DAVID LEWIS TRUST (PVT) LTD
versus
MINISTRY OF LANDS, AGRICULTURE, WATER,
CLIMATE AND RURAL RESETTLEMENT
and
THE REGISTRAR OF DEEDS
and
THE MINISTER OF HOME AFFAIRS
AND CULTURAL HERITAGE
and
THE COMMISSIONER OF POLICE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 15 November and 20 December, 2022

Opposed Matter

Mr *P C Paul*, for the applicant
Ms *Mavemwa*, for the respondent

MANGOTA J: Through a s 5 notice which was issued in terms of the Land Acquisition Act, Government compulsorily acquired Sub-division A of Lendy Estate ("the farm") which measures 2780.97 hectares in extent. Prior to its acquisition by Government, the farm belonged to the applicant which is a legal entity. It was acquired on 12 July, 2002. A portion of the farm falls within the boundaries of the municipality of Marondera, according to the applicant.

Government's acquisition of the whole farm constitutes the applicant's cause of action. It alleges that Government could not acquire the whole farm when only a portion of the same was/is agricultural land. It claims that the non-municipal portion of the farm was not acquired because the mentioned portion was never identified as is required by s 16A(2)(1) of the repealed Constitution as amended. It challenges the acquisition process which it insists is invalid, null and void *ab initio* for the reason that the acquiring authority who is the Minister of Lands, Agriculture, Water, Climate and Rural Resettlement ("the Minister") misidentified the farm

which he was to acquire. Misidentified in the sense that the s 5 notice which he issued did not separate the agricultural land which he was to acquire from the non-agricultural land which he should not have acquired. It couched its main draft order in the following terms:

" IT IS ORDERED THAT:-

1. The Applicant's property being the whole of the Remaining Extent of Sub-division A of Lendy held under did *(sic)* of transfer number 1427/64 is declared not to have been acquired in terms of the land reform process either under the Land Acquisition Act [*Chapter 20:20]* or in terms of the Constitution Amendment (No.17) Act of 2005.
2. The Second Respondent be directed to delete the endorsement on the title deed that the property vests in the President of Zimbabwe in terms of section 16B of the Amendment No 20 of 2005 of the constitution."

The second respondent whom the applicant is moving me to direct him to delete the endorsement on the title deed of the property is the registrar of deeds. He keeps in his custody records of official documents which relate to title deeds of all immovable properties in Zimbabwe.

The applicant, it is observed, does not place all its eggs in one basket. It asserts that, in the event that a finding is made to the effect that the agricultural portion of the farm was properly and procedurally acquired by Government, the municipal portion of the farm which was not acquired by Government should be hived off from the same and be treated as never having been acquired. It is for the mentioned reason, if for no other, that it couched its alternative draft order in these terms:

"BE AND IT I DECLARED THAT:-

1. The municipal portion of the Remaining Extent of Sub-division A of Lendy Estate which is situate within the boundaries of the Marondera Municipality has not been acquired in terms of the Land Reform Process either under the Land Acquisition Act [*Chapter 20:20]* or under the Constitutional Amendment (No.17) Act of 2005.
2. The second respondent be directed to issue a title deed in respect of that portion of the Remaining Extent of Sub-division A of Lendy which reflects the non-municipal portion of the property which has been acquired in terms of the Constitutional Amendment (No.17) Act of 2005 and cause to be deducted that portion from the Applicant's title deed No. 1427/64.
3. That (*sic*) second respondent be directed to remove the endorsement on applicant's title deed that the whole of the remaining extent of the property was acquired in terms of the (sic) Constitutional Amendment (No.17) Act of 2005 and to substitute an endorsement that only the agricultural portion thereof has been acquired in terms of that Act".

The applicant's statement on the issue which it placed before me is clear and straightforward. It asserts that, because the farm which it used to own was incorrectly identified by the Minister, no acquisition took place. It insists that the parties must revert to the status *quo ante* the compulsory acquisition of the farm by Government. It argues, in the alternative that, if acquisition occurred, the same took place only in respect of the agricultural portion of the farm and not in respect of the non-agricultural portion of the same which, it insists, must be returned to it.

Only the Minister opposed the application. The other respondents- all of whom are Government functionaries- did not file any notice of opposition to the application. My assumption is that they intend to abide by my decision.

In his opposition, the Minister raised a number of preliminary points which he abandoned save one. The one which he insisted upon relates to the allegation that the application is a constitutional matter which I have no jurisdiction to hear and determine. He asserts that only the Constitutional Court of Zimbabwe has the capacity to deal with the case of the applicant. He addressed me on the merits of the case and moved me to dismiss the application with costs.

The *in limine* matter which the Minister raised compelled me to examine the meaning and import of the word *jurisdiction* as well as to apply it to the circumstances of the application which the parties placed before me. It is pertinent for me to decide whether I do or do not have the jurisdiction to hear and determine this application. I remain alive to the fact that for me to deal with a matter in which I have no jurisdiction is as good as a waste of my time, effort and the resources which the State has availed to me to discharge the functions of my office without fear or favour. I should therefore satisfy myself that I can, or cannot, hear and determine the application which is before me. Because of the need to satisfy myself of this very important matter, I invited counsel for the parties to address me only on that aspect of the case first.

Counsel for the Minister who sponsored the preliminary point remained adamant on the point that I did not have the requisite jurisdiction to hear and determine the application which, according to her, remained the preserve of the Constitutional Court. She moved me to decline any audience to the applicant whose case she persuaded me to dismiss without any further ado.

Counsel for the applicant took the view that, because no acquisition of the farm occurred, the application was far removed from the provisions of the country's constitution. He insisted that I could entertain the application without any inhibition.

Before I delve into the question of whether or not I have the jurisdiction to hear this application, the word itself should be placed into context. Many a time people, litigants included, talk about it without appreciating its meaning and import. According to *Wikipedia* the word jurisdiction is from Latin *juris* 'law' + *actio* 'declaration'. The word refers to the legal term for the legal authority which is granted to a legal entity to enact justice. The *freedictionary.com* defines jurisdiction to refer to the proper court in which to bring a particular case. *merriam-webster.com* refers to the word as the power, right or authority to interpret, apply or declare the law (as by rendering a decision).

Whether or not I have the jurisdiction to hear this application does, in a large measure, depend on the interpretation which must be placed onto some sections of the constitution of Zimbabwe ("the constitution") which were/ are relevant to acquisition of agricultural land by Government as read with s 3(1)(b)(i) of the Land Acquisition Act [*Chapter 20:10*] ("the Act").

Acquisition which is the subject of these proceedings took place in 2002. This was long before the Constitution of Zimbabwe Amendment (No.20) Act of 2013 had been promulgated. The repealed constitution, therefore, governed the acquisition of the applicant's farm by Government.

It is clear that, in terms of s 16 B (3) of the Constitutional Amendment Act No. 17 of 2005, the court's jurisdiction to hear and determine acquisitions of agricultural land which was acquired in terms of s 16 B (2) (a) of the same was/is ousted. Land which the Minister compulsorily acquired in terms of s 16 B (2) (a) of the repealed constitution was properly and procedurally acquired. The acquisition of such land could not, and cannot, be challenged in the court because the law deems the acquisition to have been/ to be above board.

The position of the respondent is that the applicant's farm was acquired in terms of section 16 B (2) (a) of the repealed constitution. It is for the mentioned reason, if for no other, that he insists that the court does not have the requisite jurisdiction/power/authority to entertain this application. He places reliance in the mentioned regard on *Commercial Farmers Union* & 9 others v *The Ministry of Lands and Rural Resettlement* and 6 others, SC 31/10 wherein the issue

of the courts' ouster was extensively discussed and a legal position taken on the matter. The case enunciated that an acquisition which the Minister makes in terms of s 16 B(2) (a) of the repealed constitution is lawful and it cannot be challenged in any court of law.

The applicant, it is observed, does not quarrel with that portion of its farm which the Minister acquired in terms of s 16 B (2) (a) of the constitution. Its bone of contention centers on the Minister's acquisition of land which it alleges falls under the municipality of Marondera. It insists that the land in question, being non-agricultural, but municipal, land should not have been acquired by the Minister. Municipal land, goes its argument, is not agricultural land and it should not have been acquired. It, in the mentioned regard, places reliance on *Georgios Kondonu* v *Minister of Lands and Rural Resettlement* & Others, SC 27/11 in which the Supreme Court declared the acquisition of land which falls under the district of Salisbury by the Minister to have been invalid and it set aside the decision of the Minister.

The applicant's position is that the section 5 notice which the Minister issued acquiring the whole of its farm which comprises agricultural and municipal land is invalid. It argues further that the invalidity of the notice makes the whole process of acquiring its farm invalid. Invalid in the sense that the notice is approbating and reprobating at one and the same time in its content. It cannot, the applicant argues, be both valid and invalid. It should, in other words, either be valid or invalid and not both.

If the argument of the applicant which is to the effect that part of its farm falls under the municipality of Marondera is a correct reflection of this case, its views cannot be impugned. They cannot because the Minister would have acted outside the powers which the Legislature, through the constitution, conferred upon him to acquire only agricultural land for resettlement and/or other purposes. The law, it is evident from a reading of s16 B(2) (a) of the repealed constitution, does not confer upon the Minister the power to acquire land which is not agricultural land: *Mike Campbell (Private) Limited & Anor* v *Minister of National Security Responsible for Land, Land Reform and Resettlement*, SC 49/07 states to an equal effect. It discusses sections 16 B (3) and 16 B (2) (a) of the repealed constitution and states, in the relevant part, that:

> "The provisions of s 16 B (3) would not afford protection from the application of the provisions of subsections 18(1) and (9) of the constitution to an acquisition of agricultural land which is not in terms of section 16 B (2) (a) of the constitution. The section does not apply to an acquisition of

> property in any other land which is not agricultural land. The provisions of sections 16 (1), 18 (1) and (9) of the constitution continue to regulate the acquisition of any property other than agricultural land".

It follows, from the foregoing, that, if it is found that the applicant's farm comprises two portions which are one of agricultural land and another which falls under the municipality of Marondera, the Minister's acquisition of the farm would have been executed outside the law and, therefore, procedurally improper and/or invalid with the result that my jurisdiction to hear the application would be above reproach. If, on the other hand, the finding which I make is to the effect that no portion of the applicant's farm falls under the municipality of Marondera, then the applicant's case would be dead in the waters making the Minister's acquisition of its farm to have been properly and procedurally executed with a valid notice of acquisition which was done in terms of s 16 B(2) (a) of the constitution as a result of which s16B (3) would come into the equation prohibiting me from hearing and determining the application.

There is a dearth of authority for the proposition which is to the effect that the person who alleges must prove what he alleges. The general principle of the law is that he who makes an affirmative assertion, whether plaintiff or defendant, bears the *onus* of proving the facts so asserted: *Nyahondo* v *Hokonya & Ors*, 1997 (2) ZLR 457 (S) at 459; *Astra Paints Chemical* v *Chamburukwa*, SC 27/12; *Book* v *Davison*, 1988 (1) ZLR 365 at 384 B-F.

The applicant gave a number of names to the farm which it used to own. It, in fact, gave four names to it. These are described in its papers as follows:

i) The Remaining Extent of sub-division A of Lendy Estate (para 2 of its founding affidavit),
ii) Sub-division A of the Lendy Estate (para 4 of the founding affidavit);
iii) The remaining Extent of Lendy Estate (para 11 of its founding affidavit)- and
iv) The Remaining Extent of Lendy (para 2 of its Heads).

One is left to wonder as to the correct name of the farm which is the subject of the applicant's case. The observed position throws confusion into the mind of any person who reads the assertions of the applicant as it states them in paragraphs (2), (4) and (11) of its papers which appear respectively at pages 3, 4, 11 and 2 of the record. The confusion becomes more real than

otherwise when regard is had to the fact that the applicant does not offer any explanation for giving four names and not one to one and the same farm.

However, clarity becomes evident when one takes into account that the names which the applicant gave to the farm do, in some way or other, have a bearing on the names of the farms which the Government of the day partially incorporated into the boundaries of the municipality of Marondera through Rhodesia Proclamation No. 1 of 1977. Annexure B which the applicant attached to its founding papers is relevant. The annexure is a proclamation which was published in the Rhodesia Government Notice No.15 of 1977. It appears at p 18 of the record.
Paragraph (C) page 20 of the annexure contains names of farms which are related to the four names which the applicant variously gave to the farm which it used to own. Farms with names which are related to the names which the applicant gave and whose portions were incorporated into the municipality of Marondera comprise:

a) Lendy Estate Outspan;
b) Sub-division A of the Remaining Extent of E of Lendy Estate;
c) Sub-division A of the Remaining Extent of E of Lendy Estate;
d) Sub-division A of the Remaining Extent of Lendy Estate – and
e) The Remaining Extent of Lendy Estate.

It is evident that, when the applicant gave four names to the farm which it used to own, its clear intention was to have one of those names resonate well with any of the five farms whose portions were, by Proclamation No.1 of 1977, incorporated into the boundaries of the municipality of Marondera. A case in point is seen in paragraph (iii) of the four names as read with paragraph (e) of the farms which appear in the proclamation.

The applicant's intention which is as clear as night follows day was/is aided by the delay which it took to institute the current proceedings. It sued twenty consecutive years after Government's acquisition of its farm. It has no explanation for having delayed to sue earlier than now. The explanation for the delay is, however, not far to see. It, in my view, entertained the view that, if it sued twenty years after the event as it did, human memory would have faded away and, without any circumspection on the part of the court which was to deal with its application, it would get away with it without any hustles, so to speak. What it forget to remember is that, even where memories have faded away as it hoped they would, records do not fade away. They

remain as intact as a cause which took place yesterday, if not today. The records which it placed before me betrayed its cause to a point of no return.

The farm which Government acquired is not the Remaining Extent of Lendy Estate which is one of the five farms the boundaries of which were, in part, incorporated into the municipality of Marondera. Government acquired Sub-division A of Lendy Estate. The farm appears at paragraph 11 of Zimbabwe Government *Gazette* of 12 July, 2002. The *Gazette* is filed of record as Annexure B of the applicant's papers. It is at p 13 of the record.

The farm which Government acquired is not one of the five farms whose boundaries were, in part, or in whole, incorporated into the municipal area of Marondera. It is a stand-alone farm which used to belong to the applicant prior to its acquisition.

The applicant was being economic with the truth when it alleged that a portion of the farm which Government acquired was/is incorporated into the municipality of Marondera. No portion of the farm which Government acquired from the applicant is part of the municipal area of Marondera. The applicant's lies become crystal clear on a close analysis of the case which is before me. Its unwholesome conduct cannot be condoned let alone accepted. It invited me to walk with it along a garden path which leads to nowhere. Its effort remains unfortunate and unrewarded.

The maps, Annexures C and A, which the applicant attached to its papers do not assist its cause at all. The first annexure, C, which is p 11 of the record, makes reference to Lendy Estate and not to Sub-division A of Lendy Estate. It is, as the Minister correctly states, an aerial map which is neither clear nor credible. The other annexure, A, which the applicant also makes reference to appears at p 17 of the record. Its meaning and import remain incomprehensible save to regard it as such owing to the fact that it stands filed of record.

I fully endorse the views of the Minister who suggested that the applicant should have sought professional assistance from experts who deal with boundary issues in so far as the matter which relates to the maps which the applicant seeks to rely upon are concerned. On their own, the maps convey nothing to the eye of the person who is not well versed in map-reading. Assistance from an official who works in the office of the surveyor-general would probably have rendered the requisite meaning to the maps.

The applicant's claim which is to the effect that the s 5 notice which the Minister issued in terms of the Act is invalid on account of the allegation that no s 8 order was issued and that no application for confirmation of acquisition was made to the Administrative Court is without merit. It is devoid of merit because the Constitution of Zimbabwe Amendment (No.17) Act of 2005 did away with such restrictions. The Supreme Court made clear pronouncements on these matters in the *Mike Campbell* case (*supra*). It is in that case more than in any other that it remarked that:

> "It is to be noticed that, under the new procedure for compulsory acquisition of agricultural land for public purposes, a number of restrictions and conditions imposed in the process of acquisition have been removed. There is no requirement for a notice of intention to acquire to be given to the owner of the land before acquisition. The acquiring authority does not have to state that the acquisition is reasonably necessary for utilization of the land for settlement purposes. ….The acquiring authority is no longer under a duty to apply to a court of law for an order confirming the acquisition."

What comes out of the above-observed matters is that:

i) No portion of the farm which the applicant used to own lies within the boundaries of the municipal area of Marondera;
ii) The Minister correctly identified the whole farm as having been suitable for agricultural purposes;
iii) The Minister properly and procedurally acquired the whole farm in terms of section 16 B (2) (a) of the constitution as read with the Land Acquisition Act;
iv) Because the farm was lawfully acquired in terms of section 16 (b) (2) (a), section 16 B (3) of the constitution comes into the equation – and
v) Section 16 B (3) of the constitution takes away from me the power or authority to hear and determine the application.

It is observed and concluded that I do not have the jurisdiction to hear this application. The application is, in the result, dismissed with costs.

Wintertons, applicant's legal practitioners
Civil Division Attorney General's office, respondent's legal practitioners