

REPORTABLE (07)

ALISTAIR MICHAEL FLETCHER

v

**(1) MINISTER OF LANDS, AGRICULTURE, FISHERIES, WATER AND RURAL
RESETTLEMENT (2) REGISTRAR OF DEEDS
(3) ROBERT NJANJI**

**CONSTITUTIONAL COURT OF ZIMBABWE
MAKARAU JCC, HLATSHWAYO JCC, PATEL JCC
HARARE, 27 FEBRUARY 2024 & 11 JUNE 2024**

T. Mpofu with G. R. J. Sithole and B. Masamvu for the applicant

L.T. Muradzikwa for the first respondent

No appearance for the second and third respondents

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

1

PATEL JCC: This is an unopposed application for leave to appeal to the Constitutional Court, made in terms of r 32 of the Constitutional Court Rules, 2016 (the Rules), against the decision of the Supreme Court (the court *a quo*) in Judgment No. SCB 03-24. The court *a quo* allowed, with costs, the first respondent's appeal against the decision of the High Court in HB 102-23. It further set aside that judgment and substituted it with an order upholding the first respondent's preliminary point on jurisdiction and declining jurisdiction to hear the matter.

The background

The applicant is Alistair Michael Fletcher. The first and second respondents have been cited in their official capacities as the authorities responsible for the management and

administration of matters involving land and water resources and the registration, management, and maintenance of land rights.

The applicant holds title to an immovable property known as Umguza Agricultural Lots of Umvutcha and Reigate (the land), under title deed No. 3188/83 (the land). The government acquired the land and published a notice to that effect in the *Gazette Extraordinary* on 25 August 2000, under General Notice No. 405 of 2000. Thereafter, the first respondent placed two caveats, Nos. 77/2019 and 844/2000 respectively, on the title deed. Additionally, the third respondent also placed a third caveat, identified as No. XN 26/2017, on the same land.

The applicant was dissatisfied with the endorsement of the caveats and subsequently filed an application in the High Court seeking the upliftment of the caveats. In his founding affidavit, he averred that under Case No. HC 2291/08 the High Court had prohibited the first respondent and other parties from interfering with the land and had further nullified caveat No. 844/2000 which had been placed by the first respondent. The applicant further claimed that the third respondent had acted with malice by unlawfully placing a caveat on the applicant's land, without any prior dealings with the applicant. He asserted that the placement of the caveat on the land was in violation of his constitutional right to enjoy property rights. The applicant further contended that the continued existence of the caveats on the land was causing undue prejudice, as he was unable to transfer title in the land without the approval of the first and third respondents. The applicant then prayed for an order uplifting the said caveats with costs.

The application in the High Court was opposed by the first respondent who raised three points *in limine*. The first two points related to the improper citation of the first respondent by the applicant. The third point *in limine* related to the jurisdiction of the High Court to hear the application. It was contended that the High Court did not have jurisdiction to determine the matter. The first respondent averred that the former 1980 Constitution prohibited any person having an interest in any land, listed in General Notices published in the *Gazette* or *Gazette Extraordinary* before 8 July 2005, from challenging any of the acquisitions in any court. He further noted that the above position was confirmed in ss 72(3) and (4) of the current 2013 Constitution of Zimbabwe. In addition, the first respondent submitted that, as the applicant's properties under title deed No. 3188/83 had been acquired and listed in the *Gazette Extraordinary* on 25 August 2000, his right to institute any claim or action over the land had been overtaken by operation of law. The first respondent prayed that the application for the upliftment of the caveats be dismissed on that basis.

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

3

At the hearing of the application, the High Court found that the third respondent had erroneously caused caveat No. XN 26/2017 to be endorsed on title deed No. 3188/83. The third respondent consequently conceded that the caveat be cancelled. (I should note in passing that the third respondent has not filed any opposing papers in the instant application).

On the question of its jurisdiction, the High Court held that the applicant was not challenging the acquisition of the land but, rather, the endorsement of caveats on the title deed of his land. The High Court was of the view that the application before it was premised on the order under HC 2291/08 declaring that the land held under title deed No. 3188/83 was not subject to

acquisition or resettlement. Therefore, it was held that the applicant had the legal right to seek the cancellation of unlawfully endorsed caveats on his land.

The High Court further determined that it lacked authority to modify, alter or declare null and void any order emanating from a judge of parallel jurisdiction. Accordingly, the court held that the caveats Nos. 844/2000 and 77/2019 were not supported by law since the order issued in HC 2219/08 established that the land held under title deed No. 3188/83 was not subject to acquisition or resettlement, and that order was still extant and binding. The court also concluded that the land in question could not be vested in the State as doing so would contradict the order issued under HC 2219/08. Consequently, the High Court held that the first respondent had no interest in the land. The court accordingly granted the application to uplift the caveats, with costs against the first respondent.

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

4

The first and second respondents were aggrieved by the decision of the High Court and noted an appeal to the Supreme Court on the following grounds:

- “1. The court *a quo* erred and grossly misdirected itself on a point of law by dismissing the appellants (*sic*) preliminary point that this (*sic*) court had no jurisdiction to adjudicate this matter at all as the farm was listed under schedule 7 of the Constitution hence its title vests in the State.
2. The court *a quo* misdirected itself by cancelling the caveats which had been endorsed on the 1st respondent’s title deed No. 3188/83 under caveats 844/2000, XN caveat 26/2017 and caveat 77/2019/ The effect of the cancellation would have reversed the acquisition of the appellants (*sic*) land from the state which cannot be done by a court of law.”

At the hearing of the appeal, it was argued on behalf of the first respondent that the High Court had no jurisdiction to determine the application for the upliftment of the caveats. The first respondent claimed that the land in dispute was gazetted in 2000 and 2008 and listed under

Schedule 7 of the 1980 Constitution and hence it was State land in terms of s 16B of that Constitution. The first respondent also submitted that the removal of the caveats by the High Court was akin to the reversal of the acquisition of the land. In addition, the first respondent submitted that the gazetting and acquisition of the land was not challenged by the applicant when those events occurred. It also averred that the High Court's order under HC 2291/08 was a *brutum fulmen* because it was contrary to the Court's decision in the case of *Commercial Farmers Union v The Minister of Agriculture, Land and Rural Resettlement & Ors* 2010 (2) ZLR 576.

For the applicant, it was submitted that s 16B of the 1980 Constitution only pertained to land acquired for agricultural purposes. Therefore, the acquisition of non-agricultural land could be legally challenged. Moreover, it was argued that the disputed land had been previously declared as part of Bulawayo City Council land and the latter could not be considered agricultural land. Based on these submissions, it was submitted that the acquisition of the applicant's land was effected in error.

The court *a quo* held that the only issue for determination was whether or not the High Court had the necessary jurisdiction to deal with the matter. The court held that, following the acquisition and gazetting of the applicant's land in 2000 and 2008, the land was acquired by the State and the applicant ceased to be its lawful owner. The court thus held that any dispute relating to the acquisition of the land had to be settled through the provisions of s 16B of the former Constitution.

The court *a quo* further held that s 16B had ousted the jurisdiction of the courts to enquire into the legality or otherwise of the acquisition of land in terms of s 16B(2)(a) of the former Constitution. Consequently, the applicant had no legal cause or justification to either be aggrieved by the caveats placed over the land that had been acquired by the State or to approach the courts for the cancellation of such caveats. The court also held that the applicant had waived his right to lay claim to the land or request the cancellation of the caveats once the land was officially gazetted. Hence, it was concluded that the High Court lacked the jurisdiction to hear the application for the upliftment of the caveats imposed on the land.

Furthermore, the court *a quo* held that after the interpretation of s 16B of the former Constitution by the Court in the cases of *Campbell & Anor v The Minister of National Security Responsible for Land Reform and Resettlement & Anor* SC 49-07 and *Commercial Farmers Union v The Minister of Agriculture, Land and Rural Resettlement & Ors* 2010 (2) ZLR 576, the judgment under HC 2219/08 handed down in January 2009 was rendered a *brutum fulmen*. The applicant could not, therefore, rely on it as an extant judgment defining his rights over the land as the court's jurisdiction had been expressly ousted by the above-cited cases.

The court *a quo* was also of the view that the High Court erred by failing to consider the provisions of s 16B(5) of the former Constitution which stated that any error whatsoever contained in any notice itemized in Schedule 7 did not invalidate the vesting of title in the State. Hence, it was held that once the land was itemized under Schedule 7 "title to the land automatically vested in the State with the result that it became State land by operation of the

law” and, therefore, its acquisition was validated regardless of any errors or withdrawals in the acquisition process.

Moreover, the court *a quo* rejected the applicant’s argument that the land could not be acquired because, in terms of S.I 212 of 1992, it had been declared as part of Bulawayo City Council land. It was held that s 16B of the former Constitution and the subsequent promulgation of the Land Acquisition Act [*Chapter 20:10*] prevailed over that statutory instrument.

In conclusion, the court *a quo* held that s 72(3) and (4) of the current Constitution further confirmed that the court’s jurisdiction to deal with challenges related to the acquisition of land was ousted. In the result, the High Court lacked the necessary jurisdiction to determine the matter that was before it. The appeal was allowed on that basis.

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

7

Having been aggrieved by the decision of the court *a quo*, the applicant has filed the present application for leave to appeal. The applicant argues that there is a constitutional issue that arose regarding the interpretation and application of s 16B of the former Constitution. This is demonstrated by the fact that the court *a quo* allowed the appeal after considering and determining that issue. In addition, the applicant argues in support of his application that it has good prospects of success. In terms of the applicant's draft notice of appeal, the land in dispute is urban land that was declared as part of the City of Bulawayo through S.I 212 of 1999. Therefore, it is not subject to acquisition through laws that govern the acquisition of agricultural land for resettlement purposes.

The applicant also avers that he successfully challenged the acquisition of his land under HC 2291/08 on the basis that urban land could not be acquired on the basis of s 16B of the former Constitution. He notes that the first respondent actually acknowledged the existence of this order through a letter dated 4 April 2017, wherein it requested further time to have the unlawful occupiers of the land evicted from it. In addition, the applicant maintains that the High Court correctly held that s 16B(3) of the former Constitution and s 72(3) of the current Constitution did not oust the jurisdiction of the courts to determine applications for the removal of unlawfully placed caveats over land not subject to acquisition for resettlement purposes. It is the applicant's further contention that the court *a quo* wrongly interpreted and applied s 16B where it did not apply. He avers that the decision of the court *a quo* violated his rights to the use of the land as he was deprived of such use on the basis of the wrong legal provisions. Lastly, the applicant submits that this matter is of public importance as the issue of the application of s 16B(3) to urban land zoned for residential development needs to be determined by this Court.

Judgment No. CCZ 07-24

Const. Application No. CCZ 51/23

8

In response, the first and second respondents have filed a notice, dated 8 January 2024, stating that they will abide by the decision of this Court. I will revert to this aspect later in this judgment.

Having regard to the foregoing, the applicant seeks the following relief:

- “1. The application for leave to appeal against judgment/order of the Supreme Court in case number SCB 49/23 be and is hereby granted.
2. The applicant shall file his notice of appeal within ten (10) days of the date of this order.
3. There shall be no order as to costs.”

The appeal that the applicant intends to file is based on the following single ground:

“That the court *a quo* erred in law and misdirected itself when it held that the High Court, by operation of section 16B (3) of the former constitution of Zimbabwe, now s 72 of Constitution of Zimbabwe, 2013, lacked the jurisdiction to determine an application for the removal of caveats that had been placed over urban farmland designated urban land by presidential proclamation by virtue of Statutory Instrument 212 of 1999. Thus, the order of the court *a quo* violates appellants (*sic*) right to use, hold, transfer and not to be compulsorily deprived of his property as enshrined in section 71 (2) - (3) and his right to equal protection of the law as enshrined in section 56 of the Constitution of Zimbabwe, 2013.”

If granted leave, the applicant seeks the following relief on appeal:

- “1. That the appeal succeeds with no order as to costs.
2. That the whole judgment of the court *a quo* is set aside and substituted with the Following:
‘The appeal is hereby dismissed with costs.’ ”

Submissions by counsel

In response to an enquiry from the Court as to why the respondents did not oppose the application, Mr *Muradzikwa* submits that they did so because the first respondent believes that he would not suffer any prejudice, even if the application were to be granted. On the basis that the respondents would abide by the decision of the Court, counsel was instructed not to oppose the application.

Mr *Mpofu*, for the applicant, submits that there is a constitutional issue which has to be determined by this Court as the decision of the court *a quo* squarely revolved around the interpretation of s 16B of the former Constitution. He also argues that the appeal to the court *a quo* was predicated on grounds that raised a constitutional issue, thus cementing the fact that the court *a quo* determined a constitutional issue.

In motivating the prospects of success in the intended appeal, Mr. *Mpofu* submits that the applicant successfully challenged the acquisition of his land under HC 2291/08 on the basis that urban land could not be acquired under s 16B of the former Constitution. He notes (as I have already indicated earlier) that the first respondent acknowledged the existence of this order through a letter dated 4 April 2017.

Counsel further contends that by holding that the High Court had no jurisdiction to hear the application for the upliftment of the caveats, the court *a quo* abdicated its duty to determine whether the acquisition of the land had been carried out in terms of the law. He adds that the court erroneously held that the disputed land became agricultural land when it was gazetted as it had already been declared urban land by S.I 212 of 1999. Furthermore, the court misdirected itself when it held that S.I 212 of 1999 was subservient to s 16B of the former Constitution. This Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23
was because the two pieces of legislation spoke to two different things, that is, urban land and agricultural land respectively.

In addition, Mr. *Mpofu* submits that the court *a quo* disregarded authorities to the effect that s 16B of the former Constitution did not take away the right to challenge illegal acquisitions of land. In particular, he relies on the case of *Campbell & Anor v The Minister of National Security Responsible for Land Reform and Resettlement & Anor* SC 49-07, in which it was held that the acquisition of land effected contrary to the provisions of s 16B was null and void.

Mr *Mpofu* also argues that the decision of the court *a quo* was at variance with the decision in *Kondonis v The Minister of Lands Rural Settlement & Ors* SC 72-11, which decision

was followed by a different bench of the Supreme Court in *Toro v Vodage Investments (Pvt) Ltd & Ors* SC 15-17. In light of these authorities, the decision of the court *a quo* was *prima facie* wrong. Moreover, counsel submits that it is in the public interest that the correct interpretation of s 16B of the former Constitution be determined by this Court.

Requirements for leave to appeal

The requirements to be satisfied in an application for leave to appeal were recently spelt out in *Chombo v National Prosecuting Authority & Anor* CCZ 8-22, at pp 6-7, wherein it was held that:

“The law that governs applications for leave to appeal to this Court is settled and appears in a line of cases that remain undisturbed since the adoption of the Constitution. **A judge or court determining such an application must be satisfied that the matter raised in the intended appeal is a constitutional matter that has been clearly and concisely set out.** This is so because this Court, being a specialised court, only enjoys jurisdiction in constitutional matters. **Further, the judge or court must be satisfied that the constitutional matter enjoys prospects of success on appeal.** This in turn serves to reserve the jurisdiction of this Court only to deserving cases. (See *Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC), *Muza v Saruchera* CCZ 5/19, *Bonview Estate (Pvt) Ltd v Zimbabwe Platinum Mine (Private) Limited & Ministry of Lands and Rural Resettlement* CCZ 6/19, *Mbatha v National Foods* CCZ6/21 and *Konjana v Nduna* CCZ 9/21).

Applications for leave to appeal to this Court are made in terms of r 32 of the Constitutional Court Rules, 2016. I note in passing that r 32 does not, as does its counterpart r 21(8) which deals with applications for direct access to this Court, set out the factors to be considered as being in the interests of justice. Therefore, in assessing whether or not it is in the interests of justice to grant an application for leave to appeal, the practice of this Court has been guided by the past decisions of this Court as set out in the authorities referred to above. **Regarding prospects of success, the practice has been to look for more than an arguable case. Prospects of success are established if on appeal, this Court is likely to reverse the finding of the lower court or to materially change the order *a quo*.**” (my emphasis)

The case of *Bere v Judicial Service Commission & Ors* CCZ 10-22, at pp 5-6, also sets out the factors that must be established in an application for leave to appeal:

“Applications for leave to appeal to this Court are governed by r 32 of the Rules. The requirements to be satisfied by an applicant seeking leave to appeal are now firmly established in the jurisprudence of the Court. They are as follows:

- The constitutional matter raised in the decision to be appealed against and any other connected issues must be clearly and concisely set out.
- The applicant must intend to apply for leave to appeal against the decision of the subordinate court on a constitutional matter.
- The applicant must demonstrate prospects of success on appeal.
- The intended appeal must be in the interests of justice which are a paramount consideration.”

The above-cited authorities accentuate the main considerations in an application for leave to appeal, to wit, whether or not the court *a quo* determined a constitutional issue and whether there are prospects of success in the intended appeal.

Whether the court *a quo* determined a constitutional issue

The prerequisite that a constitutional matter exists for resolution by this Court is a foundational basis for an applicant seeking permission to appeal. This is because, when adjudicating a constitutional appeal, this Court is only able to consider the constitutional matter that has been deliberated upon and determined by a lower court, *viz.* “a matter in which there is an issue involving the interpretation, protection or enforcement of [the] Constitution”, as specifically defined in section 332 of the Constitution. The jurisdiction of the Court cannot be invoked or triggered in the absence of a constitutional issue. The nature of this specialised jurisdiction was highlighted in *Lytton Investments (Pvt) Ltd v Standard Chartered Bank Zimbabwe Ltd and Anor* CCZ 11-18, at p 9, where it was emphasised that:

“The Court is a specialised institution, specifically constituted as a constitutional court with the narrow jurisdiction of hearing and determining constitutional matters only. It is the supreme guardian of the Constitution and uses the text of the Constitution as its yardstick to assure its true narrative force. It uses constitutional review predominantly, albeit not exclusively, in the exercise of its jurisdiction.” (my emphasis)

Furthermore, it is imperative to note that there is ordinarily no right of appeal from the decision of a subordinate court to this Court on a non-constitutional matter. This was aptly underscored in *Mudyavanhu v Saruchera & Ors* 2019 (1) ZLR 434 (CC), at 438B, wherein it was held that:

“A person has a right to appeal against a decision of a subordinate court on a constitutional matter only. **A decision of a subordinate court on a non-constitutional issue is unappealable because the Court has no jurisdiction to review such a decision.** The purpose of the procedure of an application for leave to appeal provided for in r 32(2) of the Rules is to show that the Court has jurisdiction as provided for in the Constitution to hear and determine the appeal. In other words, the purpose of the procedure is to ensure that the applicant has a right of appeal to the Court against the decision of the subordinate court.” (my emphasis)

Additionally, it is crucial to elaborate what is meant by a constitutional issue. In the case of *Cold Chain (Pvt) Limited T/A Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC), at pp 16 & 17, the Court defined a constitutional matter as follows:

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

13

“Under s 332 of the Constitution a constitutional matter is one in which there is an issue involving the interpretation, protection or enforcement of the Constitution. **Absence of an issue raised in the proceedings in the subordinate court requiring the interpretation, protection or enforcement of a provision of the Constitution in its hearing and determination would invariably be sufficient evidence of the fact that no constitutional matter arose in the subordinate court.**

The principles to be applied in the determination of the question whether the Supreme Court determined a constitutional matter are clear. It is not one of those principles that the court against whose judgment leave to appeal is sought should have referred to a provision of the Constitution. **There ought to have been a need for the subordinate court to interpret, protect or enforce the Constitution in the resolution of the issue or issues raised by the parties. The constitutional question must have been properly raised in the court below. Thus, the issue must be presented before the court of first instance and raised again at or at least be passed upon by the Supreme Court, if one was taken.**” (my emphasis)

In casu, it is necessary to establish the existence of a constitutional matter not only before the court *a quo*, being the Supreme Court, but also before the court of origin, which is the High Court, wherein one traces and locates the genesis of the dispute between the parties. This is the

general position adopted by this Court in *Ismail v St John's College* CCZ 19-19, at p 9. See also *Bere's case (supra)*, at pp 13-14.

Upon scrutinising the papers submitted by the applicant from the High Court to the court *a quo*, it becomes evident that the dispute regarding the land in question has consistently centred on the interpretation of section 16B of the former Constitution. The High Court, relying on its assessment of the facts before it, determined that it had the necessary jurisdiction to hear the applicant's plea for the upliftment of the caveats. This was primarily because section 16B of the Constitution only applied to challenges against the acquisition of land by the State and therefore did not restrict the applicant from challenging the endorsement of caveats on the land that he occupied.

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

14

In turn, the decision of the court *a quo* also revolved around the interpretation of s 16B of the former Constitution, as read with s 72(3) and (4) of the current Constitution. The court found that the High Court lacked the necessary jurisdiction to hear the application for upliftment of the caveats as the jurisdiction of all courts to determine challenges regarding the acquisition of land by the State had been expressly ousted by the said s 16B. This interpretation accorded by the court *a quo* to the meaning and import of s 16B effectively determined and extinguished the dispute between the parties.

In the *Cold Chain* case (*supra*), at p 17, in considering the necessary linkage between the constitutional issue raised and the disposition of the case at hand, the Court observed as follows:

“For an applicant to succeed in an application of this nature, he or she must show that the constitutional issue raised in the court *a quo* is **one which the determination by the court**

was necessary for the disposition of the dispute between the parties. In other words, the decision on the constitutional matter must have been so inextricably linked to the disposition of the controversy between the parties that the success or failure of the relief sought was dependent on it.” (my emphasis)

In light of the foregoing, I am of the view that there was an unavoidable constitutional issue before the court *a quo* relating to the interpretation and enforcement of the provisions of the former Constitution. The determination of this issue had a direct and inescapable impact upon the disposition of the dispute between the parties and the consequent success or failure of the relief sought by the applicant. Accordingly, I am amply satisfied that this Court has the requisite jurisdiction to entertain and preside over the appeal that the applicant intends to file, if he is granted leave to do so.

The test for prospects of success on appeal

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

15

In an application for leave to appeal, the applicant is required to demonstrate that the intended appeal carries prospects of success. In *Essop v S* [2016] ZASCA 114, the court defined prospects of success as follows:

“What the test for reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

Thus, in assessing the prospects of success, this Court has to be satisfied that the applicant has more than an arguable case on appeal and that he or she has established a *prima facie* case and not a mere possibility of success. See also *S v Dinha* CCZ 11–20, at p 6. To put it differently,

the applicant must demonstrate reasonable prospects that this Court is likely to reverse the findings of the lower court or materially alter the judgment *a quo* if leave to appeal is granted. See *Cold Chain (Pvt) Ltd t/a Sea Harvest v Makoni* 2017 (1) ZLR 14 (CC), at 15G-16E; *Chombo v National Prosecuting Authority & Anor* CCZ 8-22, at pp 7-8.

In evaluating the prospects of success *in casu*, there are two inter-related issues that call for consideration. The first is the correct interpretation to be ascribed to s 16B(2) of the former Constitution. The second is the extent to which the jurisdiction of the courts has been ousted by s 16B(3) of the same Constitution.

Interpretation and application of section 16B

The critical question that arises for determination in this matter is whether or not the applicant's land was properly acquired by the State in terms of s 16B of the former Constitution – as read with s 72 of the current Constitution. The basis upon which the court *a quo* held that the High Court had no jurisdiction to entertain the application for upliftment of the caveats was that the applicant had no legal cause for bringing such an application inasmuch as the land now vested in the State. This was after the land was acquired and gazetted on 25 August 2000 under G.N. No. 405 of 2000.

However, it is evident that the court *a quo* improperly disregarded a crucial intervening event and its legal ramifications, to wit, the fact that the land was proclaimed as urban land in 1999 before it was gazetted in the year 2000. This conversion of its status was effected by S.I.

212 of 1999 which operated to alter the boundaries of the Bulawayo City Council area by the addition of the land in question, together with other pieces of land, to that council area.

The fact that the applicant’s land was regarded as non-agricultural is evinced by a letter from the Provincial Planning Officer, dated 23 November 2016, which reaffirmed that the land was included within the boundaries of the Bulawayo City Council by S.I. 212 of 1999. There is also on record a letter from the Bulawayo City Council itself objecting to the acquisition of certain lots of land on the basis that they had been designated for residential purposes.

The question that arises is whether the applicant’s land was properly acquired by the first respondent in terms of s 16B(2) of the former Constitution. That provision declares as follows:

“(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 the *Gazette Extraordinary* under the proviso to 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) ...

(iii) ...

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; ...”
(my emphasis)

Judgment No. CCZ 07-24

Const. Application No. CCZ 51/23

In my view, the meaning and import of this provision are unambiguously clear. It expressly applies only to agricultural land which may be acquired by and vested in the State as provided for in the section. It does not apply to urban land. Put differently, urban land may not be acquired by the State in terms of this provision. Our case law is replete with myriad authorities to that effect. I highlight them below, in chronological order.

In *Kondonis v Minister of Lands and Rural Settlement & Ors* SC 72/11, the Supreme Court ordered that “The acquisition of applicant’s land, being a certain piece of land situate in the District of Salisbury, ... is outside the provisions of the law, more particularly ss 16B(2)(a) and 16A of the Constitution of Zimbabwe and therefore invalid and is accordingly set aside.” The definition of what constitutes “agricultural land” was succinctly captured in *Vodage Investments (Pvt) Ltd v Toro & Ors* 2015 (1) ZLR 509 (H), at 510G, as being “land used or suitable for agriculture, but does not include communal land or land within the boundaries of an urban local authority or within a township.” The position that the acquisition of land by the State under the provisions of s 16B is limited to agricultural land only was reaffirmed by the Supreme Court in *Toro v Vodage Investments (Pvt) Ltd & Ors* SC 15-17, at p 2. It was observed that “the land in dispute ... is now urban land which cannot be allocated for agricultural purposes.” Again, in *Carthorse (Pvt) Ltd v Minister of Lands & Registrar of Deeds* HH 442-20, the court found that “The property was not rural land. It was peri-urban. And by the time of the listing in the Government Gazette in May 2003, the property was no longer such agricultural land as the Government could require for resettlement purposes. It had completely changed character in terms of land use.” In the same vein, in *Bowers & Anor v Minister of Lands, Agriculture, Fisheries, Water and Rural Resettlement & Ors* HH 72-23, it was reiterated that “Government cannot expropriate land which is not agricultural land under the guise of the land reform programme.”

Having regard to the ordinary grammatical meaning of s 16B(2), as expatiated by the foregoing case authorities, it is reasonably clear that in order for the State to acquire land it must

be agricultural land. In this regard, I am of the opinion that the full bench of the Court will doubtless endorse that position when it sits to determine the main matter on appeal. I am further inclined to conclude that the Court will also accept that land does not become agricultural land simply because it is itemised and included in Schedule 7 to the former Constitution. Where there is an obvious conflict between S 16B(2) and Schedule 7, it is the former that must prevail. This approach is amply fortified by taking into account the language of s 16A, which records the forcible dispossession of agricultural land by the former regime. Consequently, both ss 16A and 16B are concerned with and focused upon the repossession of agricultural land to be acquired without compensation for the land itself. In this context, if urban land were to be listed and acquired by the State, the historical values and rationale underlying ss 16A and 16B would be eroded and entirely negated.

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

19

Reverting to the present case, I take the view, which view I believe will also be taken by this Court on appeal, that S.I. 212 of 1999 fundamentally altered the character of the land in question. It operated to create and establish a different legal order in respect of that land. In other words, s 16B(2) and S.I. 212 of 1999 appertain to and deal with completely different things, viz. agricultural land on the one hand and urban land on the other. I accordingly conclude that the land in dispute was not lawfully acquired by the State, purporting to act as it did, in terms of s 16B(2) of the former Constitution.

For the sake of completeness, it seems apposite and necessary to clarify the position on rights to agricultural land under s 72 of the current Constitution. It provides as follows, in its relevant portions:

“(1) In this section –

‘agricultural land’ means land used or suitable for agriculture, that is to say for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including game **but does not include Communal Land or land within the boundaries of an urban local authority or within a township established under a law relating to town and country planning or as defined in a law relating to land survey;**

(2) Where **agricultural land, or any right or interest in such land**, is required for a public purpose, including; **the land, right or interest may be compulsorily acquired by the State by notice published in the *Gazette* identifying the land, right or interest**, whereupon the land, right or interest vests in the State with full title with effect from the date of publication of the notice.

(3) Where **agricultural land, or any right or interest in such land**, is compulsorily acquired for a purpose referred to in subsection (2) –

(4) All **agricultural land** which—

(a) **was itemised in Schedule 7 to the former Constitution**; or

(b) before the effective date, was identified in terms of section 16B(2)(a)(ii) or (iii) of the former Constitution;

continues to be vested in the State, and no compensation is payable in respect of its acquisition except for improvements effected on it before its acquisition.” (my emphasis)

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

20

Again, the meaning and import of s 72 of the present Constitution are crystal clear, being exactly the same as that of its precursor, s 16B of the former Constitution. The entire process of compulsory acquisition, whether by notice published in the *Gazette* or by way of itemisation in the erstwhile Schedule 7, and its attendant vesting of the land acquired in the State, is strictly confined to agricultural land. And for the absolute avoidance of any possible doubt, “agricultural land” is defined as “land used or suitable for agriculture”, viz. for horticulture, viticulture, forestry or aquaculture or for any purpose of husbandry, including game, and it explicitly excludes Communal Land or land within the boundaries of an urban local authority or within a township. All of the foregoing leads to the same conclusion in respect of the present s 72 as the one that I have drawn earlier as regards the compulsory acquisition of land under the former s 16B(2), to wit, urban land cannot be lawfully acquired and vested in the State in terms of s 72.

Ouster of jurisdiction

On the critical question of jurisdiction, the court *a quo* concluded that the High Court lacked the requisite jurisdiction to entertain the applicant's case. In so doing, the court relied on several judgments of the Court pertaining to the interpretation of s 16B(3) of the former Constitution, namely, *Campbell & Anor v Minister of National Security responsible for Land Reform and Resettlement & Anor* 2008 (1) ZLR 17, *Commercial Farmers Union v Minister of Agriculture, Land and Rural Resettlement and Ors* 2010 (2) ZLR 576, and *TBIC Investments (Pvt) Ltd & Ors v Minister of Lands and Rural Development & Ors* 2018 (1) ZLR. In the *Campbell* case in particular, at 43F-44B, it was held as follows:

“By the clear and unambiguous language of s 16B (3) of the Constitution the Legislature, in 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.**” (my emphasis)

It is immediately apparent that in the above judgment, as well as in the judgments that followed, the Court was specifically dealing with the acquisition of agricultural land and not urban land set aside for residential development or for any other non-agricultural purpose. It was emphasised that the ouster provision was confined to agricultural land in particular. Thus, where non-agricultural land is purportedly acquired utilising s 16B (2) of the former Constitution and s 72 of the current constitution, the courts invariably retain jurisdiction to determine valid

challenges to any such unlawful acquisition. Having regard to the authorities referred to above, I am of the considered opinion that the court *a quo* undoubtedly erred in holding that the High Court did not have the requisite jurisdiction to investigate the constitutional validity of the acquisition of the land *in casu*. Given my earlier conclusion that the acquisition of that land by the first respondent was invalid, it follows that this acquisition is susceptible to being challenged in any court of competent jurisdiction. I am amply fortified in this approach by the decision of the Court in the *Campbell* case (*supra*), at 44E-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 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)

To conclude this aspect of the matter, it is axiomatic that the courts cannot decline jurisdiction whenever it becomes necessary to determine questions relating to the legality of State conduct. To do so would be tantamount to the abdication of judicial authority that is vested in the courts by constitutional imprimatur. In my view, s 16B(3) of the former Constitution does not take away the principle of legality or the right of judicial review where the acquisition of land by the State is not in accordance with the Constitution. In short, the court *a quo* fell into grave error in holding that the High Court lacked the jurisdiction necessary to adjudicate and determine the matter *in casu*.

The interests of justice

In considering the interests of justice in this matter, it seems necessary to ventilate two inter-related issues. The first is the existence of conflicting positions on the applicable law. The second relates to the public interest in the definitive disposition of this matter.

In *Chikafu v Dodhill (Pvt) Ltd & Ors* SC 28-09, leave to appeal was granted on the basis of divergent positions adopted by the courts on the applicable law. Similarly, in *Vela v Auditor-General & Anor* CCZ 01-23, it was held that it is in the interests of justice to grant leave to appeal in order to clarify the law. *In casu*, the court *a quo* has taken an approach that is contrary to that taken by this Court in the *Campbell* case (*supra*) as well as the *Kondonis* case (*supra*). The decision *a quo* relates to a critical constitutional question: Can the State purport to act in terms of s 16B of the former Constitution where it is evidently unlawful to do so? The determination *a quo* has set a precedent for all cases where urban land is acquired following its listing in Schedule 7. The court *a quo* failed to conduct a proper inquiry into the meaning and scope of s 16B and has thereby created a binding precedent giving rise to confusion as to what the law should be. This, in my view, necessitates a definitive determination by this Court in order to clarify and settle the law on the constitutional question that has arisen.

Turning to the second issue, I fully agree with counsel for the applicant that there is a paramount public interest in the eventual outcome of this matter. The correct interpretation of s 16B of the former Constitution, as well as s 72 of the current Constitution, is very much alive. The import of the order granted in the *Kondonis* case (*supra*) is abundantly clear: The State

cannot acquire urban land under s 16B(2). The evidence *in casu* shows that residential properties have been constructed on the land in question. Moreover, the Bulawayo City Council, an undoubtedly interested party, was not heard in the disposition of this case. In these circumstances, the correct interpretation of the law is essential and unavoidable.

It is unquestionably necessary for this Court to provide a definitive answer to the question as to whether land designated as urban land can lawfully be acquired by the State in accordance with s 16B of the former Constitution, as well as s 72 of the current Constitution. Accordingly, in my considered opinion, it is clearly in the interests of justice to grant leave to appeal in this matter.

Disposition

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23

24

In conclusion, it appears to me that the court *a quo* fundamentally misconstrued and consequently misapplied the law governing the compulsory acquisition of agricultural land, and that it did so both substantively and procedurally. In the event, I take the view that its judgment is likely to be materially altered or overturned on appeal before the full bench of this Court. My conclusion is premised on the fact that the matter at hand pertains to a constitutional issue which, in my assessment, has reasonable prospects of success on appeal. Given the great likelihood of success, it is in the interests of justice to grant leave to appeal in this case.

Accordingly, it is ordered that the application for leave to appeal against the judgment of the Supreme Court in Case No. SCB 49/23 be and is hereby granted, with no order as to costs.

MAKARAU JCC: I agree.

HLATSHWAYO JCC: I agree.

Masamvu & Da Silva-Gustavo Law Chambers, applicant's legal practitioners

Civil Division of the Attorney General's Office, 1st respondent's legal practitioners

Judgment No. CCZ 07-24
Const. Application No. CCZ 51/23