

KENNEDY GODWIN MANGENJE
versus
TBIC INVESTMENTS [PVT] LTD & 4 ORS [Case 1]

KENNEDY GODWIN MANGENJE
versus
MINISTER OF LANDS & RURAL RESETTLEMENT & 3 ORS [Case 2]

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 19 September 2013 & 30 October 2013

Opposed application

D. Ochieng, for the Applicants in both Cases
R. Goba, for 1st and 2nd Respondents in Case 1, and for Interested Party in Case 2
L. Chimuriwo, for 4th Respondent in Case 1
No appearance for 3rd & 5th Respondents in Case 1
No appearance for 1st & 2nd Respondents in Case 2

MAFUSIRE J: I have decided in the two cases above that it would make justice “turn on its head”¹ if I did not grant relief to the applicant. These cases were heard together. The parties had agreed to such a course of action.

(a) INTRODUCTION

The applicant has undoubtedly “been more sinned against than sinning.”² The facts read like a comedy of errors. The dispute centres on a piece of land in Goromonzi district. There have been errors in describing that property. There have been errors in stating its exact name. There have been errors in describing its exact extent. There have been errors in just about everything surrounding it, including even in the spelling of the name of the original owner in some official documents; errors on whether or not it was in fact the property that had been acquired for resettlement purposes and allocated to the applicant; errors in deciding

¹See *Zimbabwe Electricity Supply Authority v Maposa* 1999 (2) ZLR 452 (S), at p 466 and *Pamire & Ors v Dumbutshena NO & Anor* 2001 (1) ZLR 123 (H) at p 127

²William Shakespeare in *King Lear*

whether or not some crime or crimes had been committed in relation to the property; errors in respect of certain legal advices proffered by certain government functionaries, including the Attorney-General, and so on.

The original title deed to the property and a replacement copy had disappeared from the deeds office. The registrar of deeds, the fourth respondent in Case 1, was still investigating at the time of the hearing. When the applicant had decided to sue there had been errors in his original application. He had had to withdraw it. When he had started afresh still there were errors in the founding papers. He had had to correct them through some supplementary affidavit and heads of argument. The litany of errors is not exhaustive.

The Attorney-General had been the legal advisor and counsel for the registrar of deeds and the Minister of Lands and Rural Resettlement, (hereafter referred to as “**the Minister**”). The Minister was the third respondent in Case 1 and the first respondent in Case 2. The Attorney-General himself was a substantive party in Case 2, having been cited as the second respondent. Owing to certain legal advice which he had proffered on the matter and which was now incongruous to the official position taken by him, the Minister and the registrar of deeds in the pleadings filed of record, the Attorney-General’s representative found herself in an invidious position. On the day of the hearing she renounced agency. The matter had to be postponed to another week to enable the Minister to secure alternative legal representation. When the matter resumed the Minister had still not found an alternative lawyer. However, the in-house counsel in the ministry was present in court. She asked for the matter to proceed to avoid any further delay. It was advised that the Minister had decided to remain neutral in the whole matter and to abide by the court’s decision. The in-house counsel would maintain a watching brief.

What the applicant seeks in the main, in a nutshell, and in my own words, is the setting aside of the current deed of transfer in respect of the property which is held by one of the litigants called TBIC Investments (Private) Limited. TBIC Investments (Private) Limited is the party cited as the first respondent in Case No 1 above. In Case No 2 it is cited under the strange title “Interested Party”. I shall from now on refer to it simply as “**TBIC**”.

The applicant also wants the re-instatement to him of the so-called “offer letter” in respect of the property. He seeks other ancillary relief that includes the eviction from the property of TBIC and all those claiming through it. As I determine these issues I have to deal with the technical objections raised by, or on behalf of the Minister, the Attorney-General and

TBIC such as whether or not the applicant has *locus standi*; whether or not Case 2 was filed timeously or properly and what the correct identity or description of the property in question is.

But before I get into the technicalities of the nature of the relief sought and the nature of the defences proffered, and before I set out the crisp issues for determination, it is necessary to explain the background of the dispute in some detail. One has to rewind back to 1997 and begin the story from there.

(b)BACKGROUND

As at 18 June 1997 the property existed as a certain piece of land situate in the district of GOROMONZI called REMAINING EXTENT OF STUHM, measuring 1074, 7410 hectares. The owner was one Cecil Michael Reimer (hereafter referred to as “**Reimer**”). The title deed no was 3032/87. From now on I shall refer to this property as the “**property**” or, depending on the context, “**the original property**” or “**the Goromonzi property**”.

It appears that at some stage Reimer had obtained a sub-division permit to subdivide the original property. He was carving out portions of land and selling them off to third parties. One such portion, measuring 412,1091 hectares, was sold off to an entity called Darnall Investments (Private) Limited. It was transferred as Lot 2 of Stuhm on 19 June 1997 under deed of transfer no 4975/97.

In 1988 Reimer sold and transferred another portion called Lot 3 of Stuhm to another entity called Douglasdale (Private) Limited under deed of transfer no 9247/98. That portion measured 79,4959 hectares.

TBIC enters the picture in 1999. Its case and that of the Minister was that in that year TBIC had bought from Reimer what had remained of the original property. In correspondence and affidavits deposed to on his behalf, the Minister avers that TBIC had made considerable investment on the portion of the original property sold to it. However, TBIC itself does not say anything in this regard. Be that as it may, it appears that once it had bought the remaining extent of the original property, TBIC subsequently leased it to one Paul Esau Hupenyu Chidawanyika (hereafter referred to as “**Chidawanyika**”). That was in 2003. Chidawanyika is cited as the second respondent in Case 1. He is not a party in Case 2.

Before going to the events of 2003 in any greater detail, I note that on 25 August 2000 the original property was identified for compulsory acquisition by Government in accordance

with its programme of land reform. It was listed in the Government Gazette under General Notice No 405A/2000 as the Remaining Extent of Stuhm. But there were errors. The notice referred to the owner as one Cecil Michael Reiner. The extent of the property was given as 1074,7410 hectares. Thus, the owner's surname was misspelt. He was Reimer, not Reiner. Further, as a matter of fact, by that time 412,1091 hectares and 79,4959 hectares had already been hived off the original property when Lots 2 & 3 had been sold and transferred in 1997 and 1998 respectively. Thus the arithmetic was also wrong because if 412,1092 hectares and 79,4959 hectares had been deducted from the original 1074,7410 hectares then 583,1360 hectares would have remained. But it seems the notice had simply referred to the original area, namely 1074,7410 hectares. It was partly for this reason that TBIC argued that the property that had been listed for acquisition was not the same property that had been sold to it. I shall come back to this particular argument later on.

In May 1992 the government had enacted the Land Acquisition Act, *Cap 20:10*. Part III of that Act provided the procedure for compulsory acquisition of land. Among other things, a notice of acquisition had to be published in the Government Gazette. Such notices would remain valid for one year after which they would automatically lapse, unless an application for the confirmation of the acquisition was pending in the Administrative Court, in which case the period during which such application was pending would not be counted as part of the one year period.

I mention in passing that the Land Acquisition Act was amended in 2001 and 2004 to increase the period of validity for the preliminary notices of acquisition to two years and ten years respectively. However, at the time that GN 405A/2002 was published the period of validity was one year. One of TBIC's strong arguments was that GN 405A/2002 had automatically lapsed after the period of validity had expired and that therefore the property could not have been up for acquisition and re-allocation by the time that the Constitutional Amendment (No 17) Act was promulgated. It was that Constitutional amendment that ushered in s 16B in the then old Constitution of Zimbabwe. It was common cause that GN 405A/2000 had never been expressly withdrawn by the time of the promulgation of s 16B of the Constitution. Furthermore, the acquisition of the property had never been subsequently confirmed in court in accordance with the provisions of s 8 of the Land Acquisition Act. I shall revert to this point later on.

The next significant events were in 2003. On 13 May 2003 GN 228/2003 was published. It listed the original property for acquisition. Whilst this time the owner’s surname was spelt correctly the area was still referred to, incorrectly, as 1074,7410 hectares. However, GN 228/2003 was on 1 August 2003 withdrawn by GN 298A/2003.

The property was again listed for compulsory acquisition for the third time. This was under GN 323A/2003. But again GN 323A/2003 was later on withdrawn by GN 438/2003. Both the Minister and TBIC averred that it was TBIC that had been behind these withdrawals allegedly owing to its vested interest in the property. TBIC argued that the withdrawals of those notices, coupled with the fact that the first one under 405A/2000 had lapsed automatically, meant that the property was no longer available for acquisition when the aforesaid s 16B to the Constitution was promulgated in 2005. Again I shall revert to these points later on.

By 2003 applicant had not yet entered the picture. It appears that in that year he had bought himself a farm elsewhere. That was in the district of Salisbury. The farm was called Remainder of Guernsey. It measured 743,8355 hectares. Hereafter I shall refer to that property as “**applicant’s Guernsey farm**” or, plainly “**Guernsey farm**”. Applicant had taken transfer of Guernsey farm on 29 May 2003. However, he was subsequently to lose this farm in 2005. It was to be compulsorily acquired by government for resettlement.

The new s16B evidently had far-reaching provisions with far-reaching consequences as far as rights to land ownership were concerned. Prior to the amendment the right to protection from compulsory deprivation of property was justiciable. Under that new Constitutional provision the jurisdiction of the courts to adjudicate on any aspect of land acquisition other than the amount of compensation payable was expressly ousted; see *Mike Campbell (Pvt) Ltd & Anor v Minister of National Security Responsible for Land, Land Reform & Resettlement & Anor* 2008 (1) ZLR 17 (S) and *Commercial Farmers Union & Ors v Minister of Lands & Ors* 2010 (1) ZLR 576 (S).

The relevant provisions of 16B of the then Constitution read as follows:

“16B Agricultural land acquired for resettlement and other purposes

(1)

(2) Notwithstanding anything contained in this Chapter –
(a) all agricultural land –

- (i) that was identified on or before the 8th July 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [Chapter 20:10], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or
- (ii) that is identified after the 8th July 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act ... being agricultural land required for resettlement purposes: or
- (iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including but not limited to –
 - A. settlement for agricultural or other purpose; or
 - B. the purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or
 - C. the relocation of persons dispossessed in consequence of the utilisation of the land referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or in the case of land referred to in subparagraph (iii) with effect from the date it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3)

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

(5) Any inconsistency between anything contained in –

- (a) a notice itemised in Schedule 7;
- (b) a notice relating to land referred to in subsections (2)(a)(ii) or (iii); and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2)(a) or invalidate the vesting of title in the State in terms of that provision.

(6)

(7)”

The Schedule 7 referred to in subsection (2)(a)(i) of s 16B had 157 preliminary notices that had been published in the *Government Gazette*. They listed the properties that had been “*identified*” for acquisition. The two notices under GN 405A/2000 and GN 228/2003 relating to the property were on the list. On 3 November 2005 the original title deed no 3032/87 aforesaid was endorsed by the Registrar of Deeds. This was in line with s 16B(4) of the Constitution. That subsection required that as soon as the new Constitutional provision had come into force the registrar of deeds would be required to make the necessary endorsements on the properties as “*identified*” for compulsory acquisition as provided. The purpose and effect of the endorsements were to cancel the existing deeds and registering such properties in the name of the State.

The endorsement over the original property read as follows:

“The within mentioned land now vests in the President of Zimbabwe in terms of Section 16B(4) of the Constitution of Zimbabwe as amended”

Although it was not clear as to when applicant’s Guernsey farm had been listed in the *Government Gazette*, it was also acquired in 2005 on the coming into being of the new Constitutional Amendment (No 17) Act. An identical endorsement was noted on its title deed on 10 October 2005.

On 7 August 2006 the Minister, in terms of the standard term “offer letter” allocated the remainder of Stuhm to the applicant. The actual description of the offered land was “Subdivision 1 of R/E of Stuhm in Goromonzi District of Mashonaland East Province..... The farm is approximately 534.00 hectares in extent.” Applicant accepted the offer on 2 February 2007. He said before accepting he had checked the status of the land at the deeds office and had been satisfied that it had become State land by virtue of the endorsement aforesaid. On request he had been given a copy of the endorsed deed of transfer.

However, when the applicant had tried to take occupation of the offered land in terms of the offer letter he had found Chidawanyika already in occupation in terms of the lease agreement aforesaid. Chidawanyika refused to move. Problems then started. The dispute that has raged incessantly began at this time. Applicant wanted to take up occupation. He wanted Chidawanyika evicted. Chidawanyika claimed rights of occupation through TBIC which in turn claimed prior rights of ownership.

When Chidawanyika would not vacate the applicant enlisted the help of the Minister. Applicant also approached the Attorney-General. He agitated for Chidawanyika’s prosecution

for his refusal to vacate what he considered to be State land. There were intense and protracted agitations. TBIC maintained that the inclusion of the property on Schedule 7 had been a mistake. It argued that the property was no longer available for acquisition because the notices for acquisition had either lapsed or been withdrawn.

On the other hand the applicant maintained that GN 405A/2000 had never been withdrawn and that in any event the property had been listed on Schedule 7 through both the original notice and the subsequent ones. The title deed had been endorsed. The property had become State land. It was still therefore capable of being offered for re-settlement.

At first the Minister, through the in-house counsel, had seemed to support the applicant's position. Part of her letter on 2 September 2009 to the Attorney-General read as follows:

“Chidawanyika contends that after Remaining Extent of Stuhm was gazetted on 8 September 2003 the preliminary notice was subsequently withdrawn and thereafter the land was never gazetted again. He is wrong. The land was identified in that gazette of 08 August 2003 and it is itemized in schedule 7 of the Constitutional Amendment (No 17) Act. That constitutes acquisition. In fact, the acquisition is confirmed twice in that the gazette of 2000 in which the Remaining Extent of Stuhm is identified is also itemized in schedule 7 of the Constitutional amendment (No 17) Act of 2005. The intention to acquire Remaining Extent of Stuhm cannot be clearer.”

As the applicant piled up pressure for Chidawanyika's prosecution, and as the Attorney-General apparently pondered on what action to take he had suggested that the property be re-gazetted for compulsory acquisition. However, in the letter aforesaid the Minister's in-house counsel had strongly argued against such a move. She had concluded her letter by saying it was totally unnecessary and an extra expense to re-gazette the land because it had already been gazetted. There was a stalemate.

(c) LITIGATION

As efforts to prosecute Chidawanyika fizzled out applicant switched his attention to civil redress. He says when he went to the deeds office to check on the title deed he had been surprised to learn that the original one with the endorsement aforesaid had been removed and had been replaced with one without the endorsement. Since he still had that copy that the deeds office had given him before, the registry staff had made an extra copy for their file.

Under HC 7301/10 applicant filed an application for the eviction of TBIC and Chidawanyika. It was this application that he subsequently withdrew and tendered wasted

costs. He felt that the application had incurable errors. According to him not all interested parties had been joined.

In March 2009 TBIC had somehow managed to take transfer of the remainder of the property under deed of transfer no 1724/2009. The transfer had apparently been the consummation of the alleged 1999 agreement of purchase with Reimer. The description of the property as transferred to TBIC was “Remaining Extent of Stuhm, measuring 583,1360 hectares”.

Applicant complained that the transfer was fraudulent. He said the property having become State land in 2005 there was no way TBIC could lawfully have taken transfer. He fingered TBIC in the disappearance from the deeds office of the original deed of transfer and the copy that he had supplied and both of which had the endorsement.

Reimer, the original owner and transferor of the property, explained in an affidavit dated 10 March 2009 that in April 1999 he had sold it to Time Bank Investments Company (Pvt) Ltd which allegedly had become the “real owner” and that the certificate of “no present interest” which he held at that time in respect of the property had eventually expired before the property had been transferred. He further explained that in May 2005 he had offered the property to the Minister but had got no response within the stipulated 90 days. He had then gone on to inform the Minister in September 2008 of his intention to sell and transfer to Time Bank Investment Company (Private) Limited which had now become TBIC.

The transfer attorney or conveyancer, one Christopher Chigwanda deposed to an affidavit also on 10 March 2010. The substance of that affidavit was that after he had been instructed to transfer the property he had been advised by the deeds office that their office copy of the title deed had gone missing but that there were no encumbrances registered against the property. He had then requested the registrar of deeds to transfer the property using the client’s copy of the deed.

The registrar of deeds filed identical affidavits in the two cases above. The summary of those affidavits was that the Remaining Extent of Stuhm had at all times been registered in the name of Reimer; that an XN Caveat had been noted against the title deed in 2000 following the listing of the property in the Government Gazette; that on 3 November 2005 the property had been transferred to the President of Zimbabwe in terms of s 16B of the Constitution Amendment (No 17) Act, an endorsement to that effect having been noted on the title deed; that both the original title deed and a copy which had been requested by one of

the deeds registry staff had been removed deliberately and had gone missing; that the transfer of the property from Reimer to TBIC had been irregular and that an investigation was under way but was being hampered by the fact that even the new title deed in favour of TBIC had also been removed and could not be located.

Applicant filed Case 1 in January 2011. He sought a declaratory order that the compulsory acquisition of the property by government had been valid. He sought several other orders, namely the nullification of the transfer of the property to TBIC; the nullification of TBIC's lease of the property to Chidawanyika and the eviction of Chidawanyika and anyone else claiming occupation through TBIC.

TBIC, the Minister and Chidawanyika all filed opposing papers in Case 1. The registrar of deeds simply filed the aforesaid affidavit. The Commissioner-General of Police who had been cited evidently as a nominal party did not file any papers.

The one ground of opposition by both TBIC and the Minister was that the applicant lacked *locus standi* allegedly because his claim was in reality based on the *reivindicatio* remedy; that this remedy was available only to owners of property and that since he was not the owner his claim was ill-conceived. The Minister weighed in with the argument that it was only the State that could take civil or criminal proceedings in relation to the land.

The next ground of opposition was taken by the Minister alone. This was in the heads of argument. It was that in Case 2 the applicant was out of time. It was argued that whatever name the applicant had chosen to call the nature of his proceedings, in reality the application was one for review which had to be filed within 8 weeks of the decision sought to be impeached in accordance with r 259 of the rules of this court. In Case 2 the applicant was some 5 weeks out of time. No application for condonation had been made.

The next ground of opposition was by TBIC. It was that the property that the applicant had been offered was different from the property owned by TBIC which it held under deed of transfer no 1724/2009. Much was made of the discrepancy between the description and the extent of the property in the offer letter and the description and the extent the property in the title deed. In the offer letter the property had been described as "**Subdivision 1 of R/E of Stuhm in Goromonzi District of Mashonaland East Province measuring approximately 534 hectares in extent**". In the title deed held by TBIC the property was registered as "**Remaining Extent of Stuhm situate in the District of Goromonzi measuring 583,1360 hectares**".

On the merits TBIC argued that the offer letter given to the applicant had been invalid because it had referred to a non-existent property since not only was the description of the property incorrect as already stated but also that by the time the offer letter had been issued the property was no longer available for compulsory acquisition by reason of the fact that the notices of acquisition had either lapsed automatically or had expressly been withdrawn.

On the merits the Minister argued that by the time the property had been acquired by government the original property had been subdivided and a portion thereof had been sold to TBIC and that therefore the property was no longer available for acquisition; that on buying the property TBIC had gone on to lease and invest heavily on it; that it was not government policy to dispossess indigenous persons of their land in favour of other indigenous persons and that efforts were under way to offer applicant alternative land.

Applicant had prosecuted Case 1 up to the hearing stage. About four months before the date of hearing the Minister gave the applicant a written notice of the immediate withdrawal of the offer letter (hereafter referred to as “**the withdrawal letter**”). The withdrawal letter was said to be in terms of the conditions of offer attached to the offer letter. Applicant was required to forthwith cease all operations on the property and to immediately vacate. The withdrawal letter concluded by inviting the applicant to make representations, if he wished to do so, within seven days of the receipt of the letter.

The reasons for the withdrawal letter were explained in two other letters written to the applicant and his legal practitioners by the Minister’s in-house counsel three days later. The reasons were basically that the property was owned by an indigenous entity, that it was not the policy of the ministry to dispossess indigenous owners of land and that therefore the applicant could not insist on enforcing his rights against TBIC.

Applicant reacted to this development by making strong representations against the withdrawal of the offer letter. He wrote to the Minister some three days after the letter from the Minister’s in-house counsel. In the letter he basically laid out the history of the matter from the time that the property had been listed for acquisition, the actual acquisition, his offer letter, the transfer to TBIC, the abortive prosecution and the loss of his Guernsey farm. He complained of the Minister’s manifest double standards on the policy regarding dispossession of land owned by indigenous persons since he, also an indigenous person, had lost his farm to government.

Applicant had been offered an alternative piece of land in the Beatrice area. However, after inspecting it he had turned the offer down as he had considered the land to be unsuitable for the type of farming that he had been carrying out in Goromonzi and which he intended to continue with. Applicant touched on this in his written representations. He concluded by imploring the Minister to support his efforts to get occupation of the property since, as he said, no plausible reason had been given for why he could not.

Applicant further reacted to the withdrawal letter by instituting Case 2 above. He argued that the withdrawal letter had offended against the rules of natural justice in that he had not been afforded an opportunity to make representation before the Minister had taken the adverse decision against him. He also argued that by taking that administrative function the Minister had failed to act fairly and had therefore breached the Administrative Justice Act, *Cap 10: 20*. After setting out the history of the dispute all over again, applicant sought the setting aside of the withdrawal letter and the reinstatement of the offer letter. He explained that his Case 1 had been predicated on the offer letter. Since it had now been withdrawn it was pointless to proceed with it without first sorting out the issue of the withdrawal letter. In Case 2 applicant cited the Minister as the first respondent, the Attorney-General as the second respondent and TBIC as the Interested Party.

Only the Minister and TBIC opposed Case 2. The Attorney-General prepared all the pleadings on behalf of the Minister but filed no papers for himself.

The Minister's one ground of opposition in Case 2 was that he and his officials had actively engaged the applicant and his legal practitioners to explain why he could not occupy the property and that therefore he could not be said to have violated the rules of natural justice.

The Minister also argued that where the acquiring authority did not support the holder of an offer letter it was incumbent upon it to withdraw the letter. He then repeated the argument that TBIC had bought the property and had been recognised as the owner; that it had been TBIC that had been behind the delisting of the property; that TBIC had invested heavily on it and that owing to applicant's adamant stance despite previous correspondence to him it became necessary "*to speak legally with a withdrawal letter*".

TBIC opposed Case 2 on the preliminary basis that the applicant had not exhausted his domestic remedies. It was argued that applicant had made representations in respect of the withdrawal letter as the Minister had invited him to do; that he ought to have waited for the

Minster's response before he approached this court and that applicant "*cannot challenge unconsummated administrative proceedings*" in a court of law. It was argued that until the Minister had responded applicant's cause of action was incomplete.

I note for the record that the withdrawal letter was on 24 June 2011. The applicant's representations were on 30 June 2011. Case 2 was filed on 28 September 2011.

TBIC's opposing affidavit is largely argumentative on mere technical points such as the claim that the Administrative Justice Act did not authorise a court to intervene in a matter that was still under consideration by an administrative authority; that the Constitutional amendment that introduced s 16B had actually supported the Minister's policy that indigenous owners of land would not be dispossessed of their land; that the applicant had not accepted the offer of land timeously and that it was unlawful for the applicant to have "*ordered*" the registrar of deeds to insert in the official records of the deeds registry a foreign document that he himself had brought. The argument that the property was no longer available for compulsory acquisition by the time of the Constitutional amendment was repeated. TBIC criticised the applicant's rejection of the offer of an alternative land and claimed that applicant believed that no other land in Zimbabwe was suitable for him and that, at any rate, the Minister had no obligation to offer him an alternative piece of land.

(d) THE ISSUES

Despite the volumes of papers filed of record, in my view there was one major issue that was decisive. What was the status of the original property by the time of the Constitutional Amendment (No 17) Act in September 2005 when it was included on Schedule 7 to s 16B via the preliminary notices that had previously been published in the Government Gazette?

However, before dealing with that main issue there are some other preliminary points arising in Case 2 that I have to dispose of. Only if applicant succeeds in Case 2 can I go on to decide Case 1.

The one issue in Case 2 was whether or not the applicant had approached the court prematurely without first having exhausted his domestic remedies. The next was whether the *audi alteram partem* rule of natural justice had been violated. The third was whether there had been a breach of the provisions of the Administrative Justice Act. The last was whether applicant lacked *locus standi*. I will now deal with these issues in turn.

(i) FAILURE TO EXHAUST DOMESTIC REMEDIES

Initially TBIC's point was that in the withdrawal letter the Minister had invited applicant to make representations, albeit after the decision to withdraw the offer letter had been made. After he had obliged applicant had however, gone on to file Case 2 before waiting for the Minister's response. Therefore, the argument proceeded, the process had not been completed.

For the record, on 20 December 2011 the Minister had finally responded to applicant's representations. But he said nothing new. He maintained his position that the land in question had been bought by an indigenous entity which had enjoyed the right of use prior to getting transfer and that it was the entity that had been behind the de-listing of the property. The Minister also said that if TBIC had procured the title deed fraudulently then that was a criminal issue that had to be investigated.

However, even if the Minister had not written the letter of 24 December 2011, I would still not have been prepared to hold that in Case 2 the applicant was non-suited. I am satisfied that he had been treated unfairly. In my view the Minister did not seem to have been sufficiently sensitive to his plight. Here was someone who had been an indigenous land owner. Despite the Minister's avowed policy of sparing indigenous land owners from compulsory acquisitions applicant had nonetheless lost his Guernsey farm. Of course, the Minister had tried to do something about it. He had offered him the Goromonzi property. But whatever the Minister's good intentions, the fact remains that since 2009 applicant had not been able to occupy that land. The Beatrice farm that he had been offered as an alternative had demonstrably turned out to be unsuitable for reasons that he had clearly and satisfactorily articulated to the Minister. It had never been in doubt that the applicant had been entitled to a second farm. TBIC's argument that the Minister had no obligation to offer the applicant alternative land was self-serving and contrary to the Minister's own position. The Minister's own position was that he would continue to look for an alternative piece of land for the applicant.

Thus given that applicant had lost his own farm in 2005 despite that he was an indigenous person; given that the land he had been offered in 2009 had turned out to be unavailable because TBIC and Chidawanyika claimed it; and given that when he had taken action in Case 1 to assert his rights the process had been thwarted by the Minister when he had revoked the offer letter just before the hearing, I would not be prepared to hold that in

Case 2 the applicant had approached the court prematurely. That case had been instituted some four months after the Minister's withdrawal letter.

I am satisfied that by the withdrawal letter the Minister had made a substantive decision. By that decision all the rights of the applicant to the property had terminated. The applicant had been ordered to cease all operations forthwith and to vacate the property. It was a complete decision. It was justiciable. That the possibility existed that the Minister could well make another decision in response to applicant's representations would not detract from that fact that the first decision had been complete by itself.

(ii) WHETHER THE AUDI ALTERAM PARTEM RULE HAD BEEN VIOLATED

The *audi alteram partem* rule holds that a man shall not be condemned without being given a chance to be heard in his own defence. The rule is so basic to jurisprudence that, as EBRAHIM J said in *Dube v Chairman, Public Service Commission & Anor* 1990 (2) ZLR 181 (H), it is often termed a rule of natural justice.

The rule implores public officials, judicial and quasi-judicial officers, and really anyone entrusted with the power to make decisions or the power to take action affecting others adversely, to exercise such powers fairly. Fairness is the overriding consideration.

The legitimate expectation doctrine is an extension of the *audi alteram partem* rule. In England, in the case of *Schmidt and Anor v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA), LORD DENNING MR, said, at p 909:

“... an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say” (emphasis added).

Later on, in 1971, LORD DENNING had this to say in *Breen v Amalgamated Engineering Union and Ors* [1971] 1 All ER 1148, at p 1153:

“It is now well settled that a statutory body, which is entrusted by a statute with a discretion, must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand, or as administrative on the other hand, or

what you will. **Still it must act fairly. It must, in a proper case, give a party a chance to be heard...** (emphasis added).

The doctrine is also part of the South African law; see *Administrator, Transvaal and Ors v Traub and Ors* 1989 (4) SA 731. In Zimbabwe it is firmly entrenched in our law; see *Health Professions Council v McGowan* 1994 (2) ZLR 392 (S); *Taylor v Minister of Higher Education & Anor* 1996 (2) ZLR 772 (S) and *Kanonhuwa v Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H) among others. In *McGowan's* case GUBBAY CJ stated as follows at p 334:

“In short, the legitimate expectation doctrine, as enunciated in *Traub*, simply extended the principle of natural justice beyond the established concept that a person was not entitled to a hearing unless he could show that some existing right of his had been infringed by the quasi-judicial body... **Fairness is the overriding factor in deciding whether a person may claim a legitimate entitlement to be heard...**”(emphasis added). See also *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S), per McNALLY JA, at p 21C - D.

Thus administrative decisions such as the one made by the Minister in the present case when he issued the withdrawal letter are reviewable by this court. An administrative decision made in violation of natural justice can be set aside, especially if it is to be implemented immediately. In the *McGowan's* case the learned Chief Justice said, at p 337C – D:

“The general rule is that once a decision has been reached in violation of natural justice, even if it has not been implemented, **a subsequent hearing will be no meaningful substitute**. The prejudicial decision taken will be set aside as procedurally invalid. In this way **the human inclination to adhere to the decision is avoided**” (emphasis added).

In the present case not only was the Minister's decision reached in violation of natural justice but also it was to be implemented immediately. I accept that when the applicant instituted Case 2 the Minister was still to respond to his representation. However, as stated in the *McGowan* case above, a subsequent hearing would be no meaningful substitute.

There may be situations where the court might accept an administrative decision taken in violation of natural justice where for, instance, a statute authorises an *ex parte* action by the administrative authority in an emergency or where there is a sufficient interval between the decision and its implementation during which there is a fair hearing. In *Sachs v Minister of Justice, Diamond v Minister of Justice* 1934 AD 11 whilst dealing with the statutory exclusion of the *audi alteram partem* rule in certain situations, STRATFORD ACJ said at p 38:

“Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has to be invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the interpretation of the Act, the implication is excluded, there is the end of the matter.”

In the *McGowan* case the learned Chief Justice stated, at p 337E – H:

“The exceptions to the rule are set out by Professor Baxter in his work on Administrative Law at pp 587 – 588, as follows:

‘(i) Where a statute authorises emergency, *ex parte* action, it might be implicit in the statute that, unless natural justice is excluded altogether, a hearing need only be given after the decision is taken. **If there is no urgency, however, the court will require natural justice to be observed beforehand.**

(ii) A court may accept as sufficient compliance with natural justice a hearing held after the decision has been taken where:

- there is a sufficient interval between the taking of the decision and its implementation to allow a fair hearing;
- the decision maker retains a sufficient open mind to allow himself to be persuaded that he should change his decision;
- the affected individual has not thereby suffered prejudice

These are concessions to the demands of administrative efficiency, but they are limited. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of ‘curing’ the failure to hold one before” (my emphasis)

The “... *human inclination to adhere to [one’s] decision...*” referred to by the learned Chief Justice in the *McGowan*’s case above was probably aptly demonstrated in this case. In his letter of 24 December 2011 aforesaid the Minister simply stuck to his earlier decision and his earlier position that the applicant could not have the property because it was owned by an indigenous entity.

In the withdrawal letter the Minister alleged that the withdrawal was in terms of the conditions of offer attached to the offer letter. The offer letter itself reserved to the Minister the right to withdraw or change the offer if he deemed it necessary or if the applicant was in breach of any of the set conditions. The set conditions must have been those at the back of the letter. They were these:

- (1) The applicant was to take up personal and permanent residence on the property or, within 3 months of the acceptance of the offer letter, appoint a manager to personally and permanently stay there.
- (2) The acceptance of the offer had to be communicated to the Minister within 30 days of the receipt of the offer letter.
- (3) Developments on the property had to be initiated in accordance with the 5 year development plan submitted with the application.
- (4) The applicant could not in any way part with possession of the property, for example, by way of cession, lease or assignment of rights, or subletting without the Minister's prior written consent.
- (5) The applicant had to comply with all the provisions of the Agricultural Land Resettlement Act, [*Cap 20: 01*] pertaining to the leasing of State land, and, in addition any special conditions which the Minister might impose.
- (6) The applicant had to comply with any laws requiring the grant of any servitude over the property.
- (7) The onus to notify the Minister of any change of address lay with the applicant whose failure to do so would absolve the Minister of responsibility over any misdirected mail.
- (8) On it being established that the applicant had taken occupation of the property a 99 year lease would be prepared for the applicant's signature.

It was common cause that the Minister's withdrawal letter was not motivated by any breach of the conditions of offer by the applicant. At any rate, in his withdrawal letter the Minister did not specify any such condition as may have been breached by the applicant. That can only mean that the Minister withdrew the offer letter on the basis that the letter itself had reserved to him the right to do so if he deemed it necessary. His in-house counsel confirmed as much. In the one explanatory letter of 27 June 2011 to the applicant she wrote:

"It is the Acquiring Authority's prerogative to issue offer letters and withdraw them where it deems necessary" (*sic*).

But as I have already mentioned, in doing so the Minister had to observe the rules of natural justice. Furthermore, and at any rate, in *Masunda v Minister of State for Land & Anor* 2006 (2) ZLR 72 (H), this court, BERE J, held that the Agricultural Land Settlement Act,

Cap 20: 01, which regulates the allocation of land, does not give the Minister unilateral powers to withdraw offer letters to beneficiaries of the land reform programme. The learned judge went on to state that it is a very basic tenet of administrative law that before a decision is taken that adversely affects another person, the affected individual has to be given an opportunity to be heard.

In the premises I find that the Minister violated the *audi alteram partem* rule when he withdrew the offer letter.

(iii) LOCUS STANDI

In support of its argument that applicant did not have the requisite *locus standi* to seek its eviction from the property because such an action could only be based on the *reivindicatio* remedy, TBIC referred to the South African cases of *Hartland Implemente (EDMS) Bpk v EnalEiendomme BK En Andere* 2002 (3) SA 653 (NC); *Joosabv. J. I. Case SA (Private) Limited and Others* 1992 (2) SA 665 (N); *Mngadi NO v Ntuli and Others* 1981 (3) SA 478 (D) and *Vumane and Another v Mkize* 1990 (1) SA 465 (W). The common thread running through those cases was that in order for an applicant to vindicate a property he was required to prove his ownership of the property and the respondent's possession of same.

Vumane's case dealt with a statute, the Black Communities Development Act, which conferred on applicants *inter alia* the right to occupy buildings on certain premises. The court held that the applicants could not in law be regarded as owners of the premises and consequently that they could not vindicate.

In Zimbabwe the issue of offer letters and *inter alia* the right of beneficiaries over agricultural lands offered for resettlement is governed by the Constitution. In *Commercial Farmers' Union & Ors v The Minister of Lands and Resettlement & Ors* 2010 (1) ZLR 576 (H) and *Commercial Farmers' Union & Ors v Minister of Lands & Ors, supra*, the Supreme Court, sitting as a Constitutional Court, held that an "offer letter" conferred on the holder or beneficiary the right to occupy and use the land so offered. Thus the South African authorities cited by TBIC are irrelevant. In Zimbabwe the holder of an offer letter in respect of land acquired for resettlement in terms of the land reform programme is entitled to occupy the land and to use it. He or she is entitled to sue for the eviction of anyone interfering with that right, unless that person proves a superior right of occupation. In this case the applicant had the requisite *locus standi*.

(iv) WHETHER THERE WAS A BREACH OF THE ADMINISTRATIVE JUSTICE ACT

In my view the Administrative Justice Act, *Cap 10: 28*, is an elaborate restatement of the rules of natural justice. In the case of *Zindoga&Ors v Minister of Public Service, Labour and Social Welfare & Anor* 2006 (2) ZLR10 (H), PATEL J, as he then was, said at p 13D – E:

“It is axiomatic that any party who has a right or interest that is likely to be affected by an administrative decision or which is susceptible to being prejudiced thereby must be heard before that decision is taken. This is dictated by the time honoured precept of the common law embodied in the *audi alteram partem* rule **and now codified in the Administrative Justice Act [Chapter 10: 28]**” (emphasis added).

In substance the Act behoves an administrative authority to observe the rules of natural justice whenever it makes an administrative decision or takes an administrative action adverse to vested rights or legitimate expectations.

One of the arguments put forward for and on behalf of the Minister, particularly in the heads of argument, was that despite the reference to the Administrative Justice Act applicant’s Case 2 was simply one for review, that in terms of r 259 of the rules of this court an application for review has to be filed within 8 weeks of the decision to be reviewed and that the applicant’s application was out of time, allegedly it having been filed some 5 weeks out of time. Relying on the cases of *Masuka v Chitungwiza Town Council & Anor* 1998 (1) ZLR 15 (H) and *Forestry Commission v Moyo* 1997 (1) ZLR 254 (S) it was argued that if the applicant instituted Case 2 in terms of s 26 of the High Court Act, then the proceedings were common law proceedings for review.

In the *Masuka* case, DEVITTIE J rejected the position taken in *Musara v Zinatha* 1992 (1) ZLR 9 (H) that in the field of administrative law there is a distinction between, on the one hand, void acts which can be brought on review within the prescribed time limits but which also can be brought as ordinary applications even outside those time limits, and, on the other hand, voidable acts which can only be brought by way of review within the 8 weeks period prescribed by r 259.

In his heads of argument on this point the applicant seemed confused. In paragraphs 34 and 35 of those heads applicant argues that proceedings brought in terms of s 4 of the Administrative Justice Act “... are not review proceedings **simpliciter** in the sense that they

do not supplant the procedure of common law review". He argued that proceedings under that Act amount to a form of statutory review but that circumstances might exist when they might not constitute a review at all.

Applicant's Case 2 was predicated on the withdrawal letter and on his argument that in terms of that letter his cause of action had matured and that he did not have to wait for the Minister's response to his representations. On the other hand the Minister and TBIC insisted he ought to have waited for that response.

In his heads of argument the applicant states unequivocally that in terms of s 26 of the High Court Act, [Cap 7: 06], this court has power to review all decisions of *inter alia*, administrative authorities; that the grounds of review as specified in the High Court Act are common law review procedures; that r 259 of the rules of this court is preemptory in providing that review proceedings "**shall**" be instituted within 8 weeks of the "**...termination of the suit, action or proceedings in which the irregularity complained of is alleged to have occurred**"; and that if he failed to bring the review proceedings timeously then he would be non-suited.

What then confuses issues is that applicant goes on to argue that it could not be said that there had been "**termination**" within the meaning of r 259 when the Minister issued the withdrawal letter, because, the argument persisted, such "termination" would only have occurred after the Minister had either made a decision on the applicant's representations (as he had been invited to do so in the withdrawal letter), or if he had failed to respond to those representations within a reasonable time. Applicant stressed that the Minister had not yet become *functus officio* at the time of the withdrawal letter.

Such confusion by the applicant prompted the Minister to retort in his heads of argument as follows:

"8.0 At paragraphs 39 and 42 of his Heads of Argument, the Applicant says he was not out of time when he instituted these proceedings because the decision to withdraw the offer letter 'was not final' at the time it was made and it was therefore 'not reviewable' at that time. But he has now instituted these proceedings because of that same decision and the question is: When did the decision become final and reviewable?"

Since, as noted before, the Minister eventually decided not to contest the matter and chose to abide by the decision of this court and since none of the remaining parties took up

the point at the hearing I have refrained from deciding whether or not the applicant's Case 2 was a review application which had to be presented within a specific time frame, or whether it was some other application that could be brought within a reasonable time.

My view is that the Minister is undoubtedly an "administrative authority" within the meaning of that expression as defined in terms of s 2 of the Administrative Justice Act. His withdrawal letter was an "administration action." Section 2 of the Act defines these terms as follows:

"2 Interpretation and application

(1) In this Act –

"administration action" means any action taken or decision made by an administrative authority ..."

"administrative authority means any person who is –

- (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or
- (b)
- (c) any other person or body authorised by any enactment to exercise or perform any administrative action concerned;"

Section 3 of the Act reads:

"3 Duty of administrative authority

- (1) An administrative authority which has the responsibility or power to take any administrative action which may affect the rights, interests or legitimate expectations of any person shall –
 - (a) act lawfully, reasonably and in a fair manner; and
 - (b) act within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to take the action by the person concerned; and
 - (c) where it has taken the action, supply written reasons therefor within the relevant period specified by law or, if there is no such specified period, within a reasonable period after being requested to supply reasons by the person concerned.
- (2) In order for an administrative action to be taken in a fair manner as required by paragraph (a) of subsection (1), an administrative authority shall give a person referred to in subsection (1) –
 - (a) adequate notice of the nature and purpose of the proposed action; and
 - (b) a reasonable opportunity to make adequate representation; and
 - (c) adequate notice of any right of review or appeal where applicable.
- (3) An administrative authority may depart from any of the requirements referred to in subsection (1) or (2) if –

- (a) the enactment under which the decision is made expressly provides for any of the matters referred to in those subsections so as to vary or exclude any of their requirements; or
- (b) the departure is, under the circumstances, reasonable and justifiable, in which case the administrative authority shall take into account all relevant matters, including –
 - (i) the objects of the applicable enactment or rule of common law;
 - (ii) the likely effect of its action;
 - (iii) the urgency of the matter or the urgency of acting thereon;
 - (iv) the need to promote efficient administration and good governance;
 - (v) the need to promote the public interest.”

In my view, the Minister breached s 3 of the Administrative Justice Act in relation to the manner the withdrawal letter was issued. In particular, he failed to comply with paragraph (a) of subsection (1) and subsection (2). He failed in his duty to act in a fair manner; he failed to give applicant any notice of the nature of his action and he gave the applicant no opportunity to make adequate representations before he implemented his decision, let alone before making it.

As I have observed the Act is a codification of the rules of natural justice as they relate to the area of administrative law. Therefore the factors that are relevant to the considerations of the common law rules of natural justice would all, or largely apply to considerations of the duties of public bodies under the Act. In this case, I find that there were no factors that would exempt the Minister from compliance in terms of subsection (3) of s 3 of the Act.

(v) STATUS OF PROPERTY AS AT 4 SEPTEMBER 2005

The registrar of deeds states categorically that the transfer of the property from Reimer to TBIC under deed of transfer no 1724/2009 dated 18 March was done **irregularly** because the rightful owner of the property was the President of Zimbabwe at the time of the that transfer. I agree.

In their opposing papers both the Minister and TIBC gloss over certain facts. TIBC may have bought the remaining extent of Stuhm from Reimer in 1999. However, at that time it had only acquired personal rights. Real rights in a property are transferred by the registration of transfer in the deeds office. In terms of the Deeds Registries Act, [*Cap 20: 05*] the owner of an immovable property is the person registered as the owner thereof.

Registration of real rights in the deeds office is not a mere matter of form. In the case of *Takafuma v Takafuma* 1994 (2) ZLR 103 (S) the Supreme Court, per McNALLY JA at pp 105 – 106, stated as follows:

“The registration of rights in immovable property in terms of the Deeds Registries Act [Cap 139] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of ‘real right’ in s2 of the Act.”

TBIC obtained transfer of the remaining extent of Stuhm only in 2009. Until it did it had no real rights over it. But most importantly, Reimer who purported to transfer the property to it had lost all rights over the property save, perhaps, the right to a fair compensation. By 3 November 2005 the property had become State land by virtue of s16B of the then Constitution of Zimbabwe as amended by Constitutional Amendment (No 17) Act.

The circumstances surrounding TIBC getting transfer of the property in 2009 have already been canvassed. The deliberate and unlawful removal from the deeds registry of the original title deed which bore the endorsement in favour of the President of Zimbabwe undoubtedly facilitated the transfer. Admittedly, there was no evidence placed before me that TBIC or anyone else associated with it was behind that illegal move. Therefore, I have drawn no inferences. Nonetheless, that does not detract from the fact that the act was illegal and that it was only because of it that the transfer could have been registered in the face of the endorsement on the title deed. Whether or not TBIC was innocent of the act does not transform a patently and blatantly illegal act into a legitimate one which this court could ignore.

There was, in my view one other irregularity in the transfer of the property to TBIC. Apparently it was transferred on the strength of, among other things, the affidavit by the transfer attorney. He had become aware that the deeds office copy of the holding deed had been removed. Part III of the Deeds Registries Regulations, 1977, RGN 249/1977, provides for the replacement of documents that are filed in the deeds registry. An elaborate procedure is prescribed. It involves an application to the registrar. It entails, among other things, notifying the public through publication of the application in the manner prescribed in the Government Gazette and the print media, and allowing for a period of objections. Section 20 of those regulations provides as follows:

“20. Application for copy or replacement of document

- (1) Any person who requires –
 - (a) a copy of any document filed in the deeds registry;
 - (b) the replacement of any document filed in the deeds registry because his copy of the document has been lost, destroyed, defaced or damaged;shall apply to the registrar in writing.”

In my view, it was not enough for the transfer attorney, on behalf of Reimer, to simply submit his affidavit and request the registrar to use Reimer’s copy of the deed for the purposes of transfer. When s16B of the Constitution and Schedule 7 thereto had been published listing the 157 properties, including Reimer’s property, for immediate transfer to the State, the whole world, including Reimer and his attorney, had become aware that the property had automatically transferred to the State. They had become aware, or ought to have become aware, that the deeds registry copy of the title deed had been endorsed in accordance with subsection (4) of s 16B. How then could Reimer and his attorney simply request the registrar to transfer on the basis of Reimer’s copy deed which they knew bore no endorsement? In my view Reimer would have required a replacement deed for the deeds office in accordance with s 20(1) (a) of RGN 249/77 before he and his lawyer could legitimately have moved for the transfer.

If TBIC had invested heavily on the property as the Minister claimed, then it would have done so on the basis of mere personal rights. Obviously it would have taken a huge risk. That should not affect the status of the transaction and therefore the status of the property. Title deed no 1724/2009 was registered irregularly and must be set aside.

The argument on behalf of the Minister and TBIC that it was a mistake that the property was included on Schedule 7 to s 16B of the amended Constitution as the listing notices had either lapsed or been withdrawn was predicated on the case of *Matanda (Pvt) Ltd v Minister of Lands & Ors* 2009 (2) ZLR 340 (H), a decision of this court by MAKONI J. In that case offer letters had been issued in respect of a property in respect of which the preliminary notices of acquisition had been issued but subsequently withdrawn. The fifth to ninth respondents, the beneficiaries of the offer letters, supported by the first respondent, the Minister or the acquiring authority, had argued that despite the “de-listing”, the property had subsequently been acquired by operation of s 16B of the Constitution as it had been listed in the Schedule. The applicant, the previous owner of the property, had argued that the inclusion of the property on the Schedule had been a mistake and he sought a declaratory order that he was still the owner.

Section 5 (7) of the Land Acquisition Act, *Cap 20: 10*, provides that an acquiring authority may at any time “**withdraw**” a preliminary notice (of compulsory acquisition) by publishing the notice of such “**withdrawal**” in the Government Gazette.

MAKONI J interpreted the word “**withdraw**”, in the context of the Land Acquisition Act, to mean to “discontinue, cancel, retract.” The learned judge held that the government had cancelled or retracted the preliminary notice in respect of the farm in question and that it no longer had an interest in it. If the government were to develop another interest in the farm it would have had to start the whole process of acquisition afresh. At p344C – E the learned judge stated as follows:

“It is not in issue that the land in question was not issued with a fresh notice of acquisition. **It is clear that it was a mistake or an oversight on the part of the acquiring authority to include the property in Schedule 7 of s 16B, since the initial identification of the land had been withdrawn.** It is therefore my finding that the land was not acquired by the operation of the provisions of s 16B of the Act as advanced by the respondents. The land in question is owned by the applicant. The fifth to ninth respondents are claiming occupation on the basis of offer letters. The first respondent is not the owner of the property and cannot, therefore, issue offer letters in respect of that land.”

With due respect to the learned judge I find myself unable to agree with her approach. Whilst in the case before me the status of the property as at the time of the Constitutional amendment aforesaid was substantially the same as that of the property my sister judge was dealing with in the *Matanda* case, it is my view that no mistake is apparent or manifest on Schedule 7 to s 16B of the then Constitution as amended. Firstly, it must be noted that the Constitution, as set out in s 3, was the supreme law of the country. Any other law inconsistent with it would be void to the extent of the inconsistency.

Secondly, I find that the mode of compulsory acquisition of agricultural land that was ushered in by s 16 B of the then Constitution was materially different from that under the Land Acquisition Act. Under the Land Acquisition Act it was the “acquiring authority” that was tasked with the duty to compulsorily acquire land for agricultural purposes. The “acquiring authority” was the President or any Minister as authorised by the President. Under that Act the process was tedious and long winded. Among other things, it entailed the issuing of preliminary notices for publication. These notices would expire if further processes were not undertaken on time. The acquisition had to be confirmed through the Administrative Court. If the preliminary notices lapsed or if the acquisition was not confirmed, the process

would have to start afresh if the acquiring authority intended to persist. Above all, the whole concept of compulsory deprivation of rights to property was justiciable.

On the other hand the acquisition process under s 16B (2)(a), particularly subparagraphs (i) and (ii) thereof, short circuited the cumbersome process under the Act. By the stroke of a pen, and in one fell swoop, Parliament, and not the acquiring authority, cancelled the prior deeds of transfer in the names of the previous owners, and transferred ownership of the acquired lands to the State. As noted by MALABA JA in the *Mike Campbell* case on page 31:

“Section 16B of the Constitution **is a complete and self-contained code** on the acquisition of privately owned agricultural land by the State for public purposes. By the use of the *non obstante* clause, ‘notwithstanding anything contained in this Chapter’ at the beginning of subs (2), **the Legislature gave the provisions of s 16B overriding effect in respect of the regulation of matters relating to the acquisition of all agricultural land identified by the acquiring authority in terms of s 16B(2)(a)**” (emphasis added).

In my view the significance of the difference in the two modes of acquisition aforesaid was that under the Act the acquiring authority was the President or a Minister but under s 16B (2)(a)(i) and (ii) it was the Legislature. Only under s 16B(2)(a)(iii) did the Minister, as the acquiring authority, retain his previous role. But this was in respect of land to be identified *after* the effective date of the Constitutional amendment. This is not the type of land with which we are concerned.

By virtue of the supremacy of the Constitution, the mode of acquisition under s 16B (2)(a)(i) and (ii) would override or supersede the mode of acquisition under the Act.

Under the Act land acquisitions were being stalled by endless litigation which challenged all sorts of perceived infractions. These could include challenges on the validity of the preliminary notices themselves; challenges on errors of description of the properties, or challenges even on the right of government to acquire any particular land. As was noted in the *Mike Campbell* case at p 29 of the judgment:

“To stop what was considered obstructive litigation and secure finality in cases of compulsory acquisition of agricultural land for public purposes, the Legislature enacted the Constitution of Zimbabwe Amendment (No. 17) Act, 2005 on 14 September 2005.”

In enacting s 16B of the Constitution and arrogating to itself the power to divest ownership of targeted lands and vesting such ownership with the State the Legislature was alive to the issue of possible mistakes that could have been made by the “acquiring authority” in the previous dispensation in relation to the identification of agricultural lands targeted for compulsory acquisitions. Subsection (5) of s 16B of the Constitution put it as follows:

“(5) Any inconsistency between anything contained in –

(a) a notice itemised in Schedule 7;

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

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

Thus while under the Land Acquisition Act the process of “**identifying**” agricultural land for compulsory acquisition entailed the publication in the Government Gazette and in a newspaper, for a period as specified, of a preliminary notice describing the nature and extent of the land, and setting out the purpose of the acquisition, in terms of the new mode of acquisition under s 16B of the Constitution the process of identification simply took the form of a reference to the preliminary notices themselves.

So in terms of the acquisition under s 16B of the Constitution, particularly subsection (2) (a) (1), one simply looked at those preliminary notices and the properties listed by them in Schedule 7 to see if a particular property was the one targeted. If the property appeared in the list then that, in my view, would be the end of the matter. It would be the property being acquired by Parliament; the property the ownership of which was being divested from the previous owner and the property the ownership of which was being vested in the State. In my view it would matter not that in a subsequent notice in the Government Gazette such a property might have been withdrawn in accordance with s 5(7) of the Land Acquisition Act.

If indeed such a property would have been withdrawn but nonetheless found itself back on the list in terms of s 16B of the Constitution then the acquisition in terms of the Constitution would prevail. Such an error, if ever it was, would be “... **any error whatsoever contained in such notice**...” within the meaning of s 16B(5)(a) and (b) of the Constitution.

The Supreme Court, in the *Mike Campbell* case above, stated that the pieces of agricultural land listed in the 157 preliminary notices as itemised on Schedule 7 had indeed been acquired by and vested in the State with full title therein with effect from the appointed day, namely 14 September 2005.

GOWORA J, as she then was, in the case of *Etheridge v Minister of State for Lands & Anor* 2009 (1) ZLR 82 (H), also noted, at p 87A – B of the judgment, that the force and effect of s16B of the then Constitution was to immediately vest ownership in the State of rural land as would have been gazetted in terms of the Land Acquisition Act, either prior to 8 July 2005, or after that date, but before 14 September 2005, the appointed date for the Constitutional amendment.

Furthermore, and at any rate, *Matanda's* case would, in my view, be distinguishable in that in the present case the very first preliminary notice in 2000, namely GN 405/2000, was never withdrawn. It had merely lapsed by operation of the law. But it was still included on Schedule 7 suggesting that the Legislature did intend to acquire the land that had previously been identified by that notice together with the rest of the other 156 properties listed.

The Remaining Extent of Stuhm had therefore been acquired by operation of the law.

(e)DISPOSITION

On 12 February 2009, which was about a month before the transfer of the property to TBIC, the registrar of deeds had issued an open letter addressed to “whom it may concern”. In substance the letter stated as follows:

- (i) that Reimer had been the owner of the original property called the remaining extent of Stuhm measuring 1047,7410 hectares and held under deed of transfer 3032/87;
- (ii) that two subdivisions therefrom called Lot 2 of Stuhm measuring 412,1091 hectares held under deed of transfer 4975/97 and Lot 3 of Stuhm measuring 79,4959 hectares held under deed of transfer 9247/98 had been sold and transferred to Darnall Investments (Private) Limited in 1997 and Douglasdale (Private) Limited in 1998 respectively; and

- (iii) that as at that date the remainder of that property was being held by Reimer under deed of transfer 3032/87 and that the extent thereof was 583,1360 hectares and that it had been acquired by the State on 3 November 2005.

As it was the property described in 3 above that was transferred irregularly to TBIC as already noted, that transfer is hereby declared null and void *ab initio*. Deed of transfer no 1724/2009 is hereby set aside. Flowing from that ruling I order as follows:

1. The decision by the first respondent in HC 9527/2001 who is also the third respondent in HC 601/2011, and his letter to the applicant dated 24 June 2011 purporting to withdraw the offer letter dated 7 August 2006 to the applicant in respect of the property situate in Goromonzi District, Province of Mashonaland East, called Subdivision 1 of the Remaining Extent of Stuhm, measuring approximately 534 hectares are hereby set aside.
2. The aforesaid offer letter to the applicant dated 7 August 2011 in respect of the aforesaid property shall be regarded as valid and effectual for all intents and purposes.
3. It is declared that the piece of agricultural land situate in the district of Goromonzi called the Remaining Extent of Stuhm measuring 583,1360 hectares and previously held by Cecil Michael Reimer under Deed of Transfer No 3032/1987 dated 12 May 1987 had been validly acquired by the State in terms of s 16B of the then Constitution of Zimbabwe.
4. Deed of Transfer no 1724/2009 dated 18 March 2009 in favour of TBIC Investments (Private) Limited over the piece of land situate in the district of Goromonzi called Remaining Extent of Stuhm, measuring 583,1360 hectares is hereby cancelled.
5. The fourth respondent in HC 601/2011 is hereby directed to restore the original endorsement in terms of s 16B (4) of the then Constitution of Zimbabwe on Deed of Transfer No 3032/1987 aforesaid on the property as more fully described in paragraph 3 above.
6. The Interested Party in HC 9527/2011 being the first respondent in HC 601/2011 and the second respondent in HC 601/2011, together with all those claiming rights of occupation through them, shall vacate the property more fully described in

paragraph 3 above within sixty (60) days of the date of service of this order failing which the Sheriff for Zimbabwe, or his deputy, or assistant deputy, and if need be, with the assistance of the Zimbabwe Republic Police, shall be authorised, empowered and directed to evict them.

7. The applicant's costs of suit in HC 601/2011 shall be borne by the first respondent, the second respondent and the third respondent jointly and severally, the one paying the others to be absolved.

8. The applicant's costs of suit HC 9527/2011 shall be borne by the first respondent and the Interested Party jointly and severally, the one paying the other to be absolved.

Robinson & Makonyere, legal practitioners for applicant in both cases,
Madzivanzira, Gama & Associates, legal practitioners for first and second respondents in Case 1, and for Interested Party in Case 2,
Civil Division of the Attorney-General's Office, legal practitioners for third respondent in Case 1 and for first and second respondents in Case 2
L. Chimuriwo, legal practitioners for fourth respondent in Case 1