HH 188-03
HC 7122/2003
MGWACO FARM (PVT) LIMITED
and
A P RICHARDS (PRIVATE) LIMITED
and
GERSHEM T PASI
and
FARAI CHOMBO
and
THE MINISTER OF LANDS, AGRICULTURE
& RURAL RESETTLEMENT
and
IGNATIOUS MORGAN CHIMINYA CHOMBO

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE,15 and 19 September, 29 October,
and 17 December, 2003

Opposed Application

E Matinenga **for applicants**
C G Dube **for first respondent**
D D Chirindo **for third respondent**

CHINHENGO J: This application is about a piece of land known as Mgwaco Farm. Mgwaco Farm is made up of three surveyed units of land being the Remaining Extent of Subdivision B of Sutton Estate ("Sutton Estate") measuring 641,1161 hectares in extent, Mgwaco of Hartleyton ("Hartleyton") measuring 507.9512 hectares in extent and Mpinge Extension of Hartleyton ("Mpinga Extension") measuring 559,4663 hectares in extent. These pieces of land are owned by Mgwaco Farm (Pvt) Ltd ("the first applicant") under one title deed. The whole of Mgwaco Farm is leased to A P Richards (Pvt) Ltd, ("the second applicant"). The lease is not registered.

Mgwaco Farm is situated in the Trelawney Area of Lomagundi District which is a prime agricultural region of Zimbabwe;. It is no doubt a much-sought after area by those inclined to engage in agriculture. The farm is extensively developed. There are on the farm horticultural greenhouses and worksheds, tobacco curing facilities, workshops, workers' houses, boreholes, a dam, underground irrigation, main lines, power lines, cattle handling facilities, fences and other developments. There are three

dwellings on the farm, a principal house and two other houses to accommodate managerial staff. Of these last two, one is referred to as the Manager's house and the other as a cottage.

Mgwaco Farm (Pvt) Ltd is a Zimbabwean registered company. It is wholly owned by Chiredzi Nominees (Pvt) Ltd another Zimbabwean registered company. Chiredzi Nominees (Pvt.) Ltd is a holding company for three other companies which own four pieces of land in the Hippo Valley area in the lowveld of Zimbabwe ("the sugar can properties"). Chiredzi Nominees (Pvt) Ltd is controlled by a company called La Boite Investments (Pvt) Ltd which is another Zimbabwean registered company in which some 3000 00 shares are divided between three trusts and 24 000 shares are held by members of the Lagesse family which is of Mauritian origin. The main holding company, La Boite Investments (Pvt) Ltd, is therefore controlled by three trusts.

On 17 May 2000 the Government of Mauritius and the Government of Zimbabwe signed an Agreement for the Promotion and Reciprocal Protection of Investments ("the bilateral agreement") in terms of which investments in Zimbabwe by Mauritian nationals either by themselves or through locally "incorporated entities were afforded certain protection. The deponent to the first applicant's affidavit, Mr Lagesse, deposed to the fact that Mgwaco Farm was protected by the bilateral agreement and that it could not be compulsorily acquired outside the terms of that agreement. The evidence placed before me did not conclusively establish that the first applicant is a Mauritian entity which is entitled to any protection under the bilateral agreements. In the result Mr *Matinenga* did not pursue any argument based on the nationality of the first respondent and its alleged entitlement to protection in terms of the bilateral agreement. The particular difficulties which he encountered revolved around the nationality of those individuals who have interests, and the nationality of the trust which have a controlling interest, in La Boite Investments (Pvt) Ltd.

Mgwaco Farm was apparently acquired by the first applicant in 1979. In 1997 the first applicant decided to dispose of the farm. It offered it to the Government of

Zimbabwe in compliance with the general legal requirement that the Government should be offered any rural land before such land can be sold to any other person. On 6 June 2000 the Government issued a certificate of "no present interest" by which it signified that it did not wish to purchase the farm for any purpose. The third respondent did not give any reason for its refusal to acquire the farm when it was offered to it. It is reasonable to assume that the Government did not have the financial resources with which to acquire the farm on a willing-seller-willing-buyer basis. The certificate of "no present interest" was valid for 12 months until June 2001.

In January and again in March 2002, Mgwaco Farm was listed for compulsory acquisition. The first applicant lodged an objection to the acquisition. From the evidence before me it appears that the acquisition was shelved for a while whilst the fourth respondent attempted to acquire the farm for himself by way of purchase as will become apparent hereunder.

Fourth Respondent's involvement with Mgwaco Farm

The fourth respondent is cited in this application in his personal capacity. He was served with the papers in this application on 8 August 2003 and again on 18 August 2003. This application was initially set down for hearing first on 15 August, 2003. The hearing was postponed to 19 August 2003 and again to l October, 2003. The fourth respondent did not appear at the hearing either by himself or through a legal practitioner. He apparently ignored the application and any notices which were duly served upon him through his private secretaries. The nature of the allegations against the fourth respondent are such that he would have been expected to oppose the application. Ideally he should have done so. There being no opposition by the fourth respondent, there was therefore no-one to persuade me that the allegations against him were unfounded. The evidence by the applicants concerning the fourth respondent's involvement and interest in Mgwaco Farm must therefore be accepted as true.

The applicants averred that after Mgwaco Farm was listed for acquisition the fourth respondent visited it. On 29 April 2002 he invited Mr Lagesse, the deponent to first applicant's affidavits and a director of the company, to his offices and advised him that he wanted to buy the farm. Present at this meeting was the Governor and Resident Minister of Masvingo Province where the sugar-cane properties are situated. Mr Lagesse averred that the fourth respondent told him that if he agreed to sell the farm to him, he would be assured of retaining, through Chiredzi Nominees (Pvt) Ltd the sugar-cane properties. Mr Lagesse said that he undertook to advise the fourth respondent about the selling price of the farm after a valuation of the farm and the improvements thereon.

On 3 May 2002, Mr Lagasse, delivered the valuation of the farm to the Minister.. The valuation covered the land, movable equipment and other improvements but it excluded a herd of cattle on the farm. The asking price was $300 million. Mr Lagesse averred that at this second meeting, the fourth respondent told him that land had no value in Zimbabwe and that if he did not like the price, the Government could always acquire the farm and allocate it to him anyway. The result of this meeting, so said Mr Lagesse, was an agreement that their respective legal practitioners should consult further on the matter.

A third meeting was held on 25 May 2002, Mr Lagesse averred that at this meeting the fourth respondent said that he could not meet the first applicant's price and proposed that they enter into another arrangement involving Mr Lagesse, the second applicant and himself. The details of such an arrangement were not revealed on the papers. After this meeting the fourth respondent's legal practitioner later gave a deadline by which Mr Lagesse had to accept the fourth respondent's counter offer of $65 million as the purchase price of Mgwaco Farm. The fourth respondent called another meeting between himself and two of the directors of the second applicant. He told the second applicant's directors that the first applicant's price was unrealistic and that he would take the farm but would want the second applicant to remain on the farm and carry on with certain farming operations. The directors advised that they would consult with Mr Lagesse.

A fifth meeting regarding Mgwaco Farm was held in Masvingo in the presence of the Minister of Foreign Affairs. Mr Lagesse averred that at this meeting the fourth respondent again asked him to give up Mgwaco Farm if he wanted his companies to retain the sugar-cane properties. Mr Lagesse said that the Minister of Foreign Affairs advised that the first applicant was entitled to protection in terms of the bilateral agreement but despite this advice, the meeting ended with the fourth respondent stating that since Mr Lagesse was not co-operating Mgwaco Farm would be taken over by the Government and made available to him.

The negotiations between Mr Lagesse and the fourth respondent finally broke down on or about 8 August 2002. The fourth respondent had maintained that the first applicant's price was unrealistic. Mr Lagesse who now considered that with the constantly rising rate of inflation the value of the farm was about $400 million appears to

have rejected the counter-offer of $65 million which according to the fourth respondent also covered the price of the herd of cattle on the farm.

Mr Lagesse averred that after the breakdown of the negotiations an order in terms of s.8(1) of the Land Acquisition Act (Chapter 20:10) ("the Act") was then served on the applicants. He averred that although the order was served in August it appeared to have been signed in July 2002.

Mr Lagesse averred that the fourth respondent has pursued his interest to acquired Mgwaco Farm through the first and second respondents and has used them as "fronts", nominees or agents with a view, in reality, to acquire the farm for himself. In his affidavit Mr Lagesse made several damaging allegations against the fourth respondent in particular about his involvement in the violence which he said accompanied the land reform exercise in the Lomagundi Area. He referred to cases No HC 4327/03 and HC 6397/03 in which he said that the fourth respondent is implicated. He also alleged that the fourth respondent owns several farms contrary to the policy announced by the State President that a person should own one farm only. I shall not repeat all that is said against the fourth respondent because it is not necessary to do so for the purposes of this judgment. Suffice it to say that the allegations are of a damaging nature and that the fourth respondent should have responded to them to set the record straight if those allegations were confirmed.

Mgwaco Farm was listed for compulsory acquisition first on 15 January 2002. The listing was repeated in March 2002. According to the second applicant various people visited the farm after its listing. Among them were the second respondent and the fourth respondent. In the affidavit deposed to on its behalf, the second applicant makes similar allegations against the fourth respondent as those made by the first applicant. I shall not dwell on the details of those allegations.

They all indicate that for quite a while the fourth respondent endeavoured to acquire the farm for himself. I may however highlight certain allegations by the deponent to the second applicant's affidavit. He averred that on 28 July 2002 Mr Shumba from the District Administrator's office visited the farm and said that he wanted to establish what farming operations were being conducted on the farm and what equipment was there because the farm was to be allocated to the fourth respondent. He said that the second respondent also visited the farm from time to time. On 9 June 2002 a Sunday Mail newspaper advertisement appeared announcing that the first three portions of Hartleyton had been allocated to A2 settlers identified therein as "F. Chombo, J Nyatsine and K Mubwandarika". Except for F Chombo, who is the second respondent herein the said Nyatsine and Mubwandarikwa did not at any time interfere with the applicants' interests in or occupation of the Farm.

On 18 May 2003, the first respondent visited the farm and told Mr Richard that the farm had been allocated to him. Mr Richard averred that the first respondent had told him that the farm had been allocated to him by the fourth respondent which averment the first respondent vehemently denied in his opposing affidavit. In mid June the second respondent put pressure on Mr Richard to vacate the principal house on the farm. He produced a letter to Mr Richard showing that he had been allocated the first portion of Hartleyton. The second respondent is alleged to have broken into the manager's house on 30 June and remained there until 2 July. He made further threats to evict Mr Richard's family during the month of July. It seems that there was a scramble for the farm during the months of June and July without it being quite clear whether the farm had

been allocated to the fourth respondent, the second respondent or the first respondent. On 28 July the first respondent visited the farm again. This time he was in possession of a letter from the third respondent in terms of which he had been offered two portions of Hartleyton now described as subdivisions 2 and 3 of Mgwaco. He brought some furniture with him. Mr Richard averred that the first respondent moved into the manager's house without his consent. He averred that he told him that the Manager's house did not fall within subdivisions 2 and 3 which had been allocated to him. The first respondent however insisted that he was entitled to take occupation of the Manager's house. He indeed took occupation of it against the will of Mr Richard. As at the date of hearing of this application Mr Richard was saying that the second respondent was still attempting to forcibly take occupation of the cottage.

The second respondent was personally served with the papers in this application. He neither appeared at the hearing or otherwise opposed this application. The allegations made against him have not been contradicted and they must be accepted as true.

The first respondent opposed the application. At the beginning of the proceedings and as appears from his opposing affidavit, he averred that the two subdivisions were lawfully allocated to him and that he was entitled to take occupation of the Manger's house because it was on the land allocated to him. He very strongly denied any suggestion that he was an agent, nominee or "front" of the fourth respondent.

Outcome of Hearing on 15 August, 2003

I must mention that the applicants had sought a provisional order on an *ex parte* basis. I refused to proceed in that manner and I directed that the application

be served on the respondents. When certain submissions were made on 15 August 2003 it became quite clear that there was confusion as to whether or not the manager's house was on the portions allocated to the first respondent. I adjourned the hearing to allow the parties to verify the position. The parties' legal practitioners carried out further consultations and verified that the manager's house and all the improvements which I have already mentioned are not on the portions allocated to the first respondent or to the second respondent. Mr *Chirindo* filed two affidavits from Stanford Katonhe a district lands officer and from Fisher Leonard Kumirai, an agricultural extension officer. Both of them are employees of the third respondents. In these affidavits it is disclosed that the acquisition of Mpinga Extension was invalid because the court application required to be made in terms of s 7 of the Act was not lodged at the Administrative Court within 30 days of the service of the order in terms of S. 7(1) of the Act. The acquisition of Mpinga Extension was therefore flawed for failure to comply with s.7(1) of the Act as read with s. 16(1)(d) of the Constitution. Mr *Chirindo* conceded that this was the position. The affidavits also showed that the fourth portion on Hartleyton on which the principal house, manager's house, cottage, greenhouses and office sheds, workshop, tobacco barns, workers' houses and the cattle handling facilities has not been allocated to anyone. These affidavits settled two questions - first that the first respondent had no right whatsoever to take occupation of the manager's house because that house was not on the land allocated to him; second, that the acquisition of Mpinga Extension was flawed and should therefore be set aside.

After the adjournment on 15 August 2003, the parties also agreed that I should

determine this matter finally and not deal only with the grant or refusal of the provisional order as originally sought. They also agreed between themselves on the timetable for the filing of the necessary affidavits and heads of argument. It was then that I set down this application for the final hearing on l October, 2003.

The final order now sought by the applicants was for a declaration that the purported acquisition of Mgwaco Farm is invalid as being contrary to the provisions of s.11 and 16 of the Constitution. The consequential relief sought is that the orders in terms of s.8(1) of the Act are invalid, the allocation of portions of the farm to the first and second respondents be set aside and that the first, second and fourth respondents be barred from entering upon any part of Mgwaco farm and from interfering with the farming operations thereon and further that the fourth respondent be barred from authorizing, permitting or encouraging any person from entering upon Mgwaco Farm. The applicants also sought an order of costs against all the respondents jointly and severally, the one paying the others to be absolved.

It is appropriate at this stage to dispose of certain averments and submissions made by the parties in their affidavits and in the heads of argument which were either withdrawn or abandoned. I have already dealt with some of them.

1. **The orders issued in respect of Mpinga Extension are invalid because the third respondent failed to comply with s.7(1)(b) of the Act as read with s.16(1)(d) of the Constitution. This much was conceded by Mr *Chirindo*.**

2. **The first respondent is not entitled to take occupation of the manager's house. The second respondent is also not entitled to take occupation of the principal house, or the manager's house or the cottage. This is so because that portion of the farm on which these dwellings and other structures mentioned in this judgment are situated has not been allocated to anybody. This also was conceded by Mr *Chirindo* and declared to be the position by Stanford Katanhe and Fisher Leonard Kumirani.**

3. In the draft interim relief, the applicants had sought an order that the respondents should file discovery affidavits on various issues. A the hearing on 15 August I pointed out that it was inappropriate, if not impermissible, for a party to seek

discovery in motion proceedings. The applicant's legal practitioner readily conceded this point and the applicants have not pursued the matter to compel discovery of certain documents.

4. A part of the final relief sought was that "the third and fourth respondents are hereby prohibited and interdicted from taking any further steps whatsoever to acquire Mgwaco Farm either for the State, in the case of the third respondent, or for himself or any nominees, relative or associate of his, in the case of the fourth respondent without the express authority of an order of this court". This part of the final order sought was inappropriate for various reasons which I do not have to deal with. Again Mr *Matinenga* agreed that this part of the order be deleted.

5. The nationality of the first applicant could not be readily established because the holding company is owned by three trusts. The bilateral agreement was intended to cover and protect, in the manner specified therein, investments by Mauritian nationals, or Mauritian entities. The failure to establish the nationality of the first applicant meant that it would not be necessary to consider any submission based on the bilateral agreement. Mr *Matinenga* said that he was not pursuing the matter on the basis of the bilateral agreement.

6. Mr *Chirindo* had raised, *in limine*, the "dirty hands" argument in relation to the respondents. His argument was that the respondents were approaching the courts with dirty hands in that they had refused to comply with s.9 of the Act which required them to vacate Mgwaco Farm within 90 days from the

date on which they had been served with the orders in terms of s.8(1) of the Act. For this proposition Mr *Chirindo* had relied on *Associated Newspapers of Zimbabwe (Pvt) Ltd* v *The Minister of Information and Publicity in the Office of the President and 2 Ors* SC 20/2003. He wisely abandoned any argument based on the "dirty hands" doctrine. The facts in this case and the provisions of s 9 of the Act did not at all support the application of that doctrine - see *Antony Bertram Micklethwait* v *The State* HH 3/2003 at pp 5 ff. Mr *Chirindo* conceded that the point *in limine* could not be pursued.

The outstanding issues for decision are - whether the acquisition of Mgwaco Farm is valid having regard to the provisions of the Act and whether the allocation of portion of the farm to first and second respondent is lawful.

The applicants' main argument against the validity of the acquisition of Mgwaco Farm was that the third respondent did not serve the notice in terms of s.5(1)(b) of the Act on the lessee, i.e. the second applicant. That the second applicant was not served with the notice was common cause. Mr *Chirindo* submitted that the failure to serve the notice on the second applicant was permissible in terms of s.5(1)(b) of the Act as read with s. 16(1)(b) of the Constitution. Mr *Matinenga* on the other hand, submitted that the amendment of s. 5(1)(b) by Act 15 of 2000 rendered that provisions *ultra vires* s. 16(1)(3) of the Constitution. He urged me to find that s. 5(1)(b) of the Act was *ultra vires*. Section 16(1)(b) of the Constitution and on that basis the acquisition of Mgwaco Farm should be declared invalid. Mr *Matinenga's* submissions may be summarized thus -

Section 5(1)(b) of the Act before its amendment by Act No 15 of 2992 read -

"Where an acquiring authority intends to acquire land otherwise than by agreement, he shall -

(a) publish once in the Gazette and once a week for two consecutive weeks, commencing with the day on which the notice in the Gazette is published, in a newspaper circulating in the area in which the land to be acquired is situated and in such manner as the acquiring authority thinks will best bring that notice to the attention of the owner, a preliminary notice -

(i) describing the nature and extent of the land which he intends to acquire and stating that a plan or map of such land is available for inspection at a specified place and at specified times; and

(ii) setting out the purposes for which the land is to be acquired; and

(iii) calling upon the owner, or occupier or any other person having an interest or right in the land who -

A. wishes to contest the acquisition of the land, to lodge a written notice of objection with the acquiring authority within thirty days from the date of publication of the notice in the Gazette; or

B. wishes to claim compensation in terms of Part V for the acquisition of the land, to submit a claim in terms of section twenty-two, where the land is not designated rural land, and

(b) serve on -

(i) the owner of the land to be acquired and the holder of any other real right in that land; and

(ii) any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition;

whose whereabouts are ascertainable, after diligent inquiry, notice in writing providing for matters referred to in subparagraphs (1), (ii) and (iii) of paragraph (a)."

In addition to amending subparagraph (B) of subparagraph (iii) of s. 5(1)((a) which is not relevant to the issue before me, Act No 15/000 also amended s. 5(1)(b) and substituted it with the following -

"(b) serve on the owner of the land to be acquired and the holder of any other registered real right in that land whose whereabouts are ascertainable after

> diligent inquiry at the Deeds Registry and, if necessary, in the appropriate companies register, notice in writing providing for the matters referred to in subparagraphs (i), (ii) and (iii) of paragraph (a)".

Mr *Matinenga* argued that in so amending the Act, Act No 15 of 2002 left out certain categories of persons who were required to be served with no notice in terms of s. 5(1)(b) and s. 16(1)(b) of the Constitution. In so doing Act No 15/2002 reduced the scope of protection provided by s. 16(1)(b) of the Constitution and to that extent the amendment was *ultra vires* the Constitution.

I have difficulty in accepting the validity of Mr *Matinenga's* submissions in the regard. Section 16(1)(b) of the Constitution that provides -

> "No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law which -
>
> **(a)** ----
>
> **(b)** requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;"

This portion no doubt requires that a notice be served on the owner or person having any other interest or right in the land. In my view the key words in s. 16(1)(b) are "any person -- having any other interest or right therein". The word "therein" means "in the land" to be acquired. Section 5(1)(b)(ii) of the amended Act expanded the category of persons to be served with a notice from the owner or other person having any other interest or right in the land to encompass, in addition to the owner or holder of any other real right in that land as in s. 5(1)(b)(i) of the Act, any other person who it appears to the acquiring authority may suffer loss or deprivation of rights by such acquisition. The question is: Did Act 15 of 2002 by deleting s. 5(1)(b)(ii) and substituting the new provisions requiring service only on the owner or holder of any registered real right derogate from s. 16(1)(b) of the

Constitution. I do not think so. In *Cowley & Anor* v *Hahn* 1987(1) SA 440(E), the Court dealt with the meaning of the words "any interest in land". At 445 I to 446 B MULLIN J, in relation to whether a usufruct was an interest in land, said:

> **"The first question is whether a usufruct over immovable property is an 'interest in land' as envisaged by the definition of land in the Act. What authority there is suggests it is not. See Aronstan <u>The Alienation of Land</u> at 5. The various textbooks there referred to suggest that a restrictive interpretation should be applied, and that only those rights which diminish the rights of ownership, or confer on the holder powers inherent in the right of ownership, should be regarded as 'interests in land'.**

A usufruct is a personal right, held by the usufructuary only, to the use of the property and its fruits. It does not diminish the rights of ownership such as a real or *praedal* servitude does and which confers on the holder of the servitude a right <u>in</u> the property adverse to the *dominium* holder. The existence of a usufruct may well limit or restrict the enjoyment by the owner of certain rights of possession, and of benefits accruing from the property, but it does not diminish in any way any of the rights of ownership or *dominium*."

This test seems to have been accepted by the courts in the Roman Dutch Law system. Silberberg & Schoeman in <u>The Law of Property</u> 3rd ed. refer to this test as :the subtraction from the *dominium* test" and state at p 50-51 that -

> **"Consequently our courts formulated the so-called subtraction from the *dominium* test which is based on the reasoning that a limited real right diminishes the owner's *dominium* over his thing in the sense that it either (a) confers on its holder certain powers inherent in the universal right of ownership; or (b) to some extent prevents the owner from exercising his right. This means that a limited real right must amount to a 'diminution' of, or a 'subtraction' from the owner's *dominium* over the thing to which the limited real right relates".**

In order to more clearly understand what the learned authors mean in this passage, I think one has to refer to the statement by DE VILLEIRS JP in *Ex parte Geldenhuys* 1926 OPD 155 where he states that a right is real if its correlative obligation constitutes a burden upon the servant thing. He said -

> **"One has to look not so much to the right, but to the correlative obligation.**

If the obligation is a burden upon the land, a subtraction from the *dominium*, the corresponding right is real".

Now Mr *Matinenga* did not submit that the second applicant's interest in the land was a real right in the land which would be recognized in terms of s 5(1)(b) of the Act as warranting a notice. Rather he submitted that the second applicant was a person who should have appeared to the acquiring authority as one who may suffer loss or deprivation of rights and who was recognised as entitled to a notice in terms of s. 5(1)(b)(ii) which was repealed by Act No 15 of 2000. It may be assumed that in so submitting Mr *Matinenga* must have been of the view that the second applicant's rights as a lessee did not constitute a real right in the land.

The lease of Mgwaco Farm by the second applicant was not registered. I think that where a lease is not registered, it should generally not be regarded as conferring a real right in the land. In this case I do not think it does. The owner's *dominium* though restricted to some extent, is not diminished. It is the kind of lease which if notified to a prospective buyer of the land, comes to an end upon the purchase and transfer of the land to the purchaser. The definition of "real right" in the Deeds Registries Act (Cap 20:05) that it means "any right which becomes a real right on registration" is not helpful. But s. 14 of that Act is a little more helpful in that it provides that other real rights in land, other than ownership which is conveyed by a deed of transfer executed and attested by the registrar of deeds, may be conveyed from one person to another only by means of a deed of cession attested by a notary public and registered by the registrar of deeds. In the present case it cannot be said that the second applicant's unregistered base amounts to a diminution or subraction from the owner's *dominium*.

If, as Mr *Matinenga* appeared to have accepted, the second applicant's lease was not a real right in the land, then the need to have served a notice in terms of s. 5(1)(b) of the Act would have arisen only if the Act had not been amended by Act 15 of 2000. The second respondent would then have been covered under the category of any person whose interest or right may be adversely affected by the acquisition as provided in the repealed s. 5(i)(b)ii).

The amendment ushered in by Act 15 of 2000 in respect of s. 5(1) of the Act did not, in my view, derogate from s. 16(1)(b) of the Constitution. Section 16(1)(b) requires that a notice be served on a person with an interest or right in the land to be acquired. The second respondent did not have an interest or right in the land within the meaning ascribed to the phrase "interest in the land" in *Cowley's* case, *supra*. Thus if s 5(1)(b) is *ultra vires* s. 16(1)(b) of the Constitution because it meets the Constitution's minimum requirement in respect of service of a s. 5 notice, which

I am satisfied is the case here, then the failure or omission to serve the notice on the second applicant did not render the acquisition process invalid. To conclude on this aspect of the application, I am satisfied that s 5(1)(b) of the Act as amended by Act 15 of 2000 is *intra vires* s. 16(1)(b) of the Constitution and that the exclusion of persons who may suffer loss or deprivation as a result of an acquisition of land is permissible having regard to s. 16(1)(b) of the Constitution. In my view the class of persons who "may suffer loss or deprivation" is too wide and includes persons who may have peripheral rights to the land but do not have rights or interests in land as defined in *Cowley supra*. See also *David Leon Mead* v *The Minister of Lands, Agriculture and Rural Resettlement and Commissioner of Police* HH 173-2002. The applicants' case based as it was on the contention that the Act was *ultra vires* the Constitution cannot succeed. The acquisition of Hartleyton and Sutton Estate of Mgwaco Farm was accordingly valid to that extent.

The remaining question is whether the first and second respondents were allocated the pieces of land lawfully. The second respondent has not opposed the averments that he is a "nominee" or front for the fourth respondent. To this extent if the fourth respondent was prohibited by law from acquiring land through nominees or agents or "fronts" I would have had no difficulties setting aside the allocation to of land, the second respondent on that ground. There is unfortunately no such law. Admittedly a policy enunciated by the President exists that no person should own more than one farm. I am not aware that that policy has been reduced to law. In this regard then if the allocation of the land to the second respondent was not vitiated by other considerations I would not have found anything to be wrong with it legally.

Mr *Matinenga* submitted, as did aver the applicants in their affidavits, that the allocation of portions of Mgwaco Farm to the first and second respondents was not in compliance with the Agricultural Land Settlement Act [Cap 20:01]. This Act provides in s. 9 that -

> **"No lease in respect of a holding of land referred to in section <u>eight</u> shall be issued to an applicant therefor until the application has been referred to the Board for its consideration and report.**
>
> Provided that nothing in this section contained shall be construed as requiring the Minister to comply with a recommendation or report of the Board in

relation to an applications."

Section 9 of the Agricultural Land Settlement Act quite clearly requires that whilst the Minister may issue leases to applicants he may not do so without considering the recommendation or report of the Agricultural Land Settlement Board established by Part II of that Act as amended by Act No 2 of 2000.

The first, second and third respondents were unable to place before me any evidence that the provisions of the Agricultural Land Settlement Act were complied with in respect of the allocation of portions of Mgwaco Farm to the first and second respondent. Mr *Chirindo* conceded that there was no such evidence. When Parliament enacted the Agricultural Land Settlement Act and amended it in 2000 through Act No 2 of 2000, it had in mind that the Board should perform its functions as stated in s. 6 L i.e. consider and report upon all applications for leases and select and recommend applicants for leases.

The offer of land letter to the first respondent dated 25 June 2003 (Annexure "F") to the founding affidavit) seems to me to go a little beyond the provisions of the Act. Although Clause 6 of the offer letter provides that -

> "A lease agreement will only be entered into once the Minister is satisfied that all conditions have been met".

the conditions attached to the letter requires the first respondent to take up personal and permanent residence on the farm, undertake to initiate development on the farm in terms of the five year development plan submitted by the applicant and refrain from ceding or assigning any right in respect of the farm. It refers to the first applicant as lessee in clauses (c)(ii) and (iii) and in clause 2(b)(i) it reiterates that a formal lease shall be prepared and signed once it is establish that the

applicant has occupied and is developing the land offered. In clause (2)(c) it is provided that -

> **"Irrespective of the date of signature of the lease agreement, the commencement date shall be set back to cover the actual period of occupation and you will be responsible for payment of lease rentals and council rates from the date of your acceptance of this offer".**

In my view the first respondent is in effect constituted into a lessee by the offer letter, He is required to settle on the land and to develop it. He is required, upon it being established that he has met all the requirements of the allocation of the land to him and a lease agreement is concluded to pay rentals and rates with effect from the date of occupation. In my view the first and second respondents obtained leases of portions of Mgwaco Farm without any evidence that s. 9 of the Agricultural Land Settlement Act were complied with. It was upto the third respondent and the first and second respondents to satisfy me that the provisions of the Act had been complied with. They did not so satisfy me.

The Act in s. 8(2)(b) empowers the acquiring authority to exercise any right of ownership, including the right to survey, demarcate and allocate the land concerned without undue interference with the living quarters of the owner or occupier of the land who can only be evicted in terms of s. 9 of the Act. "Allocate" in context must mean "assign" or "devote to" a person and no more. Section 8 (2) (b) must have been deliberately phrased in order to take account the process of lessee identification as provided in the Agricultural Land Settlement Act and in recognition of the fact that the land concerned is not finally acquired until the acquisition is confirmed by the Administrative Court in terms of s. 7 of the Act. I am satisfied that because there is no evidence at all that the third respondent

complied with s. 9 of the Agricultural Land Settlement Act in respect of the first and second respondents the allocation of the land to them must be set aside.

There is one last matter arising from paragraph 6 of the applicants' draft final order sought i.e. that the fourth respondent be prohibited from entering upon any part of Mgwaco Farm. The fourth respondent is a Minister. The applicants have sued him in his personal capacity. Is it to be understood that he may enter upon the farm or any portion of it in his official capacity? If this is so I think an order as prayed for will not be effectuated. This means that this part of the relief is inappropriate. I do not think that it is proper for this court to prohibit a Minister, albeit sued in his personal capacity from entering upon any farm for the purpose of performing his official functions. The order against the fourth is an order made in default of affidavits. I am inclined to grant only a part of the relief prayed for in the said paragraph 6.

In the result I make the following order -

1. **The acquisition of the Remaining Extent of Subdivision B of Sutton Estate and Mgwaco of Hartleyton both of Mgwaco Farm situate in the Lomagundi District is declared to be in compliance with sections 16(1)(b) of the Constitution and therefore valid and consequently the orders in terms of seciton 8 of the Land Acquisition Act (Cap 20:10) issued in respect thereof are valid.**

2. **The purported acquisition of Mpinga Extension of Hartleyton is invalid for failure to comply with s. 7(i)(b) of the Land Acquisition Act (Cap. 20:10).**

3. **The allocation/lease of any portion of Mgwaco Farm to the first and second respondents is invalid for failure to comply with s. 9 of the Agricultural Land Settlement Act [Chapter 20:05].**

4. The first and second respondents are hereby interdicted and prohibited from interfering with the occupation of Mgwaco Farm by the applicants or other person living and working on the farm on the authority of the applicants or either of them and with the conduct of farming operations thereon.

5. The fourth respondent is prohibited and interdicted from authorising, permitting or facilitating or encouraging the unlawful entry upon or occupation of Mgwaco Farm.

6. The first, second and fourth respondents shall pay the applicants' costs, jointly and severally, the one paying the others to be absolved.