable for resettlement purposes. It has only 4 hectares of arable land, poor soils, steep gradients, many rocky outcrops, no perenial surface water and little under ground water. The property is not conducive to crop production and the flock of 30 sheep that I have on the property requires substantial supplementary feeding to survive."

Under paragraph 9 she goes on to complain that:

> "It is inconceivable to me that the property could honestly be required for urban expansion. I say this because it is many kilometres away from any urban area."

She then concludes under paragraph 3 as follows:-

> "13. Because the property is unsuitable for either rural resettlement or urban expansion and because the preliminary notice delivered to me gives a different reason for acquisition to that appearing in General Notice 43/2004, I have good reason to believe that efforts made to acquire this property are bogus and

corrupt."

Where an acquisition order is contested it is subject to confirmation by the Administrative Court in terms of Section 7 of the Act. Subsection 4 of the section provides that:

"(4) The Administrative Court shall not grant an order referred to in subsection (1) unless it is satisfied-

a) that the acquisition of the land is reasonably necessary in the interests of defence, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public.

b) Where the acquisition relates to rural land that the acquisition is reasonably necessary for the utilisation of that or any other land-

i) for settlement for agricultural or other purposes, or

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

iii) for the re-location of persons dispossessed in consequence of the utilisation of land for a purpose referred to in sub-paragraph (i) or (ii)."

Subsection 4a provides for a presumption that if the land was for the past fifty years at any time used for agricultural purposes, then it shall be presumed that the land is suitable for agricultural purposes.

The applicant's affidavit clearly demonstrates that the presumption applies to this case. That being the case the onus is squarely on the applicant to rebut that presumption.

On the merits I am satisfied that there is no urgency in this matter. The issues being raised are substantive issues which must be placed before the administrative court for a determination. To do otherwise will be to usurp the functions of the Administrative Court.

That being the case the application cannot succeed. It is accordingly ordered that the application be and is hereby dismissed with costs.

*Atherstone and Cook*, the applicant's legal practitioners