

REPORTABLE (38)

(1) NAVAL PHASE FARMING (PRIVATE) LIMITED (2) BEACH FARMS (PRIVATE) LIMITED (3) TAWANDA NYAMBIRAI
v
(1) MINISTER OF LANDS AND RURAL RESETTLEMENT (2) BERNARD MAKOKOVE (3) STEPHEN CHIURAYI (4) MALVERN DZVAIRO

**SUPREME COURT OF ZIMBABWE
HLATSHWAYO JA, BHUNU JA & UCHENA JA
HARARE: NOVEMBER 24, 2016 & JULY 27, 2018**

T. Mafukidze, with him *H. N. Nkomo*, for the appellants

J. Mumbengegwi, for the first respondent

D. Ochieng, for the second to fourth respondents

HLATSHWAYO JA: This is an appeal against the entire judgment of the High Court dismissing the appellants' application for the following order:

“IT IS DECALRED THAT:

1. The purported acquisition of Duncanston, Kopje Alleen, the Beach, and Rustfontein by the first Respondent is invalid.
2. The occupation of Kopje Alleen, the Beach, and Rustfontein by the Respondents and all those claiming title through them is illegal.

IT IS ORDERED THAT:

1. The Respondents and all those claiming title through them be ejected from Kopje Alleen, the Beach and Rustfontein.
2. The Respondents jointly and severally, the one paying the others to be absolved, pay the costs of suit.”

The facts leading to the dismissal of the application are as follows:

The first and second appellants are registered companies. The third appellant is the managing director and principal shareholder of the first two appellants. The second appellant asserted that it owned the two farms that were contiguous, namely Kopje Alleen and the Beach and all the movable assets thereon through the acquisition of the entire issued share capital of the second appellant by the third appellant under two separate agreements on 21 September 2000. Upon acquiring the farms, the title deed to the two farms was passed in favour of the second appellant. It is further alleged that on 25 October 2001, the appellants acquired all rights of occupation and use of another farm called Rustfontein from one Jacobus Johannes Erasmus and that farm was the administration centre for all three farms including Kopje Alleen and The Beach.

On 20 October 2000, the first respondent proceeded to give notice in the Government Gazette that it intended to compulsorily acquire Rushfontein Farm for resettlement purposes under General Notice 483G of 2000. The notices were given in terms of s 5(1) of the Land Acquisition Act [*Chapter 20:10*] (“the Act”). The first respondent gave the same notice with respect to Kopje Alleen Farm in the Government Gazette under General Notice 591 of 2001 on 16 November 2001. On 3 September 2004, the first respondent then gave notice of its intention to compulsorily acquire The Beach Farm in the Government Gazette under General Notice 449 of 2004. It is common cause that all three Government Notices were listed under Schedule 7 of the former Constitution.

The appellants made an objection to the acquisition of the farms in terms of s 5(1) (a) (iii)A of the Act. In turn, the first respondent made an application for the confirmation

of the compulsory acquisition of the farms in the Administrative Court on 11 February 2002 in terms of s 7 of the Act. At the hearing of the application on 20 February 2003, it is averred that the first respondent withdrew the application and the Administrative Court held that the “withdrawal nullifies s 5 notices and the s 8 order issued in respect of the two properties.”

The first respondent then gave the second to fourth respondents the authority to occupy all the farms, including Rustfontein. As a result, it is averred that those who claimed occupation of the three farms through the appellants were violently ejected from the farms by the second to fourth respondents. It is on that basis that the appellant approached the High Court on 2 February 2015 for an order as captured earlier on.

According to the appellants, their removal from the farms was unlawful because they were violently removed from the farms which they were in peaceful occupation of. Therefore, it is alleged, at the time that the appellants approached the High Court, the second to fourth respondents illegally occupied the said farms. The appellants further stated that as long as the Administrative Court order was extant, the three farms were not validly gazetted since that order had declared the government notices invalid.

The first respondent, having been given time to file their notice of opposition out of time, opposed the application by stating that in effect, the Administrative Court order was overtaken by events when s 16B of the former Constitution came into force. It is common cause that s 16B of the former Constitution provided that agricultural land that was identified on or before 8 July 2005 in the Gazette or Gazette Extraordinary under s 5(1) of the Act as listed under

Schedule 7 of that Constitution and was required for resettlement purposes was acquired by and vested in the State with full effect from 8 July 2005. According to the first respondent, the acquisition of the farms was beyond his control. He also asserted that the second to fourth respondents occupied the farms legally on the basis of valid offer letters that he issued to them.

The second to fourth respondents asserted that they were legal occupants of the farms because they were given offer letters to occupy the farms. They also argued that since the three farms had been gazetted and were listed under Schedule 7 of the former Constitution that was conclusive proof that the farms had been compulsorily acquired and that acquisition could not be challenged in a court of law. The second to fourth respondents also disputed the allegation that they despoiled appellants. It was further asserted that the appellants' remedy was to seek compensation for any improvements on the farms and not to allege that the acquisition of the farms was discriminatory since the farms were owned by black persons. The second to fourth respondents also maintained that the order of the Administrative Court with regards to the notices made in the Government Gazette for the compulsory acquisition of the farms did not in any way invalidate the listing of those farms under Schedule 7 of the former Constitution.

The High Court found that the farms were properly identified in terms of the Act, that they were lawfully listed in Schedule 7 of the former Constitution and that the second to fourth respondent held validly issued offer letters. On that basis, therefore, the court was of the view that the appellants could not have been entitled to the relief which they sought but only to claim compensation for improvements on the farms. The application was therefore dismissed. The appellants were aggrieved by that dismissal and appealed to this court on the following grounds:

GROUNDS OF APPEAL

1. The court *a quo* erred at law in condoning the failure by the 1st respondent to file opposing papers on time in circumstances where:-
 - 1.1 There is no finding that the explanation for the delay was adequate
 - 1.2 There is no finding, in fact, that the 1st respondent had met all the requirements for an application for condonation and/or application for upliftment of bar.
 - 1.3 The application was fatally defective as it did not comply with Rule 84 of the High Court Rules (1971).
2. The court *a quo* erred in fact in concluding that the ownership of the Kopje Alleen and Beach Farms was questionable or not clear when the facts on record show that:
 - 2.1 2nd appellant, at all material times, always owned Beach Farms and Kopje Alleen.
 - 2.2 3rd appellant acquired the entire issued share capital of the 2nd appellant on 21 September 2000.
 - 2.3 2nd appellant duly applied to 1st respondent for a certificate of no present interest.
 - 2.4 The acquisition of the entire issued share capital of 2nd appellant by 3rd appellant became unconditional according to law when 1st respondent failed to issue a certificate of no present interest by 11 December 2000, upon the expiry of the 90 days from 11 September 2000 as prescribed by law.
 - 2.5 1st respondent only purported to compulsorily acquire these farms on 20 April 2001, long after the acquisition of 2nd applicant's entire issued share capital by 3rd appellant had become unconditional, payment having already been effected and the appellants in possession of the two farms.
3. The court *a quo* erred in fact and in law in finding that there was no "*admissible evidence on record to controvert*" the bald denials by the 2nd to 4th respondents that they did not take part in the forcible removal of the applicants from their farms when the record is replete with evidence that the forcible removal was done at their instance and/or for their benefit.
4. The court *a quo* erred at law in finding that the Estate of the Late General Mujuru or the former Vice President needed to be cited in order for the court to properly evaluate the allegations of despoliation made by the appellants when in fact no substantive relief was being sought against them.
5. The court *a quo* erred at law in finding that the appellants had been forcibly ejected from their farms by, or at the instance, or for the benefit, of the respondents who did not have lawful authority to do so at the time.
6. The court *a quo* misconstrued section 12 of the High Court Act in holding that a declaratory order "*cannot be directly enforced*", and thus erred at law.

7. The court *a quo* erred in finding that the appellants' farms were properly and lawfully identified under section 5 of the Land Acquisition Act and itemized under schedule 7 of the former Constitution when:-
 - 7.1 It was common cause that the notices under which these farms had been identified were nullified by the Administrative Court, and no fresh subsequent notices were issued.
 - 7.2 The decision of the Administrative Court is extant.
8. The court *a quo* erred in finding that the appellants' farms constituted agricultural land required for resettlement purposes as required by section 16B of the former Constitution when the farms were already owned, or occupied by people who fall in the category of people for whose benefit land reform was implemented in terms of section 16A of the former Constitution.
9. The court *a quo* erred in that it addressed itself to the wrong issue, of whether the purpose of land reform is to take away land from Zimbabweans of white descent and redistribute it to Zimbabweans of black descent, when the correct issue it must have addressed itself to and resolved as set out in section 16A of the former Constitution, was whether land already owned or occupied by people sought to be protected under section 16A (whatever their race), can be said to be land "*required for resettlement purposes*" within the meaning of section 16B(2)(a) of the former Constitution.

Prior to the hearing of the appeal, the appellants filed an application to adduce evidence they sought to rely on to show that the acquisition of the farms was not done in accordance with the law. The application was granted in chambers with the consent of the parties. Costs in that application were to be in the cause.

On appeal, Mr *Mafukidze* for the appellants accepted that by virtue of s 16B of the former Constitution, all agricultural land identified under gazettes listed under Schedule 7 of that Constitution was State land. He however insisted that the first respondent had illegally acquired the three farms as the notices which had been placed in the Government Gazettes as required by s 5(1) of the Act had been declared invalid by the Administrative Court. According to Mr *Mafukidze*, s 16 B (2)(a)(i) of the former Constitution only recognised land to have been

compulsorily acquired if it was identified on or before 8 July 2005 in the Gazette or the Gazette Extraordinary. The appellants argued that by virtue of the Administrative Court order which remained extant at all material times, the three farms were no longer lawfully identified as required by s 16 B (2)(a)(i) of the former Constitution. The coming into effect of s 16B of the former Constitution did not regularise the striking down of the notices by the Administrative Court and the listing of those farms under Schedule 7 of the former Constitution was therefore a nullity. On that premise, therefore, Mr *Mafukidze* submitted that effectively, at the time that the appellants were removed from the farms and at the time that the first respondent gave offer letters to the second to fourth respondents, the offer letters were also invalid hence their occupation of the farms was not sanctioned by law. The acquisition of the farms was therefore not in accordance with the law.

Per contra, Mr *Mumbengegwi* for the first respondent submitted that the court had no jurisdiction to inquire into the validity of the acquisition of the farms by virtue of s 16B (3)(a) of the former Constitution. It was also his argument that as long as the farms in question were identified under Schedule 7 of the former Constitution, then they were compulsorily acquired in terms of the law.

Mr *Ochieng* for the second to the fourth respondents was of the view that whatever rights the appellants had to possession of the farms were taken away by the coming into effect of s 16B of the former Constitution. Section 16B of the former Constitution made an inquiry into the validity of the compulsory acquisition a factual matter. All that had to be proven was that the agricultural land in question was identified under Schedule 7 of the former Constitution. Upon showing that, then that land was compulsorily acquired in terms of the law. With regards to the

appellants' argument on the import of the order of the Administrative Court, Mr *Ochieng* asserted that as long as the farms in question were identified under Schedule 7 of the former Constitution, the nullification of the notices in the Administrative Court was inconsequential.

ISSUES FOR DETERMINATION

From the arguments advanced by the parties, it must first be determined whether the court had the jurisdiction to inquire into the legality of the compulsory acquisition of the farms. The second determination will be on the effect of the Administrative Court order on the notices that were made for the compulsory acquisition of the farms in question.

APPLICATION OF THE LAW TO THE FACTS

The question on the jurisdiction of the court can be determined by reference to s 16B(2) and the relevant court decisions made under it:

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; 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.

(3) 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, and the provisions of section 18(1) 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 -

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;

(b) 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.

(4) As soon as practicable after the appointed day, or after the date when the land is identified in the manner specified in subsection (2)(a)(iii), as the case may be, the person responsible under any law providing for the registration of title over land shall, without further notice, effect the necessary endorsements upon any title deed and entries in any register kept in terms of that law for the purpose of formally cancelling the title deed and registering in the State title over the land.

(5) **Any inconsistency between anything contained in -**

(a) a notice itemised in Schedule 7; or

(b) a notice relating to land referred to in subsection (2)(a)(ii) or (iii);

and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision. (emphasis added)

In *Mike Campbell (Pvt) Ltd & Ors v Minister of National Security Responsible for Land, Land Reform and Resettlement & Anor* 2008 (1) ZLR 17 (S). MALABA JA (as he then was) commented on the import of s 16B of the former Constitution at page 43F-G to 44A as follows:

“By the clear and unambiguous language of s 16B(3) of the Constitution the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases, in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited, in effect, to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the *Gazette* in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.”

At page 44E-H, the learned judge went on to observe:

“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 s 16B(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 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)

The *Mike Campbell* case makes it clear therefore that a court of law only has jurisdiction in a case where the aggrieved party seeks compensation for the improvements of the compulsorily acquired farms and where they allege that the acquisition was not in terms of the law, that is, it is not in terms of s 16B (2)(a) of the former Constitution. The appellants questioned the validity of the acquisition of the farms by the first respondent hence it is the court’s view that the court has jurisdiction in the matter. In effect, the appellants questioned whether the identification of the farms under Schedule 7 of the former Constitution was proper. The first respondent’s argument on the question of jurisdiction on this point is therefore without merit and is accordingly dismissed. However, by the same token, the appellants’ eighth and ninth grounds of appeal are not matters that any court of law may inquire into.

The next inquiry therefore is whether the first respondent acquired the farms in terms of the law. The court is of the view that the appellants’ argument with regards to the effect of the order of the Administrative Court is untenable at law. Section 5(7)(a) of the Act provides as follows:

(7) An acquiring authority may at any time—

(a) withdraw a preliminary notice, by publishing notice of its withdrawal in the Gazette and serving notice of its withdrawal on every person on whom the preliminary notice was served; ...” (my emphasis)

It is common cause that the first respondent did not withdraw the government notices in terms of s 5(7)(a) as above. Therefore, once the preliminary notices were then listed under Schedule 7 of the former Constitution as required by s 5(7)(a) of the Act, the three farms were compulsorily acquired in terms of the law. In the absence of evidence to the contrary, the appellants failed to convince the court that the compulsory acquisition of farms which they previously had an interest in had not been done in terms of the law. Their argument in that regard was therefore without merit and is accordingly dismissed. Since the appellant approached the court *a quo* challenging only the validity of the compulsory acquisition of the farms and the court having found no merit in their case, the appellants are not entitled to an order declaring the compulsory acquisition of the farms by the first respondent invalid.

There is ample support for the conclusion reached above in the recent case of *TBIC Investments (Pvt) Ltd &Ors v The Minister of Lands and Rural Development &Ors* SC 469/13 (although not decided at time of hearing, this court is bound to take judicial notice of it) where BHUNU JA, with the concurrence of GWAUNZA JA (as she then was) and GOWORA JA held that by virtue of s 16B(5) “the expirations, errors and withdrawals complained of by the appellant” could not invalidate or adversely affect the vesting of title in the State:

“The effect of the above section (s 16B(5)) was to revive, resuscitate and validate the acquisition of all identified agricultural land listed in the 7th Schedule for resettlement purposes prior to 8 July 2005 regardless of any errors or withdrawals in the acquisition process. No limitation has been imposed on the acquisition process once the land is shown to have been gazetted and listed in the 7th schedule prior to 8 July 2005.

The language used in s 16B (5) of the former Constitution is clear and unambiguous admitting no ambivalent interpretation. The only meaning to be ascribed to the section is that once land is gazetted and listed in schedule 7 it automatically stands acquired by the State with full title by operation of law. The mere fact that the notice was at one time withdrawn or expired is irrelevant. The same applies to any errors contained in the acquisition process.”

Having found that the farms were compulsorily acquired in terms of the law, it follows therefore that the appellants are not entitled to an eviction order against the second to the fourth respondents. That is so for the following reasons.

Section 290 (1)(a) of the current Constitution provides that all agricultural land which was itemised in Schedule 7 to the former Constitution continues to be vested in the State.

Section 291 of the Constitution goes on to state as follows:

“291 Continuation of rights of occupiers of agricultural land

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.”

It is not in dispute that the second to fourth respondents are in possession of offer letters to the farms in question. The farms continue to vest in the State. Section 291 as above entitles the second to fourth respondents to continue to occupy the farms. Furthermore, s 3(1) as read with s2 of the Gazetted Land (Consequential Provisions) Act (*Chapter 20:28*) confirms that once a person is given an offer letter to land which was compulsorily acquired, they have the lawful authority to occupy the land. Section 3(1) of the Gazetted Land (Consequential Provisions) Act provides that no person may hold, use or occupy gazetted land without lawful authority. Section 2 of the same defines lawful authority to include an offer letter. By enacting s 3 of the Gazetted Land (Consequential Provisions) Act, the Legislature intended that occupants with offer letters be

allowed to occupy gazetted lands. To then suggest that the respondents be removed from farms which they legally occupy would be in effect to render the Gazetted Land (Consequential Provisions) Act nugatory.

The appellant's right to occupy the farms was overtaken by events upon the coming into effect of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 which ushered in s 16B of the former Constitution. Resultantly, the appellants could not have been given a spoliation order in their favour against people who are legally entitled to occupy the farms. As was held in *Commercial Farmers Union & Ors v The Minister of Lands & Rural Resettlement & Ors* 2010 (2) ZLR 576 (S) at 594E, spoliation is a common law remedy which cannot override the will of Parliament and a common law remedy cannot render nugatory an Act of Parliament. The High Court was therefore correct in refusing to grant the spoliation order which the appellants sought.

In the light of the findings made above, there is no need to traverse the other matters raised in the grounds of appeal.

DISPOSITION

Accordingly, it is the court's view that the appeal lacks merit and it ought to and is hereby dismissed. Costs for both the application for leave to adduce further evidence and for the appeal itself are to be borne by the appellants.

BHUNU JA: I agree

UCHENA JA: I agree

Mhishi Legal Practice, appellants' legal practitioners

The Civil Division of the Attorney General's Office, first respondent's legal practitioners

Messrs Coghlan, Welsh & Guest, second to fourth respondent's legal practitioners