AMALINDA ESTATES (PVT) LTD

and

PETER EDWARD HUDDY

versus

THE ATTORNEY GENERAL

and

THE MINISTER OF LANDS AND RURAL RESETTLEMENT

and

MAGISTRATE PAIDA MUKUMBIRI

and

M.B. ZVARIVADZA

and

THE COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 15 June 2011

Mr *F. Nyamayaro*, for the applicants

Mr *T.R. Zvekare*, for first, second, & fifth respondents

Fourth respondent not present

CHIWESHE JP: On 17 June 2011 I dismissed this application with costs and indicated that my reasons would follow. These are they.

The applicant company, Amalinda Estates (Pvt) Ltd, is the former owner of certain piece of land registered under Deed of Transfer 5988/83 situate in the District of Salisbury. This property is commonly referred to as Amalinda Estates. It is 1 101, 8283 hectares in extent.

By notice published in the Government Gazette on 19 June 2009 Amalinda Estates was acquired by the State in terms of 16B (2) (a) (iii) of the Constitution.

Section 16 B (2) of the Constitution provides:

“(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 (I) 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-

1. settlement for agricultural or other purposes; or
2. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
3. 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 ; 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.”

Subsection (3) of the same section provides:-

“(3) The provisions of any law referred to in section 16 (I) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section18 (I) 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-

1. shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;
2. 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.”

It is clear from the above that the acquiring authority has made the necessary publication in the gazette. The land, the subject matter of the publication, becomes State land (gazetted land). In other words the acquisition process is complete – there are no further requirements

Amalinda Estates (a body corporate) and its director, Peter Edward Huddy, cited in both his capacity as director and in his own personal capacity, were arraigned before a magistrate sitting at Harare charged with contravening s 3 (2) (b) as read with s 3 (3) of the Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*], that is to say, occupation of gazetted land without lawful authority. The State case was to the following effect. The property, Amalinda Estates, was acquired by the State on 19 June 2009. The accused, being the former owners or occupiers of gazetted land unlawfully held, used or occupied gazetted land, namely, Amalinda Estates, without lawful authority from the State. The accused were required by law to vacate the farm by 3 August 2009 but have defied the law by failing or refusing to vacate the property. The accused, according to the State, have therefore no lawful authority to continue to occupy, hold or use the said State land.

The accused persons pleaded not guilty to the charge. Their defence outline may be summarised as follows: Firstly, it is contended that the accused persons have been advised by senior government land officials to stay and continue farming. Secondly, the farm is in the process of being replanned according to a report done on 28 January 2010 by the Minister of Lands and accused persons are pitted to receive a portion of the farm. Thirdly, the accused persons have not been paid compensation for improvements on the farm and are therefore holding on to the farm as a *lien* pending such payment. Fourthly, the accused persons applied for an offer letter and await and expect a positive response. Fifthly, the farm in question has been subdivided into several portions and the accused persons no longer occupy the full farm. The portion they occupy was never separately gazetted and therefore cannot be termed “gazetted land” to support the charges levelled against them.

After a full trial the magistrate convicted the accused persons and sentenced the first and second accused to each a fine of US$100 or in default of payment warrant of execution against property. The third accused person (second applicant) was sentenced to a wholly suspended sentence of 6 months imprisonment. In addition, the magistrate ordered that the accused persons vacate Amalinda Estates on or before 9 June 2011.

The accused persons have appealed against conviction. They filed an application in the court *a quo* for stay of execution of the Magistrate’s decision pending the disposal of the appeal. That application was dismissed whilst a counter application by the State for leave to execute the judgment pending appeal was granted.

The accused persons have now approached this court by way of the present urgent chamber application. They seek stay of execution of the order of the magistrate (third respondent) granting leave to execute pending appeal. They also seek costs of suit against first and second respondents.

It is trite that in an application in which it is sought to stay execution of the order of the court *a quo* pending the decision of the appeal court, the applicant needs to show *inter alia* that the appeal itself has reasonable prospects of success.

In the present case I am convinced that the appeal is doomed to fail. The applicants have completely misunderstood the import of an acquisition under s 16 B 2 (a) (iii) of the constitution. All the acquiring authority needs to do to acquire property under that section is publish the necessary notice in the Government Gazette, and, once publication has been effected, the property is acquired by the State by virtue of that act of publication and henceforth full title vests with the State with effect from the date of such publication. The suggestion contained in the grounds of appeal that notwithstanding this publication, the acquiring authority must then, in order to complete the acquisition, proceed in terms of the procedures outlined in the Land Acquisition Act [*Cap 20:10*] is without foundation whatsoever. Subsection (3) of s16 B of the Constitution *supra* provides to the contrary, namely, that “The provisions of any law referred to in s 16 (I) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18 (I) and (9), shall not apply in relation to land referred to in subsection 2 (a) except …………..”

Counsel for the applicant sought to argue that non applicability cannot be extended to acquisitions made under section 16 B 2 (a) (iii) because these are made after the “appointed day.” With respect I, do not see the distinction, firstly, because section 16 B (2) (a) uses the two terms, namely, “appointed day” and “the date it is identified”, in the alternative to the other. Secondly, it is a fact that the Land Acquisition Act was in force on the appointed day. It still is in force but its provisions do not apply to acquisitions made in terms of section 16 B (2) (a) of the Constitution (save for purposes of compensation). In my view therefore the property was lawfully acquired by the State.

In terms of the Gazetted Land (Consequential Provisions Act) [*Cap 20:28*] no person may occupy or utilize gazetted land without lawful authority. Lawful authority has been defined as either on offer letter given by the acquiring authority, a permit or lease. The applicants do not have any of these. The learned magistrate’s decision to convict the accused persons cannot be faultered in that regard. Section 3 of the Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*] provides that the magistrate shall upon conviction and as part of the sentence order the eviction of the accused persons from the property concerned. The magistrate proceeded to do so in accordance with the law.

The applicants contend also in their grounds of appeal that the acquisition process was flawed. As already indicated all that was required of the acquiring authority under s 16 B (2) (iii) of the Constitution was to identify the property and issue the necessary notice in the Gazette. That is the procedure that is prescribed under that section. No impropriety arises on the part of the acquiring authority.

It is important to point out that a prosecution under the Act does not depend on whether the property has been offered another or not. The prosecution is based on the illegal occupation of gazetted land by the accused persons. They cannot offer as a defence (as the applicant tried to do) that an offer letter in favour of another had been improperly issued. The allegation to be answered by them is whether they themselves have authority to occupy gazetted land.

In my view therefore the applicants cannot succeed because their appeal has no reasonable prospects of success.

It was for these reasons that I dismissed the application with costs.

*Khanda & Company,* Applicants’ legal practitioners

*Civil Division of the Attorney General’s Office,* 1st, 2nd & 5th respondents’ legal practitioners