FRANCES MARY BOWERS
and
BERNADETTE ROSE COSTAS N.O.
*(In her capacity as executrix dative of the estate of the late Vernon Reuben Bowers)*
versus
MINISTER OF LANDS, AGRICULTURE, FISHERIES, WATER AND RURAL SETTLEMENT
and
MARGIE SIZIBA
and
COLLIN SHIRICHENA
and
NYASHA MANYAKARA
and
TENDAI MUNEDZI
and
PEARSON NDORO
and
EMMANUEL MATIZANADZO
and
TARIRO ELFORD MOYO

HIGH COURT OF ZIMBABWE
MUTEVEDZI J
HARARE; 26 January and 3 February 2023

**Opposed Application**

*T Mpofu,* for the 1st and 2nd applicants
*J Shumba,* for the 1st respondent
*T Kamwemba,* for the 2nd -6th respondents
*No apperaence,* for the 7th and 8th respondents

**MUTEVEDZI J:** For those that support it Zimbabwe's land reform programme will eternally be famed as one of the most iconic revolutions in African history. To those who oppose it, the scheme is immortally etched in their minds as notoriety of epic proportions. The programme commenced more than two decades ago. In its formative years, it was confronted by fierce resistance both politically and legally by a section of those who owned commercial farms across the country. After Government had weathered the political storm parliament moved in to exorcise the many legal stratagems employed the erstwhile

commercial farmers to obstruct progress by enacting s 16B of the former constitution. The most conspicuous part of that provision was s 16B (3) (a), a clause which ousted the jurisdiction of the courts in determining issues to do with land expropriated under the land redistribution programme. Unfortunately, despite both the Executive and Parliament's best efforts to smoothen the process, legal challenges remain an albatross around the programme's neck to this date. This is so largely because of the courts' desire to protect their constitutional turf of interpreting the law and adjudication of disputes. The principle was observed by the Supreme Court in the case of *Naval Phase Farming (Private) Limited and Others* v *Minister of Lands and Rural Resettlement and Others SC 50/18* at p.12 where it remarked that:

> "No ouster provision, no matter how comprehensive can completely exclude the jurisdiction of the courts. The courts, the world over are wont to interpret ouster clauses narrowly so that it has been said that nothing short of abolishing the court altogether can prevent them from exercising some aspects of review jurisdiction."

This application typifies the above position. The first applicant alleges that soon after Zimbabwe's independence in 1981 and 1983 she together with her husband who unfortunately is now late, acquired an immovable property in Gweru properly described as Subdivision of J and K of Mnyami Farm, Gweru (hereinafter referred to as the farm). In pursuit of its land reform agenda government acquired the farm in 2005. The first applicant further alleges that in her conviction, that acquisition was erroneous and unlawful for one principal reason. The law didn't and still does not allow the acquisition of land belonging to indigenous Zimbabweans. To vindicate her right not to have the farm expropriated, she applied for a delisting of the farm in 2006. Both the land Identification Committee and the Resident Minister supported the delisting on the basis that the farm was indigenously owned. The outcome of the application for delisting is unknown to her but in 2011, the farm was invaded and occupied by some people she describes as illegal occupants. She made numerous attempts to have the illegal occupants ejected but to no avail. The then Resident minister for the province advised her that the only reason why the illegal settlers were not being removed from the farm was that government intended to find alternative land for them.

The second – eighth respondents have been cited in this application because they are currently in occupation of the farm. They did so on the strength of offer letters given to them sometime between 2011 and 2013. During a period which she did not specify in her founding affidavit, the first applicant said she lodged a complaint in relation to the illegal takeover of the farm with the Land Commission. Her ground for doing so remained that the acquisition had been made in error given that the farm was indigenously owned. In December

2018, the Land Commission rendered its determination of the dispute. Its main findings were that:-

a. The first respondent who is the Minister of Lands, Agriculture, Fisheries, Water and Rural Settlement should withdraw the offer letters issued to the second to sixth respondents
b. That the first respondent should find alternative land for the second to sixth respondents
c. That the farm should revert to the first and second applicant

Despite these findings, so the first applicant argued, the first respondent has failed to implement the resolutions of the Land Commission. The offer letters granted to the second to sixth respondents remain extant and on that basis they continue to illegally occupy the farm.

The second applicant is the executrix dative of the estate of Vernon Reuben Bowers the first applicant's late husband who jointly owned the farm with her. She joined in the proceedings ostensibly to protect the interests of the estate. She deposed to a supporting affidavit confirming all the allegations and facts raised by the first applicant. It was on that basis that both of them sought from this court, an order couched as follows:-

i. The applicants' immovable property namely subdivision J and K of Mnyami farm, Gweru be and is hereby delisted as state land
ii. The 1st respondent be and is hereby ordered to withdraw the offer letters issued to the 2nd - 6th respondents within 30 days of the date of this order
iii. If the 1st respondent fails to comply with paragraph 2 above, the offer letters issued to 2nd - 6th respondents she be deemed to have been procedurally withdrawn
iv. The 2nd - 6th respondents and anyone claiming occupation through them be and are hereby evicted from subdivision J and K of Mnyami Farm, Gweru
v. The operation of paragraph 4 above be and is hereby suspended until the 2nd - 6th respondents' offer letters are withdrawn in terms of either paragraph 2 or 3 of this order
vi. The respondents shall pay cots of suit

The second to sixth respondents all opposed the application. The second respondent deposed to the opposing affidavit which opposition was then supported by third to sixth respondents. The second respondent's basis of opposition was that she was never in occupation of the disputed farm. Instead, the offer letter was granted to her son called Emmanuel Matizanadzo (7th respondent) on 15April 2011. In summary the opposition was that there was no error on the part of the state in the acquisition of the land. The farm had been procedurally gazetted. She argued further that the applicants had made a futile attempt to have the farm delisted. They did not follow through that process. The result is that the

farm remains state land and the respondents are the rightful occupiers of the farm. In addition the second respondent alleged that whatever findings may have been made by the Land Commission were merely recommendations which do not bind the first respondent. The offer letters given to her son and the third to sixth respondents are valid, the land is state land and the applicants have no claim to it. As already stated, the third to sixth respondents supported these averments in separate supporting affidavits. The seventh and eighth respondents did not file any opposition. In addition to supporting the averments made by second respondent, the third respondent indicated that she was offered a subdivision of the farm on 12 April 2011. She had however voluntarily surrendered her portion of the farm. That portion was then reallocated to the eighth respondent named Taririo Elford Moyo. In other words the third respondent alleges that she is no longer in occupation of the farm.

In light of the apparent fact that the application is premised on the perceived erroneous acquisition of the farm, the substantive opposition to the application was inevitably left to the 1st respondent as the acquiring authority. John Bhasera, the Permanent Secretary in the Ministry deposed to the opposing affidavit on behalf of the 1st respondent. He began from the premise that the farm in dispute was acquired by government in 2005 and was listed under schedule 7 of the Constitution. The result was that title to the farm vested in the State. The effect of a schedule 7 listing is that the acquisition of the farm cannot be reversed by an application to a court of law. The only method to delist the farm is an amendment of schedule 7 to the constitution. On the court's jurisdiction, the 1st respondent's view was that this court has no authority to determine the application. The applicants are challenging the acquisition of the farm in complete violation of the Constitution which provides that an acquisition cannot be challenged in a court of law.

He added that the application for a *mandamus van spoile* by the applicants is misplaced because with title to the land, the State can do as it pleases with the farm. All that the applicants seek to do is to reverse the acquisition of the farm through the back door because the procedure they adopted is not provided for at law. The only remedy which the law provides following an acquisition is an application for compensation for improvements effected on the land prior to its acquisition in terms of the constitution or in terms of SI 62/2020. The Secretary further argued that to seek audience in motivation of the delisting of an acquired farm before the Land Identification Committee or the Resident Minister or the Land Commission like the applicants did is a futile exercise for the simple reason that such procedure is not recognised at law.

Further, the requirements for a *mandamus* were not met, so the first respondent continued to argue. The applicants failed to show that they were in peaceful and undisturbed possession of the farm. They equally did not show how they were wrongfully and forcibly dispossessed of the farm.

On the basis of the submissions in opposition outlined above the first to sixth respondents prayed for an order dismissing the application with costs.

At the hearing, all the parties simply emphasized the arguments already outlined above. **The issues for determination**

When all the dust has settled from the mounds of argument between and amongst the parties the issues which the court has to determine are fairly clear. These are:

a. Whether the Court has jurisdiction to determine the application?
b. If it has whether subdivision J and K of Mnyami Farm in Gweru was procedurally acquired by government given that the applicants are indigenous Zimbabweans?

The rest of the issues as suggested by the parties in their heads of argument are corollary to the two isolated above.

**Jurisdiction**

Inevitably, the court's starting point is to determine if it has jurisdiction to deal with the application. The farm was acquired in 2005. It was therefore expropriated in terms of the Land Acquisition Act [*Chapter 20:10*] (the Act) and subsequently in terms of the former constitution. In the present case, there is no allegation and therefore no argument that the processes which were stipulated in ss5 (1), 8(1), 9(1) and 10A (1) of the Act were not followed by the acquiring authority.[1] Those procedures were then supplanted by the advent of constitutional amendment 17 of 2005 which introduced s16B of the former constitution. That amendment as has been demonstrated in a number of authorities had sweeping powers with far reaching consequences on the procedure of acquisition of agricultural land. It came into force in the second half of 2005. In the case of *TBIC Investments (Pvt) Ltd &Ors* v *The Minister of Lands and Rural Development & Ors* SC 469/13 the Supreme Court acknowledged that one of the telling effects of the amendment was that in s 16B (5) it sanitized all expirations, errors or withdrawals which may have occurred in the process of acquisition under the Act. The Court noted that:-

> "The effect of… s 16B(5)) was to revive, resuscitate and validate the acquisition of all identified agricultural land listed in the 7th Schedule for resettlement purposes prior to 8 July

[1] For those requirements see the case of *Chisvo & Anor* v *Peter & Ors HH 23/2006*

2005 regardless of any errors or withdrawals in the acquisition process. No limitation has been imposed on the acquisition process once the land is shown to have been gazetted and listed in the 7th schedule prior to 8 July 2005."

It follows therefore that even if there had been any errors in the acquisition of the farm in dispute in this case, s 16B (5) would have regularised any such mistakes. I mention these issues because compliance with procedure is critical to the determination of whether or not a court may exercise its jurisdiction in a challenge relating to the acquisition of agricultural land. The pertinent provisions of s16B are couched as follows:-

**16B Agricultural land acquired for resettlement and other purposes**

(1) In this section -

"acquiring authority" means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

"appointed day" means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17)Act, 2005.

(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 [*Chapter 20:10*], 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 purposes; or

B. the purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilization of land for a

purpose 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) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(*a*) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(*b*), that is to say, a person having any right or interest in the land -

(*a*) **shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge;** (bold is for my emphasis)

The above provision was fully interpreted by the Supreme Court in *Mike Campbell (Pvt) Ltd & Ors* v *Minister of National Security Responsible for Land, Land Reform and Resettlement & Anor* 2008 (1) ZLR 17 (S) where MABALA JA (now CJ) at p. 43F-G to 44A remarked that:

> "By the clear and unambiguous language of s 16B(3) of the Constitution the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases, in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited, in effect, to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the *Gazette* in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B (2) (a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There annot be any clearer language by which the jurisdiction of the courts is excluded."

My understanding of the finding by the Supreme Court is that once agricultural land has been lawfully acquired no challenge to that acquisition may be brought to a court of law. The question which then must be asked is what constitutes unlawful acquisition of such land to clothe a court with jurisdiction to review the acquisition? The question was once again answered in *Mike Campbell* (supra) at p. 44 E-H as follows:

> "Section 16B(3) of the Constitution has not however taken away, for the future, the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, **not in terms of s 16B(2)(a).** This is because the principle behind s 16B (3) and s 16B (2) (a) is that the acquisition must be on the authority of law. The question whether an expropriation is in terms of s 16B (2) (a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, **not in accordance with the terms of s 16B (2) (a) of the Constitution** a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must depend, existed in a particular case as required by the provisions of s 16B(2)(a) of the Constitution. (my bolding for emphasis)

In *Naval Phase Farming (Private) Limited and Others v Minister of Lands and Rural Resettlement and Others* HH 765/15 CHIGUMBA J at p.8 of the cyclostyled judgment grappled with the question of to what extent judicial review of expropriated land should go. She acknowledged the existence on one hand of judicial review in the narrow sense as confined to scrutinising procedural propriety in terms of the court's general grounds of review such as absence of jurisdiction, bias and gross irregularity in the proceedings or decision complained of and on the other judicial review in the wider sense extending to oversight on whether in

the acquisition process the set of facts which constitute a lawful expropriation existed. She then chose to leave the debate open. My view is that, that discourse is not necessary in the first place. Given the unequivocal pronouncements of the Supreme Court in *Campbell* as illustrated above, the issue is an open and shut one. I entertain no doubt in my mind that the lawfulness of the process which is alluded to must be confined to compliance with the procedural requirements listed in s16B (2) (a). It is the theme which the Supreme Court emphasized when it said *"the question whether an expropriation is in terms of s 16B (2) (a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power."* It means that it is only a failure to act in accordance with any or all of the procedural imperatives in that section which can be used to found the jurisdiction of the court to exercise its powers of judicial review. Conversely it implies that any other factor outside those mentioned in s 16B (2) (a) amounts to an irrelevant consideration and is not a basis for an aggrieved applicant to request the court to invoke its review jurisdiction. For purposes of completeness I will paraphrase the procedural requirements which must be observed for an acquisition to be lawful to include that the land:

i. Is agricultural land required for resettlement purposes
ii. Must have been identified on or before 8 July 2005
*iii*. The identification was in the *gazette* or *gazette extraordinary* in terms of s 5(1) of the Act and
iv. Must have been itemised under schedule 7 of the Constitution

Or

a. Is agricultural land required for resettlement purposes
b. identified after 8 July 2005 but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Act

Or

Must be land identified in terms of s 16B by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for any purpose which may include settlement for agriculture, land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources or the relocation of persons dispossessed in consequence of the utilization of land.

Counsel for the applicants in his heads of argument and during his submissions at the hearing persistently drew my attention to the case *Carthorse Enterprises (Private) Limited* v *Minister of Lands and Rural Resettlement and Registrar of Deeds* HH 442/20 for the proposition that a failure to take into account the factors listed under s16A of the former constitution could result in an unlawful acquisition. In that case, the court noted that:

> "Plainly, s 16A is the preamble to s 16B. The two are read together. Whilst the court cannot entertain any challenge relating to the right and power of the Government to acquire agricultural land for resettlement purposes, it certainly has the power to enquire into the constitutional validity of any process of land acquisition. If the process is done outside of the constitutional framework, the court does have the jurisdiction to make a pronouncement."

The court, on the strength of the above argument concluded that the rights of indigenous blacks to hold onto their properties and to be spared from being deprived of their farms for resettlement purposes under the land reform programme could not be relegated to mere Government policy that is non-binding because it was law. It is a constitutional imperative.

Three issues arise from the above conclusion in *Carthorse Enterprises.* The first is that in *Carthorse Enterprises* the court appeared to determine the dispute and correctly so in my view, on the principal ground that the land which the acquiring authority had expropriated was not agricultural land anymore because it had mutated into other forms of use such as residential plots, a shopping complex and a motel. The correctness of that finding cannot be debated. Government cannot expropriate land which is not agricultural land under the guise of the land reform programme. If it wished to acquire such land, it could proceed under its powers of eminent domain which would require it to pay the former owner of the land compensation. As such the dicta regarding the acquisition of land owned by indigenous Zimbabweans being unlawful may well pass for obiter.

The second is that the court appeared to have overlooked its earlier decision in *Naval Phase Farming (Private) Limited and Others* v *Minister of Lands and Rural Resettlement and Others* HH 765/15 in which it arrived at a conclusion which is diametrically opposite. The argument put forward in that case was that to ensure the success of the reform programme and its compliance with the basic tenets of the former and the current Constitutions, land redistribution must not seek the replacement of one indigenous owner or settler on agricultural land with another because that could result in a system of patronage or nepotism. That in turn would affect investor confidence and in failure to achieve the constitutional objectives of food security, employment creation and productivity. In that regard, so the

argument went, agricultural land already owned or occupied by indigenous Zimbabweans cannot be considered as land required for resettlement purposes within the meaning of s 16 A of the former Constitution as read with ss 72, 289 and 290 of the current Constitution. The Court proceeded to reject outright the above argument. I can do no better than reproduce wholesale CHIGUMBA J's finding at pp. 17-18 that:

> "The applicants' papers are permeated with an unfortunate equation of the perceived meaning of 'indigenous Zimbabweans', with Zimbabweans of black African descent. Section 16 A of the former Constitution speaks of the people of Zimbabwe and of a former colonial power. Section 289 of the current Constitution talks about addressing the need to redress the unjust and unfair pattern of land ownership which was brought about by colonialism and to bring about land reform and equitable access by <u>all</u> Zimbabweans to the country's natural resources. Section 289 (b) entrenches in the Constitution the right of every Zimbabwean to acquire, use and to hold agricultural land regardless of his or her race or color. Section 289 (c) entrenches a policy that the allocation and distribution of agricultural land be fair, and equitable, regard being had to **gender balance and diverse community interests.** (The bolding is mine for emphasis)
>
> With all due respect to the submissions put forward by the 3rd applicant, I am unable to agree that either the former or the current Constitutions entrench a policy that agricultural land must not be taken away from a black African Zimbabwean and given to another black African Zimbabwean. I am unable to accede to the contention that land that is already owned or occupied by 'indigenous (read black) Zimbabweans cannot be said to be land required for resettlement purposes within the meaning of s 16 B of the former Constitution. The question of whether compulsory acquisition of agricultural land from one particular race in favor of another violated s 23 of the former Constitution, was considered and settled in ***Campbell (supra), at p 16-17***;
>
> "It must be stated at this stage that the law as embodied in the provisions of s 16(B)(2)(a)(i) of the Constitution and the acquisitions of the pieces of agricultural land which resulted from its operation had no reference at all to the race or color of the owners of the pieces of land acquired. There was no question of violation of s 23 of the Constitution to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution."

I am in entire agreement with the dicta in *Naval Phase Farming* (H) (supra). The s 16A factors categorised as fundamental and overriding in the acquisition of land in *Carthorse Enterprises* do not mention anything about from which group of people land could be expropriated for resettlement or other purposes. They neither bestow any rights on any person whose land government wishes to acquire nor create any procedure by which the acquisition must take place. What they simply do is recite the historical background of the land reform programme, state what the people of Zimbabwe need to do and acknowledge the compensation modalities for former owners of land who had made improvements on it prior to acquisition.

The third issue is that the Supreme Court's findings in *Mike Campbell* that the law as stated in s 16B (2) (a) (i) of the Constitution and the expropriation of agricultural land which

resulted from the operation of that law made no reference at all to the race or color of the owners of the pieces of land acquired, that their conduct and circumstances were irrelevant factors and that consequently there was no violation of any rights to talk about seals the debate. It put the issue as follows;

> "The right to protection of law under s 18(1) of the Constitution, which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislative, executive or judicial power of the State. The right is not meant to protect the individual against the lawful exercise of power under the Constitution. Once the state of facts required to be in existence by s 16B (2) (a) of the Constitution does exist, the owner of the agricultural land identified in the notice published in the Gazette has no right not to have the land acquired. The conduct and circumstances of the owner of the agricultural land identified for compulsory acquisition would be irrelevant to the question whether or not the expropriation of his or her property in the land in question is required for any of the public purposes specified in s 16B(2)(a) of the Constitution. In the circumstances there is no question of prejudice to the rights of the individual since his personal conduct or circumstances are irrelevant to the juristic facts on which the lawful acquisition depends. No purpose would be served in giving the expropriated owner the right to protection of law under s 18(1) and (9) of the Constitution when an attempt at the exercise of the right would amount to no more than its abuse." (Underlining is for my emphasis.)

Needless to say, the above findings bind this court. That they do so in turn makes the decision in *Carthorse Enterprises* possibly a judgment *per in curiam* if counsel for the applicants persists that the court's *ratio* in that case was that acquisition of indigenously owned farms is unlawful.

Lastly, s 295 of the Constitution also supports the argument that Government is allowed to expropriate land belonging to indigenous Zimbabweans. It provides as follows:

> **"295 Compensation for acquisition of previously-acquired agricultural land**
> (1) Any indigenous Zimbabwean whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired.
> (2) Any person whose agricultural land was acquired by the State before the effective date and whose property rights at that time were guaranteed or protected by an agreement concluded by the Government of Zimbabwe with the government of another country, is entitled to compensation from the State for the land and any improvements in accordance with that agreement.
> (3) Any person, other than a person referred to in subsection (1) or (2), whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State only for improvements that were on the land when it was acquired.
> (4) Compensation payable under subsections (1), (2) and (3) must be assessed and paid in terms of an Act of Parliament." (My underlining for emphasis)

In statutory interpretation under contextual cannons, there is a rule of construction called the presumption against surplusage.[2] Put simply, it is a presumption against

[2] https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf

superfluity. It means, where possible every word and every provision in a statute must be given effect to. None must be ignored because the legislature does not make gratuitous enactments. On the basis of that presumption there is no gainsaying that s 295 was enacted as a direct acknowledgement that farms owned by indigenous Zimbabweans could be acquired and that if they did the former owners would not only be compensated for the improvements on the farm but also for the land itself. Indigenous Zimbabweans need not look up to the former colonial power for compensation. They and people whose farms are protected by an agreement concluded by the Government of Zimbabwe with the government of another country, as can be discerned from the provision, are in a special category because the rest of former owners of agricultural land can only be compensated for improvements.

**Application of the law to the facts**

It is already recorded that the applicants did not attack the acquisition of the farm on the basis of any impropriety in the expropriation process. They did not point to any failure by the acquiring authority to comply with the requirements listed under s 16B (2) (a). Their gripe is simply that they are indigenous Zimbabweans. As such the acquisition of their farm would go against the intended objective of redressing the historical imbalances in land ownership in the country. It is for that reason that they allege that the process of acquisition was erroneous and unlawful. They seek to strengthen their argument with the support that was lend to their cause by various state functionaries and some state institutions namely the Land identification Committee, the Resident Minister of the Midlands Province at the time of the acquisition and occupation of the farm and the Zimbabwe Land Commission. Those State functionaries and institutions were within their rights to support the delisting of the farm. The applicants had indeed approached the right fora for resolution of the dispute. Unfortunately for the applicants and as explained above being an indigenous Zimbabwean amounts to their "conduct and circumstances." These are not factors that will vitiate the legality of the acquisition process. The expropriation of land pays no regard to a land owner's idiosyncrasies. It is not enough for an applicant in a matter where he/she/it challenges the process of acquisition of land under the land reform scheme to baldly allege an irregularity in the process without more and hope to clothe the court with the necessary jurisdiction to embark on judicial review. He/she/it is expected to rely on a violation of one or more of the procedural requirements itemised in s16B (2) (a). If that does not happen it is difficult for such applicant to escape the conclusion that he/she/it seeks to reverse the acquisition of land

through unorthodox or illegal stratagems. *In casu*, the applicants' dependency on the factors itemised in s16A of the old constitution cannot take their claim a step further.

**Disposition**

The question whether agricultural land owned by an indigenous Zimbabwean can be expropriated under the land reform programme is a political rather than a legal question. An applicant who is unhappy with the expropriation of his/her/its land solely on the basis of being an indigenous Zimbabwean has no remedy in the courts of law because the courts are in no uncertain terms proscribed from adjudicating such disputes. That factor like many others which fall outside the remit of S16B (2) (a) speak to the conduct and circumstances of the farm owner. They have all been deemed irrelevant to the consideration whether on the face of the record, an acquisition of agricultural land is not in accordance with the terms of s 16B (2) (a) of the Constitution. As a result this court is prohibited from determining the application.

On the issue of costs, all the respondents prayed that the application be dismissed with costs. I note however that the application falls within the sphere of public interest litigation. It was by any measurement not a frivolous one.

In the circumstances and for the reasons explained above, this court must as it hereby does, withhold its jurisdiction to determine the application.

There shall be no order as to costs.

*Atherstone and Cook*, first and second applicants' legal practitioners
*Civil Division of the Attorney General's office*, first respondent's legal practitioners
*Tavenhave and Machingauta,* second to sixth respondents' legal practitioners