PORTLAND HOLDINGS LTD
v
MINISTER OF SPECIAL AFFAIRS IN THE PRESIDENT'S OFFICE

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GOWORA JA & OMERJEE AJA
HARARE, OCTOBER 15, 2012 & JUNE 3, 2013

P C Paul, for the appellant
N Mutsonziwa, for the respondent

ZIYAMBI JA: This is an appeal from a decision of the Administrative Court in terms of s 7 of the Land Acquisition Act ("the Act") confirming an acquisition by the respondent of the appellant's farm for urban development.

The grounds of appeal as amended at the hearing are as follows:

1. The court erred in failing to find that the s 5 notice and s 8 order were both null and void and that in the circumstances no confirmation of the acquisition was competent.
2. The learned Judge erred in holding that the appellant was not opposing the application on the merits.

The history of the matter is as follows. On 16 July 2010, the Minister of lands and Rural Resettlement, duly authorized by the President of Zimbabwe to be the Acquiring Authority in terms of s 2(a) of the Land Acquisition Act [*Cap. 20:10*] ("the Act"), gazetted a preliminary notice of the Government's intention to acquire certain property known as 'Subdivision E' of Arlington Estate in the district of Salisbury and measuring 530, 2555 hectares ("the Land"). The Land is registered in the name of the appellant.

In terms of s 5 of the Act the appellant lodged a written objection to the acquisition. On 11 November 2011 an acquisition order in terms of s 8 was served on the appellant. The respondent, as it is required to do in the event of an objection to the acquisition, applied to the Administrative Court for confirmation of the acquisition.

The respondent, who deposed to the founding affidavit in support of the application, averred that the acquisition of the land was reasonably necessary for its utilization for urban expansion and urban development purposes. He stated that by reason of rural urban migration since independence, Harare now has a waiting list of 500 000 people in need of accommodation. The city of Harare which has the capacity to accommodate only 300 000 people is now over-populated with the total number of residents surpassing 2 000 000. This overpopulation has exerted pressure on the existing infrastructure making it necessary for more land to be acquired to sufficiently cater for the existing population.

He attached to his affidavit a letter from the Director of Housing and Community Services of the City of Harare dated 5 December 2011 which stated:

> "Please be advised that basing on the 2002 Census results, it is estimated that the current population of Greater Harare now exceeds 2 million people. At the same time demand for housing is growing, therefore it is estimated that there are more than 500 000 home seekers in Harare."

He said that the acute shortage of accommodation has seen a steep increase in rentals and the erection of illegal slums posing a threat to state security, the economy, environment and the general social public. Civil servants working in urban areas were also hard hit by the serious shortage of accommodation. Government workers, from the lowest level to senior civil servants, are residing in substandard accommodation. This has led the

government to come up with Housing Delivery programs to alleviate the suffering of urban workers.

While the Urban Councils Act [*Cap. 29:15*] provides for local authorities to designate pieces of land for urban acquisition on a willing seller basis, this method has not proved sufficient to provide for the large number of people in need of accommodation by reason of the fact, among other things, that the owners of the pieces of land adjacent to and surrounding the local authorities have become speculative in that their prices have been raised to such high levels as are unaffordable to the local authorities who consequently were unable to buy the properties to expand their boundaries or to develop peri-urban land. Accordingly land in peri-urban areas has now been earmarked for the construction of housing units to cater for the different sectors of society. It is the intention of the Government, he averred to acquire some 33 000 hectares of land for urban expansion an urban development to satisfy the need for both residential and commercial development. It is in keeping with this intention and the need to meet the demand for affordable housing that the land has been acquired by the State. It has been identified for urban expansion and urban development for the City of Harare and it is suitable for both residential and commercial development.

The appellant gave notice to the court and to the respondent that the application for confirmation was opposed by the appellant on the following grounds.

1. That the application was fatally flawed in that a prior s 5 notice of intention to acquire the Land ("the 2003 notice") was issued on the 12 September 2003 and, not having been withdrawn, is still current.
2. Pursuant to that s 5 notice, a s 8 Acquisition Order ("the 2004 order") was made on 24 September 2004. In the circumstances the Land has already been acquired and it is not

possible for new ss 5 and 8 Acquisition Orders to be issued before these two notices have been disposed of or withdrawn.

3. An application for confirmation of the earlier acquisition was still pending before the Administrative Court.
4. In respect of the earlier s 5 notice it was stated that the intention was to acquire the land for urban development but when the s 7 application to the Administrative Court was lodged it was stated that the intention was to acquire the land for agricultural resettlement. In the circumstances it was denied that the acquiring authority intends to acquire the land for urban development.
5. It was denied that the land is reasonably required or suitable for the purposes of urban development and the respondent was put to the proof thereof.

The appellant filed no opposing affidavit.

The respondent, in its written submissions to the court *a quo* filed on or about the 12 March 2012, the actual date is not clear, took the point that, since the appellant had filed no opposing affidavit, the factual averments in the respondent's founding affidavit had not been controverted and that accordingly the application being unopposed, the acquisition of the appellant's property was shown to be reasonably necessary for urban development.

In its written submissions in reply the appellant merely repeated the averments set out above. It added that the respondent must either prosecute the earlier application pending before the court or withdraw the same. It submitted that the instant application was defective both in form and on the merits and ought therefore to be dismissed.

Subsequently, the first application for confirmation of the earlier acquisition pending before the court was withdrawn by the respondent and costs tendered.

On 4 April 2012, the matter was argued before the court *a quo* which granted an order confirming the acquisition.

The appellant contended before us that both the s 5 notice and the s 8 order (issued 2010) are null and void. The reasoning was that the 2003 notice and the 2004 order were extant at the time the s 5 notice (of 2010) was issued. That being so, it is "impermissible", by virtue of ss 5(4), 5(7), 5(9) and 7(6) of the Act, to issue a fresh s 5 notice. In the premises, so it was argued, the second s 5 notice and all subsequent documents based thereon are null and void as the withdrawal of the application did not have the effect of withdrawing the 2003 notice.

Section 5 provides in relevant part:

> "(4) A preliminary notice or a notice in terms of subsection (3) shall remain in force for a period of ten years from the date of publication of the notice in the *Gazette*:
>
> Provided that any period during which an application to the Administrative Court in terms of section *seven*, or any action in any other court in relation to the acquisition of the land in question, is pending or undetermined shall not be counted as part of the period of ten years referred to in this subsection.
> (7) An acquiring authority may at any time—
> (*a*) withdraw a preliminary notice, by publishing notice of its withdrawal in the *Gazette* and serving notice of its withdrawal on every person on whom the preliminary notice was served;
> (*b*) withdraw a notice in terms of subsection (3), by serving written notice of its withdrawal on every person on whom the first-mentioned notice was served.
> (9) The fact that a preliminary notice—
> (*a*) or a notice in terms of subsection (3) has lapsed—
> (i) before the substitution of subsection (4) by the Land Acquisition Amendment Act, 2000, or the Land Acquisition Amendment Act, 2001; or
> (ii) in terms of subsection (4); shall not prevent the acquiring authority from issuing a fresh notice in terms of subsection (1) or (3), as the case may be, in respect of the same land after a period of one year from the date when such notice lapsed or, if so

> agreed by the acquiring authority and the owner of the land concerned, at any earlier time; or
> (*b*) or a notice in terms of subsection (3) has been withdrawn in terms of subsection (7), whether before, on or after the date of commencement of the Land Acquisition Amendment Act, 2000, or the Land Acquisition Amendment Act, 2001, shall not prevent the acquiring authority from issuing a fresh notice in terms of subsection (1) or (3), as the case may be, in respect of the same land; and s 7 (6) The failure for any reason whatsoever to determine an application in terms of this section or the refusal by the Administrative Court to grant an order in terms of this section authorising or confirming the acquisition of any land, whether before, on or after the date of commencement of the Land Acquisition Amendment Act, 2000, or the Land Acquisition Amendment Act, 2001, shall—
> (*a*) not affect the validity of a preliminary notice issued in respect of that land if the notice is still in force in terms of subsection (4) of section *five*, nor prevent the acquiring authority from making a fresh application in respect of that land in terms of section *seven*;
> (*b*) where the preliminary notice has lapsed, not prevent the acquiring authority from issuing a fresh preliminary
> notice in terms of section *five* and subsequently acquiring that land in terms of this Act:
>
> Provided that the acquiring authority shall not be entitled to acquire the same land on the same grounds as those on which the Administrative Court had refused the original application."

It will be seen that these statutory provisions relate to the life of a preliminary notice and the withdrawal or lapsing thereof as well as the consequences of a refusal by the Administrative Court to confirm an acquisition. The provisions undoubtedly relate to a valid preliminary notice. As will be seen below the preliminary notice of 2003 was invalid. It was void. There was no need to withdraw it before issuing the notice of 2010.

It was submitted by Mr *Mutsonziwa*, for the respondent, that the wrong procedure had been followed in acquiring the land in 2003 because the procedure for the acquisition of rural land had been followed. The affidavit filed by the Minister in the application for confirmation withdrawn by the respondent states clearly that the purpose of the acquisition is for rural resettlement. Since the appellant' s farm is undisputedly urban land, the procedure applied earlier to acquire the land being applicable to rural land only, was

void *ab initio*. It was for this reason that the respondent had withdrawn the earlier application for confirmation.

Further, since the 2003 notice published on the 19 September 2003 was void *ab initio*, there was no s 5 notice pending at the time of issue of the second notice which notice is therefore valid as is the s 8 acquisition order. Accordingly, the application was properly upheld by the court *a quo*.

I agree with Mr *Mutsonziwa's* submissions. The appellant has produced no evidence in support of its allegation that the 2003 notice related to the acquisition of urban land. The affidavit sworn by the then Minister in support of the application for confirmation of the purported acquisition avers that the land is agricultural land required for rural resettlement. It was clearly sought to be acquired as rural land. Since the land is urban land, it follows that the wrong procedure, being that for the acquisition of rural land, was followed in the purported acquisition in 2003. The result is that the purported acquisition of the land based on the 2003 notice was void and of no effect whatsoever to the extent that there was no s 5 notice extant in respect of the land at the time of the issue of the s 5 notice in 2010. Accordingly, that s 5 notice, as well as the s 8 order following it, are both valid.

The appellant contends further that the court *a quo* erred by not allowing its legal representative to address the court on the merits of the application. To this the respondent submitted, however, that the appellant 'arguments on the merits were placed before the court'.

An examination of the record shows that the appellant had alleged in the court *a quo* that the application was defective both in form and *on the merits.* The notice of intention to oppose the application for acquisition set out the grounds on which the appellant intended to oppose the application. They were two-fold. The invalidity of the preliminary notice of acquisition and the acquisition order dated 2010 and a denial that the acquisition was reasonably necessary. Regarding the latter ground the appellant contented itself with putting the respondent "to the proof thereof". It filed no affidavit. The letters written to the acquiring authority by the appellant objecting to the acquisition were attached to the notice of opposition. They contained no argument as to the reasonable necessity or otherwise of the acquisition. They dwelt on the impermissibility of issuing a new s 5 notice when there was already an earlier s 5 notice in existence. The Minister's affidavit, on the other hand, was unchallenged. It clearly shows that the acquisition is necessary for urban development. I can therefore find no merit in the appellant's contention that it was refused a hearing on the merits. The appellant's legal practitioner did address the court *a quo* placing all the allegations referred to above before the court. He did not add any further submissions. What more was there to say? He filed no affidavit on the merits. I find no merit whatsoever in this ground of appeal.

It follows from the above that the appeal is devoid of merit.

It is hereby dismissed with costs.

GOWORA JA: I agree

OMERJEE AJA: I agree

Wintertons, appellant's legal practitioners

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