Judgment No. HB 131/2003
Case No. HC 1185/2003

L F WHITE & SON (PVT) LTD

And

MARTIN GEOFFREY WHITE

Versus

**MINISTER OF LANDS, AGRICULTURE &
RURAL RESETTLEMENT**

And

**MINISTER OF JUSTICE, LEGAL &
PARLIAMENTARY AFFAIRS**

And

THE ATTORNEY-GENERAL OF ZIMBABWE

And

MISHECK DUBE

And

**DR P MOYO, THE PROVINCIAL VETERINARY OFFICER –
MATABELELAND**

And

ONLY DUBE, THE ANIMAL HEALTH INSPECTOR, KEZI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 11 JULY AND 4 DECEMBER 2003

S P Finch for applicant
C Dube for 1st, 2nd and 3rd respondents

Chamber Application

NDOU J: The second applicant is a director of the first applicant. The second applicant and his brother own individual half shares in two pieces of land known as La Concorde and Vreigevight situate in the district of Bulawayo. First

applicant leases and runs the farming operations on these two properties. The second applicant resides on Vreigevight and his co-director and brother. Andrew John White resides on La Concorde. The properties are farmed in conjunction with each other having a common boundary and the combined hectradge is 4 902 hectares.

In respect of La Concorde Farm the Preliminary Notice in terms of section 5 of the Land Acquisition Act [Chapter 20:10] (the Act) was served the respondents on 24 March 2001. The acquisition order in terms of section 8 of the Act was served and on 15 March 2002 an application in terms of section 7 of the Act was served.

In respect of Vreigevight Farm the preliminary notice was served on 13 April 2001 and the acquisition order was served and on 19 February 2002 an application was served in terms of section 7 of the Act.

Both these properties are subject to applications presently before the Administrative Court in terms of section 7 reference numbers LA 680/001 and 1009/002.

The nature of this application is twofold. Firstly the applicants seek a declaration to the effect that until such time as the issue of the acquisition of applicants' properties have been finally determined by the Administrative Court, then no active acquisition or settlement can take lace. Secondly, it is to remove all cattle which have been illegally brought onto these properties and to prevent fourth respondent from bringing any further cattle onto the property without the express permission of first and second applicants.

In essence the applicants' case is that there is a situation being created that will denude the disputed land of grazing to such an extent that serious environmental damage will be caused to the lands by over grazing, which in turn will lead to erosion

and eventually irreversible damage to the veld which, *inter alia*, will effect of destroying applicants' farming operations on the properties. Thus if they win their appeals in the Administrative Court and be entitled to keep the properties, this would result in returning the land in extreme degradation if the uncontrolled influx of cattle onto the land were not stopped.

The first, second and third respondents oppose the application. Their case is that the applicants' case is not attainable. They say by the operation of law, the said farms now vest with the acquiring authority as the applicants have been served with orders in terms of section 8 of the Act. The applicants are not challenging the constitutionality of section 8. Therefore in terms of section 8 the applicants should have ceased all farming activities in the disputed properties within ninety (90) days of the order specified in that section. By operation of the law, the said properties now vest in the acquiring authority. In fact according to the said provisions the applicants should have moved out. What the applicants are basically asking for in the interim relief is the suspension of the operation of section 8 in respect of their properties until their appeals pending in the Administrative Court have been finalised. This is not attainable. In my view section 8 may possibly be suspended if there is a matter pending before the Supreme Court challenging its constitutionality. *In casu*, there is no such matter pending. What the applicants seek from this court is that it stops a lawful process. Can this court authorise the applicants to continue their farming operation in contravention of the explicit provisions of section 8? With respect, the court cannot stop what is lawful and in turn authorise what is unlawful. There are settlers already on these properties. The applicants' case is, in any event, that they

have no problems with the settlers (and their cattle) who have all along co-existed with them. In terms of the Act I have no doubt that the first respondent has the power to allocate the acquired land even with cases pending in the Administrative Court. What seems debatable is whether "to allocate" includes "to settle" people on the land. I do not have to decide this issue *in casu*. The dilemma faced by the applicants is that it seems that according to the Act the settlers are lawfully present on the property yet the applicants are unlawfully present after the expiry of ninety days. In order to contextualise the application it is necessary to highlight the relevant statutory provisions.

The Act has been amended on a number of occasions. First, in terms of section 5, where an acquiring authority intends to compulsory acquire land, he shall, *inter alia*, serve on the owner of the land and the holder of any other registered real right in land (section 5(1)) *Nicolle* v *Minister of Land, Agriculture & Rural Resettlement and Ano* HH-34-03. Second, the acquiring authority shall thereafter serve an order in terms of section 8.

Section 8 reads:

> "1. Subject to section seven, the acquiring authority may, not less than thirty days after the date of publication of the preliminary notice in the Gazette, acquire, by order describing the nature and extent of the land affected and serve on the owner of the land concerned all or any of the land described in that notice."

In casu, the section 5 preliminary notice and the section 8 order were validly served on the applicants. In the circumstances the applicable provisions of section 8 reads:

> "The following provisions shall subject to subsection 5 of section seven and subsections 2, 3, 4 and 7 of section eight apply to the vacation by the owner or occupier of land acquired in terms of this Act:

(a) …
(b) In relation to any agricultural land required for resettlement purposes, the making of an order in terms of subsection (1) of section eight shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty-five days after the date of service of the order upon the owner or occupier and he fails to do so, he shall be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or imprisonment for a period not exceeding two years or both such fine and such imprisonment.

Provided that:
(i) the owner or occupier of that land may remain in occupation of his living quarters on that land for a period of not more than ninety days after the date of service of the order;
(ii) the owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i) and if he fails to do so he shall be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or imprisonment for a period not exceeding two years or both such fine and imprisonment."

The above statutory provisions are clear and unambiguous. The basic interpretation approach of our courts is intentionalism. This intention theory was aptly formulated in *Farrar's Estate* v *Commissioner of Inland Revenue* 1926 TPD 501 at 508 as follows:

> "The governing rule of interpretation – overriding the so-called "golden rule" – is to endeavour to ascertain the intention of the lawmaker from a study of the provisions of the enactment in question …"

(The "golden rule" referred to is the precept of literalism) – see also *Sanlam* v *Roux* 1978(2) SA 856(A) at 868, *Secretary for Inland Revenue* v *Brey* 1980(1) SA 472 (A); *Mkrola* v *Samela* 1981(1) SA 925 (A) at 930; *Federated Employers' Insurance Co Ltd* v *Magubane* 1981 (2) SA 710 (A) at 716 and *Pio* v *Smith* 1986 (2) ZLR 120 (S). The basis of this is the maxim – *Iudices est ius dicere sed non dare* i.e. it is the province of judges to expound the law and not to make it. In *R* v *City of London Court Judge* [1980] 1 QB 273 at 290, LORD ESHER MR said:

> "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity. In my opinion the rule has always been this – if the words of an Act admit of two interpretations, then they are not clear; and if one interpretation leads to an absurdity and the other does not, the court will conclude that the legislature did not intend to lead to an absurdity, and will adopt the other interpretation."

In our jurisdiction there is some exception or qualification to this rule. In *Ntini* v *Masuku* HB-69-03 at page 3 of his cyclostyled judgment CHEDA J said:

> "In as much as the courts have a duty to apply the law as it is, it is however now generally accepted that judges have an inherent duty to make law as they are required to meaningfully contribute to law reform and development.
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> In *Mashingaidze* v *Mashingaidze* 1995(1) ZLR 219 (H) at 225D ROBINSON J drove the last mail to the coffin regarding the need for judges to play their role in the law development when he stated,
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> "The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a cause. If a judge holds to their precedents too closely, they may surprise the fundamental principle of justice and fairness for which they stand."

This qualification is not applicable to the facts of this case. We are dealing here with clear provisions of the Act. The court cannot amend such clear provisions to achieve equity and justice. A reading of the several amendments to the Act shows that the legislature intended that the farmer should cease farming activities and vacate the land on the expiry of the stipulated period. The legislature has even criminalised failure to comply with the said provisions. The scenario here is not one of reform and development. To make law in the circumstances of this case would amount to a naked usurpation of the legislative function by the court under the guise of interpretation. The facts here are distinguishable from those in the cases *Mashingaidze* v *Mashingaidze supra* and *Ntini* v *Masuku supra*. In the latter cases the

learned judges were dealing with the development and reform of the common and customary law. Here we are dealing with explicit provisions of a statute. It is therefore not necessary for me to decide whether or not I agree wit the findings of ROBINSON and CHEDA JJ.

Mr *Finch*, for the applicants referred me to a number of cases where this court granted similar orders. I have looked at those matters. The orders were either made with consent of the respondents or simply by default. There was no decision on the merits. Why the first respondent ignored process in the other matters or consented to the relief sought is neither here nor there because this court is not bound thereby. The bottom line is that by operation of the law, these properties now vest in the acquiring authority. The applicant should have already ceased farming activities and vacated the acquired land. The nature of the relief sought is such that it is available to the acquiring authority or his lawful agent.

As the acquiring authority has impliedly allowed the applicants to co-exist with the first group of settlers with each party having cattle on the properties the applicants specifically submitted that they do not have problems with this group and their stock.

They are against the wholesale leasing by the fourth respondent, either on his own or on behalf of himself of "the grazing" on the property Such leasing of grazing impacts on the head of cattle belonging to the applicants and the "genuine" settlers. Such leasing of grazing has the effect of denuding the properties of all vegetation, bringing disease and diminishing the grazing area. Such wholesale movement of cattle under grazing leases by fourth respondent affects the applicants and the "genuine" settlers' livestock. In the circumstances, the applicants have made out a

prima facie case against the fourth, fifth and sixth respondent and the relief sought in respect of them is merited.

I accordingly dismiss the applicants' applications as against the first, second and third respondents with costs. As against the fourth, fifth and sixth respondents it is provisionally ordered as follows:

Terms of final order sought

That you show cause to this honourable court why an order should not be made in the following terms:

1. That fourth respondent be and is hereby permanently interdicted from moving cattle onto properties, La Concorde and Vreigevight both properties situate in the District of Bulawayo, without the prior written consent of the owner of the said property or a court order.
2. That fourth respondent and all those claiming under him be and are hereby directed to remove all cattle which he (fourth respondent) and all those claiming under him have unlawfully permitted to enter from surrounding district forthwith and the Deputy Sheriff be and is hereby authorised to remove the said cattle from the said properties.
3. In the event that the Deputy Sheriff, Bulawayo deems it necessary to give effect to this order, members of the Zimbabwe Republic Police are directed to assist the Deputy Sheriff, Bulawayo in removing the said cattle.
4. That fifth and sixth respondents are hereby permanently interdicted from issuing any cattle movement permits in respect of any cattle due to be moved into La Concorde and Vreigevight except those cattle

which have prior written consent of the owners of the said properties to be brought onto the said properties.

Interim relief granted

Pending the determination of this matter it is ordered:

1. That fourth respondent be and is hereby interdicted from moving cattle or any livestock on La Concorde and Vreigevight property situate in Bulawayo District.
2. That fourth respondent is required to immediately remove all cattle and other livestock which he has unlawfully permitted to enter La Concorde and Vreigevight properties and which are presently on the said properties and the Deputy Sheriff, Bulawayo be and is hereby authorised to remove the said cattle from the said properties.
3. In the event that the Deputy Sheriff, Bulawayo deems it necessary to give effect to this order, members of the Zimbabwe Republic Police are directed to assist the Deputy Sheriff, Bulawayo in removing the said cattle.

Service of provisional order

The provisional order shall be served by the Deputy Sheriff or his lawful deputies.

Webb, Low & Barry applicants' legal practitioners
Paradza, Dube and Associates 1st, 2nd and 3rd respondents' legal practitioners
instructed by the Civil Division of the Attorney General's Office