

VUKUTU [PRIVATE] LIMITED
versus
PRIDE KWINJE
and
MINISTER OF LANDS, LAND REFORM & RESETTLEMENT¹

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 18 February 2016 & 15 June 2016

Opposed application

T. Biti, for the applicant
H. Magadure, for the second respondent
First respondent in default

MAFUSIRE J: The applicant's heads of argument spanned over fifty-five pages. As I waded through them, a certain article in the journal, *Advocate*, of December 2001, by LCT HARMS, Judge of the Supreme Court of Appeal in Bloemfontein, South Africa, with the eye-catching title: "*What irritates judges?*" drifted into my mind. It said in part:

"Another form of padding is taking too many points. It is indicative of counsel's lack of confidence in the matter. Cases usually turn on one point, occasionally on a few. Too many points tend to obfuscate the good ones. Counsel should be astute enough to make a firm decision of what can and what cannot work."

A few lines down, the learned judge wrote:

"Expert counsel fall into two classes: the one assumes that the court consists of totally ignorant judges and file[s] a treatise on the subject. The other accepts that the court can follow the jumps in the argument ... Both are wrong."

I have lent Mr *Biti* a leaf.

In this matter the applicant's claim hung on multiple causes. The heads of argument were a treatise on constitutionalism. Every conceivable topic was given generous treatment. The topics covered were legality and constitutionalism; the rule of law; the doctrine of

¹ The correct designation should be Minister of Lands and Rural Resettlement

separation of powers; supremacy of the constitution; the inviolability of court orders; function of the law; the justiciability of land acquisition; the doctrine of estoppel; interpretation of statutes; retrospectivity of amending legislation, and so on.

The proceedings before me were the return day of a provisional order that had been granted by this court six months previously. The interim relief was both an eviction order and an interdict. In terms of it, the first respondent was ordered to vacate applicant's 87.8 hectare property in Nyanga, Makoni district, called Vukutu of Liverpool [hereafter referred to as "*Vukutu*"]. The first respondent had also been interdicted and restrained from chopping down any trees or plants therefrom.

The final relief sought was an order to bind the second respondent to a certain order by the Administrative Court in 2002, i.e. some fourteen years ago [hereafter referred to as "*the Admin Court Order*" or "*the Order*"]. The Order had been granted by consent. The parties then were the within named applicant, then respondent; and the within named second respondent, then applicant. The Order said:

"WHEREAS

- A The Respondent is the owner of Liverpool measuring 1 526.4100 hectares situated in the district of Makoni;
- B The Respondent is also the owner of Vukutu of Liverpool measuring 87.8268 hectares situated in the district of Makoni;
- C The Respondent has agreed that Liverpool be conceded to the Applicant, **and the Applicant has agreed that it shall not acquire Vukutu of Liverpool;** [my underlining]

IT IS HEREBY ORDERED:

- 1 That in terms of Section 7 of the Land Acquisition Act, *Chapter 20:10*, the acquisition by the Applicant of Liverpool measuring a total of 1 526.4100 hectares is hereby confirmed."

Apart from costs, the final relief also sought an order that any offer letter that might have been issued to the first respondent or to any other party, should be declared null and void. The words "... *any offer letter* ..." were in relation to Vukutu.

The facts of this case were common cause, or uncontested. The matter straddled two constitutional dispensations concerning land reform in Zimbabwe. In the old, compulsory

land acquisition by government was a cumbersome process. It attracted what MALABA JA, as he then was, described as “... *obstructive litigation* ...”: see *Mike Campbell [Pvt] Ltd v Minister of Lands & Anor*². Generally, the process entailed or involved the following procedural steps:

- The acquiring authority giving a reasonable notice to the owner of the land, and others, of its intention to compulsorily acquire the property;
- If the intention to acquire was contested, the acquiring authority to apply to court for an order to confirm the acquisition;
- The owner to apply to court for the return of the property if acquisition was not confirmed;
- The acquiring authority to pay fair compensation within a reasonable time;
- The owner entitled to apply to court for determination of fair compensation.

The old dispensation lasted until September 2005. The new came in via an amendment to the Constitution, the seventeenth amendment since the adoption of the National Constitution at independence in April 1980 [hereafter referred to as “*Constitutional Amendment No.17*”]. Among others, a new section, s 16B, was inserted.

In the new dispensation, compulsory land acquisition became radically different from the old. In *Mangenje v TBIC Investments [Pvt] Ltd & Ors; Mangenje v Minister of Lands & Ors*³ I said [at pp 561F – 562B]:

“I find that the mode of compulsory acquisition of agricultural land that was ushered in by s 16 B of the then Constitution was materially different from that under the Land Acquisition Act. Under the Land Acquisition Act it was the ‘acquiring authority’ that was tasked with the duty to compulsorily acquire land for agricultural purposes. The ‘acquiring authority’ was the President or any Minister as authorised by the President. Under that Act the process was tedious and long winded. Among other things, it entailed the issuing of preliminary notices for publication. These notices would expire if further processes were not undertaken on time. The acquisition had to be confirmed through the Administrative Court. If the preliminary notices lapsed or if the acquisition was not confirmed, the process would have to start afresh if the acquiring authority intended to persist. Above all, the whole concept of compulsory deprivation of rights to property was justiciable.

² 2008 [1] ZLR 17 [S]

³ 2013 [2] ZLR 534 [H]

On the other hand the acquisition process under s 16B(2)(a), ... short circuited the cumbersome process under the Act. By the stroke of a pen, and in one fell swoop, Parliament, and not the acquiring authority, cancelled the prior deeds of transfer in the names of the previous owners, and transferred ownership of the acquired lands to the State. As noted by MALABA JA in the *Mike Campbell* case on page 31:

‘Section 16B of the Constitution **is a complete and self-contained code** on the acquisition of privately owned agricultural land by the State for public purposes.’”

In casu, the applicant’s cause of action, in a nutshell, as I understood it, and in my own words, was that by virtue of the Admin Court Order, fourteen years ago, the second respondent was estopped from acquiring, or wanting to acquire, Vukutu again. Mr *Biti*, as I understood him, argued that all the jurisprudence surrounding land acquisition in the new dispensation, as might have been espoused in cases such as *Mike Campbell* above, is distinguishable, because, as between the applicant and the respondent, the matter had since been concluded for all time via a competent order from a competent court of competent jurisdiction.

Back then, there evidently had been some kind of trade-off between the applicant and the second respondent. That trade-off had been in respect of Vukutu, on the one hand, and another much larger property, also belonging to the applicant, on the other hand. The much larger property was called Liverpool [hereafter referred to as “*Liverpool*”]. It was 1 526.4100 hectares in extent. The government, through the second respondent, had served the applicant with a notice to acquire both properties. The applicant had objected. It had also made representations. Eventually the matter had been settled amicably. The second respondent would acquire Liverpool. The applicant would retain Vukutu. The “deal”, as said before, was “sealed” in the Administrative Court under Case No. LA2041/02.

On one or two occasions after that the government had come back to acquire Vukutu again. The applicant would make representations, waiving the Admin Court Order. The government would desist. It would abandon the process. In fact, it had gone further. It assessed Vukutu’s suitability for purposes of the land reform programme. The land was found to be completely unsuitable. The assessment said:

“... Vukutu of Liverpool was found to be unsuitable for resettlement purposes [rocky and steep slopes.]”

In a more comprehensive report on 25 November 2008, the relevant district land committee referred to the Admin Court Order and passed the following verdict:

- “2. Our observations from the documents reveal that the Court Order [case no. LA2041/02] establishes that Liverpool, measuring 1526, 41 ha in extent, was offered to the State for resettlement purposes, excluding ‘Vukutu of Liverpool’ and that the Government agreed not to possess this farm.
3. A letter by the Provincial Head Taskforce dated 03/05/06 confirms continuation of operations by the original owner and that ‘Vukutu of Liverpool’ will not be acquired for resettlement.
4. This piece of land according to soil and landscape assessment done by AREX official in Nyanga is not suitable for any crop production, if anything, the land is suitable for Holiday farming.”

Under “**Recommendations**”, the report concluded:

“It is further recommended that ‘Vukutu of Liverpool’ be allowed to operate as agreed to by Government in the courts.”

Section 16 B of Constitutional Amendment No. 17 had Schedule 7. Listed on that Schedule were 157 pieces of land which had previously been listed for acquisition by means of notices published in the *Gazettes* or *Gazettes Extraordinary* between 2000 and 8 July 2005. On that Schedule such properties were identified by reference to the numbers and dates of those *Gazettes* or *Gazettes Extraordinary* which had been published during that period.

Section 16 B then said, among other things, all such land as had been identified as such, had now been acquired by, and vested in, the State, with full title therein, with effect from the date that Constitutional Amendment No. 17 had come into operation, i.e. September 2005. The Registrar of Deeds was required to immediately register the change of ownership in favour of the State, and to make the necessary endorsements on the title deeds of all such properties, and on all such other records as might be kept by him, so as to reflect such change of ownership. The right of any person to challenge in the courts the acquisition of land by the State, and the power of the courts to adjudicate on any such challenges, was ousted. Only the right to challenge, and the power to adjudicate on, the amount of the compensation payable for the acquired land was preserved.

In June 2015, the second respondent offered, or purported to offer, Vukutu to the first respondent. The first respondent moved in and started chopping down indigenous wood. As

before, the applicant objected. As before, it referred to the Admin Court Order. It stressed that the second respondent's own experts had adjudged Vukutu as rocky and unsuitable for agricultural purposes. It said it was using, and had always used Vukutu for the production and promotion of stone sculpture. Nothing had changed.

The applicant further averred that the first respondent had been allocated another farm, called Brittainia, under the same land reform programme. It argued that government policy did not permit multiple farm ownership.

The first respondent filed no opposing papers. The second respondent did. Essentially he took two basic points. The first was that Vukutu had since been re-assessed and re-adjudged to be agricultural land. Reference was made to some site inspection allegedly carried out in 2014. From it, Vukutu had allegedly been found to be 60% suitable for livestock production. 20% was allegedly suitable for cropping. These averments appeared in the opposing affidavit by the second respondent's Permanent Secretary. No supporting affidavits or documents were attached. The applicant disputed such statements.

The second point taken by the second respondent was that the Admin Court Order had since been overtaken by events. It was said Vukutu had now been acquired through s 16B of Constitutional Amendment No. 17. As a matter of fact, Vukutu had been one of the properties listed on Schedule 7. The second respondent argued that it had become State land, and that, as such, the Admin Court Order was no longer binding.

Of applicant's point that the first respondent had been allocated another farm elsewhere and that therefore giving him Vukutu again would violate the land reform policy of one person one farm, the second respondent simply said that the first respondent had the lawful authority to occupy, use and hold Vukutu by virtue of the offer letter given him by the second respondent as the Acquiring Authority.

The old s 16 of the Constitution guaranteed the right of protection from compulsory deprivation of property. The right was justiciable. But sub-section [3] of the new s 16 B ousted such rights. The new section said, among other things, the provisions of any law referred to in s 16, regulating the compulsory acquisition of land that was in force on the appointed day, would no longer apply in relation to the listed land. In *Mike Campbell* the Supreme Court said s 16 B was overriding in effect in respect of the regulation of matters relating to the acquisition of all such agricultural land as had been identified by the Acquiring Authority in terms of that section.

From the foregoing, the second respondent argued that Vukutu had properly been acquired and that the courts no longer had the jurisdiction to entertain the applicant's challenge. The second respondent's conclusion was that s 16 B overrode all previously existing laws, including court orders such as the Admin Court Order.

The Second respondent also relied on the case of *Commercial Farmers' Union & Ors v The Minister of Lands, Rural Resettlement & Ors*⁴ for the argument that a litigant whose land had been acquired in terms of the Constitution could not seek to set aside that acquisition on the basis that it violated the rights conferred on him by a provision in the Declaration of Rights. In *Commercial Farmers' Union*, the Supreme Court noted, just as it did in *Mike Campbell*, that sub-section [2] of the new s 16 B began by the *non-obstante* clause: "Notwithstanding anything contained in this Chapter - ; that for that reason, it prevailed over all other Declaration of Rights provisions of the Constitution; that such derogation of rights did not constitute a violation of the Constitution; and that therefore a litigant whose land had been acquired in terms of the Constitution could not seek to set aside the acquisition on the basis that it violated the rights conferred on him by a provision contained in, among others, the Declaration of Rights.

Mr *Biti's* did not agree. I would summarise his multi-faceted and long winded-argument as follows:

- 1 Court judgments being inviolable, it was now *res judicata* that the respondent no longer had the right to acquire Vukutu;
- 2 The matter between the applicant and the respondent, concerning Vukutu, having been sealed in court, the applicant had acquired a right that even Constitutional Amendment No.17, i.e. s 16B thereof, could no defeat or derogate from;
- 3 The rule of law concept encompasses the doctrine of separation of powers amongst the three arms of government, namely the Legislature, the Executive and the Judiciary, and as such, a court judgment cannot be invalidated by a subsequent constitutional amendment which is but a law passed at the instance of the Legislature and the Executive;
- 4 The mischief behind Constitutional Amendment No. 17 being to deal with obstructive litigation, i.e. vexatious multiple proceedings concerning compulsory land acquisition that were still pending in the Administrative Court, the case of the applicant and the respondent was distinct, and therefore had to be treated differently because by the

⁴ 2010 [1] ZLR 576 [S]

time of that amendment the case had become *perfecta* in the sense that it had since been concluded through the courts;

- 5 In terms of s 164[4] of the new Constitution an order or decision of a court binds the State and all persons and governmental institutions and agencies to which it applies, and must be obeyed by them, and therefore, the government cannot, by self-serving legislation, seek to do away with court orders and whatever rights granted by them, as that would amount to self-help, a recipe for anarchy;
- 6 Despite the wording of s 16B and the *Mike Campbell* judgment, the power of the court to ensure scrupulous compliance with the “*self-contained code*” was not, and could never be, ousted. The Constitution entrusts the judiciary with the responsibility to ensure compliance with its provisions.
- 7 The Admin Court Order was a bargained outcome. The second respondent induced the respondent to relinquish Liverpool without any further argument in return for the right to keep Vukutu. Nothing had changed. The applicant had not shifted its position. The second respondent had. But he is bound by the doctrine of estoppel.
- 8 According to s 17 of the Interpretation Act, *Cap 1: 01*, an enactment repealing another, does not, among other things, affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed. The repealing enactment also does not affect, among other things, any legal proceeding or remedy in respect of a right, privilege, obligation, liability, etc., which is exercisable, continued or enforced as if the old enactment had not been repealed.
- 9 Vukutu is simply not agricultural land. The second respondent cannot seek to rely on a phantom report that allegedly re-graded it as agricultural land.
- 10 At any rate, the applicant was entitled to the continued occupation of Vukutu by virtue of s 291 of the new Constitution that provides that, subject to it, any person who, immediately before the effective date [i.e. 22 March 2013] was using or occupying, or was entitled to use or occupy, any agricultural land by virtue of a lease or other agreement with the State continues to be so entitled to use or occupy that land on or after the effective date, in accordance with that lease or other agreement;
- 11 Section 293[2] of the new Constitution provides that the State may not alienate more than one piece of agricultural land to the same person and his or her dependants. The first respondent having been allocated another farm elsewhere, namely Brittonia, where he was in fact farming, his offer letter in respect Vukutu was a complete nullity and should be set aside.

It is now trite that s 16 B of Constitutional Amendment No. 17 was a self-contained code on the compulsory acquisition by government of agricultural land for resettlement purposes. By the use of the *non-obstante* clause in sub-section [2], “*Notwithstanding anything contained in this Chapter -*” it overrode all other sections of the Bill of Rights. The

jurisdiction of the court to adjudicate on whether or not a litigant's rights as enshrined in the Bill of Rights had been violated was ousted. Section 16B, as part of the Bill of Rights in Chapter 3 of the old Constitution, was carried forward and incorporated into the new Constitution by virtue of s 72 [4] and the Sixth Schedule.

But *in casu*, the second respondent has not at all dealt with the applicant's case. The point is not about the derogation by s 16B of any right as might have been enshrined in the Bill of Rights. It is about the effect of such derogation on pre-existing rights such as had been conferred by a court order.

I shall not be bogged down by every facet of Mr *Biti*'s multifarious treatise. One point decides the matter. But for completeness' sake, I deal with four that are interrelated. I shall work backwards.

[i] **Alienation of Vukutu to first respondent**

Section 293 [2] of the new Constitution reads:

“[2] The State may not alienate more than one piece of agricultural land to the same person and his or her dependants.”

The second respondent has not refuted the applicant's claim that the first respondent was allocated Brittainia under the land reform programme. So I take it as fact. Even accepting that Vukutu is now suitable for agricultural purposes, the second respondent has not explained why it is being given to the first respondent. Multiple farm ownership is unconstitutional. Therefore, the purported allocation of Vukutu to the first respondent is null and void. In the circumstances, the order sanctioning the eviction of the first respondent from Vukutu and barring him from chopping down wood from there should be confirmed.

[ii] **Right of applicant to continued use and occupation of Vukutu**

Section 291 of the new Constitution reads:

“Subject to this Constitution, any person who, immediately before the effective date, was using or occupying, or was entitled to use or occupy, any agricultural land by virtue of a lease **or other agreement with the State** continues to be entitled to use or occupy that land on or after the effective date, in accordance with that lease **or other agreement.**” [emphasis added]

On the effective date, the applicant was using or occupying Vukutu. Even without invoking the Admin Court Order, that use and occupation was by virtue of the applicant's agreement with the State in October 2002. In September 2005 when s 16B came into operation, Vukutu would have been one of the properties affected by its inclusion on the listing in terms of Schedule 7. Post that, the State would, on more than one occasion, purport to alienate Vukutu again. But on being reminded, it would sanctify the agreement and abandon the purported alienation. The applicant remained in use and occupation of Vukutu. That was the state of affairs on the effective date of the new Constitution in May 2013. That was the state of affairs in July 2015 when the State again purported to alienate Vukutu to the first respondent. Nothing had changed.

In my view, the protection accorded the applicant for its continued use and occupation of Vukutu as at July 2015 was no longer merely by agreement with the State. It was now by virtue of the Constitution, in terms of s 291. The Admin Court Order neatly fell within the meaning of "... or other agreement with the State." In the circumstances, the purported deprivation of the applicant's right of use and occupation of Vukutu by the purported alienation of the property was unconstitutional. It is null and void.

[iii] **Whether s 16 B of the Constitution took away vested rights**

Undoubtedly, s 16B of Constitutional Amendment No. 17, in September 2005, was meant to have, and did have, retrospective application. It went as far back as 2000. All land as might have been identified by means of listing in the old *Gazettes* or *Gazettes Extraordinary* now belonged to the State.

Even though under the common law there is a general presumption against retrospective application of amending legislation, it is also the law that where the Legislature has made it plain, by the language used in the new law, that it intends that the amending legislation should apply retroactively, the courts have no choice but to give effect to such intention. The principle was expressed as follows by INNES JA in *Mahomed v Union Government*⁵ [quoted by BARTLETT J in *Walls v Walls*⁶]:

⁵ 1918 AD 1, at p 8

⁶ 1966 [2] ZLR 117 [H], at p 138A – C

“... The principle that [in the absence of express provision to the contrary] no statute is presumed to operate retrospectively is one recognised by the civil law ... The lawgiver is presumed to legislate only for the future; and therefore a statute which repeals another is considered not to interfere with vested rights under that other, unless it does so in clear terms. Very frequently, however, the legislature when it repeals one statute and enacts another in its place, inserts a clause in the repealing enactment defining with greater or less elaboration the extent, if any, to which the repeal is to operate retrospectively.”

There is a distinction between general retrospectivity and an interference with existing rights. A new law affects future matters. It does not take away pre-existing rights. In *Curtis v Johannesburg Municipality*⁷ INNES CJ, as he had now become, said:

“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 so interpreted as not to take away rights actually vested at the time of their promulgation.”

As far as the principle is concerned, *Walls v Walls, supra*, is almost on all fours with the current case. A decree of divorce had been granted in terms of the matrimonial causes regime in place at the time. Ex-spouses could agree on the right of the one to receive periodic emoluments after the divorce, and the obligation of the other to make such payments, but without such agreement being made, or being considered as an order of maintenance for the purposes of the then Maintenance Act. One of the effects of such an arrangement, which the law, as it stood then, expressly permitted, was that such a maintenance order would not be varied by the court without the consent of the paying ex-spouse. On the parties' divorce, such kind of an order was granted by consent. The ex-husband continued to make payments. Eighteen years later, the ex-wife applied for an upward variation of the amount. The old Matrimonial Causes Act had now been repealed and replaced. The new Act allowed the court, in granting a decree of divorce, or at any time thereafter, to make an order with respect to the payment of maintenance.

A three judge court ruled that the “maintenance order” could not be increased without the consent of the ex-husband. *Inter alia*, it was held that the “maintenance order” under the old law had given the ex-husband a substantive right that it would not be regarded as maintenance for the purposes of the Maintenance Act. Therefore, there could be no variation without his consent.

⁷ 1906 TS 308 at p 311

The court also held that a distinction had to be drawn between retrospectivity, which declares that at a particular date the law shall be taken to have been that which it was not, and interference with existing rights. The court found that there was nothing in the new law from which it could be inferred that the intention of the Legislature had been to legislate with retrospective effect or to interfere with existing rights.

*Barclays Bank v Nyahuma*⁸ is also an analogous case. In it, the employee had been dismissed when, in terms of the then existing labour legislation, an appeal suspended the decision appealed against. At the hearing of an appeal in the Labour Court, the new labour legislation had reversed the old position. Now an appeal did not suspend the decision appealed against. CHIDYAUSIKU CJ held that the rights and obligations of the parties that had accrued and had existed at the time of the noting of the appeal had not become affected by the subsequent amendment. The learned Chief Justice quoted with approval the remarks of his predecessor, GUBBAY CJ, as he then was, in *Nkomo and Another v Attorney General, Zimbabwe, and & Others*⁹, as follows:

“It is a cardinal rule in our law,, that there is a strong presumption against a retrospective construction. Even where a statutory provision 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,, unless such a construction appears clearly from the language used or arises by necessary implication.”

In *Walls*, the rights granted by the court, which the respondent had enjoyed for eighteen years, were held to have been unaffected by the supervening legislation which purported to apply retrospectively. It was the same situation in *Nkomo and Another v Attorney General, Zimbabwe, and & Others* and *Barclays Bank v Nyahuma, supra*.

In the present case, the Administrative Court, in its preamble to the substantive order that it eventually passed, endorsed the agreement between the applicant and the second respondent concerning Liverpool and Vukutu. In *Walls*, the court had similarly adopted the parties’ consent paper and had made it part of its order.

Therefore, the rights and obligations granted by the Admin Court Order and which had endured for fourteen years until the second respondent purported to alienate Vukutu to

⁸ SC 86/04

⁹ 1993 [2] ZLR 422 [S], at p 428H – 429C

the first respondent, a person that did not even qualify, were not affected by s 16 B of Constitutional Amendment No. 17.

Section 17 of the Prescription Act, [*Chapter 1:01*], deals with the effect of the repeal of an enactment. The relevant provision reads as follows:

- “[1] Where an enactment repeals another enactment, the repeal shall not –
- [a]
 - [b]
 - [c] affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed; or
 - [d]
 - [e]
- ”

In my view, the Prescription Act merely codifies the common law as regards retrospectivity of an amending enactment.

[iv] **Power of the courts to review constitutionality of expropriation**

Mr *Magadure* argued the second respondent’s case on the premise that the applicant’s case was purely a s 16 B acquisition and that, as such, the courts are precluded for all time from meddling. To him, the courts cannot even check whether or not a particular expropriation is indeed a compulsory acquisition in terms of the Constitution. With respect, that is not correct. The Supreme Court rejected that notion. In *Mike Campbell*, it said [at pp 44 E – H]:

“Section 16B[3] of the Constitution has not however taken away, for the future, the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s16B[2][a]. This is because the principle behind s 16B[3] and s 16B[2][a] is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B[2][a] of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B[2][a] of the Constitution, a court is under a duty to uphold the Constitution and to declare it null and void. **By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts, on the existence of which it provided that the acquisition of agricultural land must depend, existed in a particular case as required by the provisions of s 16B[2][a] of the Constitution.**”[my emphasis]

At the risk of deforming, with all due deference to the superior court, such a magnificent moulding of the principle, I would add, as I have already found in this case, that there is nothing in s 16B[3][a] that precludes the court from assessing and determining from the words used, the reach of s 16 B [2] [a] in relation to retrospectivity of a repealing enactment.

I agree with Mr *Biti* that the removal of the courts' jurisdiction under s 16 B of Constitutional Amendment No.17 was only in relation to any possible challenge, on the merits, by a person having rights or interest in agricultural land compulsorily acquired, or to be acquired, by the State for redistribution in terms of the land reform programme. The status of the judiciary, as the watchdog of the Constitution in terms of Chapter 8, was not affected. Under s 175 of the Constitution, it is the judiciary that is reposed with the power to make orders concerning the constitutional invalidity of any law **or any conduct of the President or Parliament** [my underlining].

In respect of their own Constitution, the South African Constitutional Court, in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*¹⁰said [per CHALSKALSON P, at p 918, para 100I – J:

“The Constitution itself allows this Court to control the consequences of a declaration of invalidity if it should be necessary to do so. Our duty is to declare legislative and executive action which is inconsistent with the Constitution to be invalid, and then to deal with the consequences of the invalidity in accordance with the provisions of the Constitution.”

Thus, the jurisdiction of the court to review the constitutional validity of, *inter alia*, any expropriation in terms of the Constitution, has not been, and cannot be, withdrawn by any legislative device.

My conclusions above make it unnecessary for me to determine the rest of the applicant's causes, even though there is a strong temptation to interrogate the second respondent's suspicious allegation that Vukutu was re-assessed and re-graded in 2014 as land suitable for agricultural purposes.

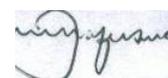
The applicant has sought costs of suit on a legal practitioner and client scale. No basis for such has sufficiently been laid out. Therefore, costs shall be awarded on the ordinary scale.

¹⁰ 1995 [4] SA 877

In the circumstances, the provisional order issued by this court on 5 August 2015 is hereby confirmed. Based on the final relief sought by the applicant, and on the findings in this judgment, the following order is hereby granted:

- 1 The second respondent is bound by the Order of the Administrative Court on 16 October 2002 in Case No. LA2041/02;
- 2 The rights granted, and the obligations imposed by, the Administrative Court Order aforesaid were not affected by the 17th amendment to the old Constitution which, *inter alia*, ushered in s 16 B thereto.
- 3 The offer of land in terms of the letter from the second respondent to the first respondent dated 15 July 2015, in respect of certain piece of land situate in the district of Makoni, measuring 87.8268 hectares otherwise known as Vukutu of Liverpool, is hereby declared null and void.
- 4 The first and second respondents shall pay the costs of suit jointly and severally.

15 June 2016



Tendai Biti Law, legal practitioners for the applicant.
Civil Division of the Attorney-General's Office, legal practitioners for the second respondent