HORTBAC (PVT) LTD.
versus
THE MINISTER OF LANDS, AGRICULTURE AND RURAL RESETTLEMENT N.O.
And
JAMES CHIYANGWA
And
TENDAI BONGA
And
RONALD KITULI

HIGH COURT OF ZIMBABWE
WAMAMBO J
MASVINGO, 14 NOVEMBER, 2019 & 6 JULY, 2020

Opposed Application

G. Madzoka with I. *Chingarande* for the applicant
T. Undenge for the 1st respondent
A. Maeresera for the 2nd and 4th respondents

WAMAMBO J: The applicant seeks the following relief as per the draft order:-

"*IT IS ORDERED THAT*

1. *The applicant be and is hereby declared to be the lawful occupier and owner of portion of the Globe Farm measuring 142,38 hectares held under Deed of Transfer No. 224/96.*

2. *The offer letters issued to the 2nd, 3rd and 4th respondents by the 1st respondent be and are hereby declared to be unlawful and wrongful and accordingly set aside.*

3. *The 2nd, 3rd and 4th respondents are declared to be in unlawful occupation of the portion of the Glebe Farm, measuring 142,38 hectares, Goromonzi Mashonaland East*.

4. *The 1st,2nd, 3rd and 4th respondents are ordered to pay costs of suit on a client and attorney scale, jointly and severally, one paying the others to be absolved*."

The applicant is the former owner of a farm called The Glebe in the District of Goromonzi held under Deed of Transfer Number 224/96 (*hereinafter called the farm*). The government acquired the said farm under the Land Acquisition Act [*Chapter 20:10*]. The applicant engaged the first respondent through the Administrative Court. The engagement led to the result that 1st respondent subdivided the farm into two and applicant was given a portion measuring 142,38 hectares while 1st respondent obtained 526,81 hectares. The negotiations were encapsulated into a Court Order by the Administrative Court on 8 August 2003 under case number LA 2898/02. The order was granted by consent of the appellant and 1st respondent. The said Order reads as follows:-

"IT IS ORDERDED BY CONSENT THAT:-

1. *The Acquisition of the undermentioned property in terms of Section 7 of the Land Acquisition Act [Chapter 20:10] be and is hereby confirmed*

   (a) *Portion of Glebe measuring 526.84 hectares situated in the District of Goromonzi held under Deed of Transfer Number 224/96*

2. *The Acquisition proceedings in respect of the remaining portion of Glebe measuring 142,38 hectares situated in the District of Goromonzi held under Deed of Transfer No. 224/96 be and is hereby withdrawn.*

3. *The applicant shall subdivide Glebe and pay the subdivision costs thereof.*

4. *There shall be no order as to costs.*

Thereafter 1st respondent allocated the same piece of land (*that is the 142,38 hectares that had been withdrawn from the acquisition process through the above Administration Court Order*) to 2nd, 3rd and 4th respondents through offer letters. This allocation to the 2nd, 3rd and 4th respondents is essentially what has dissatisfied the applicant.

There were spirited arguments from all parties involved.

Applicant's arguments unfolded as follows:

The 1st respondent proceeded unlawfully by apportioning the same piece of land allocated to applicant through an Administration Court Order.

1st respondent's conduct violated applicant's rights over the piece of land and infringed on its constitutional obligation imposed by section 291 of the Constitution.

- The applicant's massive developments on the piece of land have been undermined by the allocation of piece of land to the 2nd to 4th respondents
- The Administrative Court Order of 8 August, 2003 is lawful authority and remains extant
- The portion of land allocated to the applicant remains ungazetted and remains private property

Constitutional Amendment No. 17 of 2005 does not apply to this case as an order of Court had already been granted when it came into effect. The gazette of 18 May 2001 was withdrawn by the Administrative Court Order of 8 August, 2003.

First respondent strenuously made submissions to the following effect.

Section 2 of the Gazette Land (Consequential Provisions) Act [*Chapter 20:28]* provides that lawful authority is an offer letter, a permit or a land resettlement lease and applicant does not possess any of the three.

Section 16B(2) as read with Section 16B(3) of Constitutional Amendment Number 17 of 2005 of the former Constitution provides that all land previously identified for resettlement vests in the State.

Reliance was also placed on Section 289 of the Constitution and among others the case of the *Commercial Farmers Union and Others* v *The Minister of Lands, Rural Resettlement and Others* 2010 (1) ZLR 576 (S).

Second to 4th respondents relied on various cases, notably *TBIC Investments (Pvt) Ltd and Another* v *Mangenje & Others* SC 13/18, *Cedor Park (Pvt) Ltd* v The *Minister of State for National Security and Land Reform* (hereafter the Cedor Park matter), *Resettlement in the President's Office* HB 65/10 (*hereinafter referred to as the Cedor Park matter*), *J.C. Connolly & Sons (Pvt) Ltd* v *Ndlukula & Anor*. SC 22/18.

The effects of Constitutional Amendment No. 17 of 2005 were canvassed in detail. Counsel for 2nd to 4 respondents sought to distinguish the case of *Vukutu (Pvt) Ltd* v *Pride Kwinje and The Minister of Lands, Land Reform and Resettlement* HH 364/16 (*hereinafter called the Vukutu matter*) which the applicants heavily relied on. To my mind central to the instant case is the effect

of the Constitutional Amendment 17 of 2005 and the Constitution of 2013. Did one or both of them supercede the Administrative Court Order or does the Administrative Court order remain intact.

In the *Vukutu* matter (supra) MAFUSIRE J made an important observation at pages 8-9 as follows: -

"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 subsection [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 into the new Constitution by virtue of s 72(4) and Sixth Schedule."

MAFUSIRE J in the Vukutu matter (supra) found as follows:-

First respondent was allocated another farm and thus the purported allocation of Vukutu Farm to the first respondent is null and void. Notably in this case there is no similar averment.

On the effective date of the new Constitution the applicant was using or occupying Vukutu. The court found that the Administrative Court Order fell within the meaning of "or other agreement with the State "under Section 291 of the new Constitution.

Section 291 reads as follows:-

"*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*".

In the instant case there is an Administrative Court Order alienating 142,38 hectares to the applicant. The applicants assert in paragraph 23 of the Answering Affidavit that it is in lawful occupation. It follows in this case as well that the occupation by applicant of the portion of the farm allocated to it through the Administrative Court Order and/ or entitlement to occupy the said land places the applicant squarely within the confines of section 291 of the Constitution. I thus find adopting the same reasoning by MAFUSIRE J in the Vukutu case that the purported deprivation of applications rights of use and occupation of a portion of Glebe farm is null and void.

The Honourable Judge placed reliance on Section 17 of the Prescription Act [*Chapter 1:01*] and common law as regards retrospectivity of amending legislation and cases such as *Barclays Bank* v *Nyahuma* SC 86/04, *Nkomo and Another* v *Attorney General Zimbabwe and Others*

1993(2) ZLR 422(S). He found flowing from the above legal framework that the rights and obligations granted by the Administrative Court Order were not affected by section 16B of the Constitutional Amendment No. 17.

In this case the Administrative Court Order relied on by the applicant was granted on 8 August, 2003. It has endured up to this late stage when the 2nd to 4th respondent were granted offer letters to the same property.

I find in the circumstances that the reasoning adopted in the Vukutu case is sound and also find that section 16B did not affect the rights and obligations granted by the Administrative Court Order of 8 August 2003.

MAFUSIRE J in the Vukutu case at page 14 said the following:-

> "*I agree with Mr Biti that the removal of the court's jurisdiction under s 16B of Constitutional Amendment No. 17 was only in relation to any possible challenge, on the merits by a person having rights or interests in agricultural land compulsory 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."*

A reading of the Vukutu judgment as summarised above clearly reflects that the facts in that case and in the instant case were similar. It is also clear that the learned Judge in that case did not place reliance only on the fact that the 1st respondent in that case had been allocated other land under the Land Reform Programme. As summarised above there was other major considerations leading to the provisional order being confirmed and an order *inter alia* binding second respondent to the Administrative Court Order and declaring the offer letters to the first respondent being declared null and void.

It is also clear that the matter of Cedor Park matter (supra) was decided before the ushering of the New Constitution of 2013 which contains Section 291 the effects of which I have found to be in favour of the applicant.

To that end I am of the considered view that the applicant deserves the relief he seeks. On costs I am convinced that not enough basis has been laid out for the request for costs on a legal practitioner and client scale. The matter appears important to resolve an important facet of the Land Reform Programme. Costs will thus be granted on the ordinary scale.

In the result it is ordered as follows:-

IT IS ORDERED THAT: -

1. The applicant be and is hereby declared to be the lawful occupier and owner of a portion of the Glebe Farm measuring 142,38 hectares held under Deed of Transfer No. 224/96
2. The offer letters issued to the 2nd, 3rd and 4th respondents by the 1st respondent be and are hereby declared to be unlawful and wrongful and accordingly set aside.
3. The 2nd, 3rd and 4th respondents are declared to be in unlawful occupation of the portion of the Glebe Farm, measuring 142,38 hectares Goromonzi, Mashonaland East.
4. The 1st, 2nd, 3rd and 4th respondents are ordered to pay costs of suit jointly and severally, one paying the others to be absolved.

G.N. Mlotshwa & Co, applicant's legal practitioner
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners
Chizengeya, Maeresera & Chikumba, 2nd to 4th respondents legal practitioners