ZIMBABWE TOBACCO ASSOCIATION
v
MINISTER OF LANDS AND RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, GARWE JA & OMERJEE AJA
HARARE, SEPTEMBER 24, 2012 & JUNE 17, 2013

L Uriri, for the appellant
N Mutsonziwa, for the respondents

ZIYAMBI JA: This an appeal against an order of the Administrative Court confirming the acquisition of the Remainder of the Farm Odar measuring six hundred and five comma eight zero nine two (605, 8092)hectares, situate in the district of Salisbury (hereinafter referred to as ("the property"). The grounds of appeal as they appear in the notice of appeal are as follows:

GROUNDS OF APPEAL

1. The learned President erred in not finding that the proceedings before the court were invalid for want of compliance with the peremptory requirements of section 5 (1) of the Land Acquisition Act [*Cap. 20:10*].

2. The court *a quo* erred in not finding that failure to serve the preliminary notice of intention to acquire the land on the owner of the land or the holder of any right or interest therein was fatal and invalidated the entire acquisition process.

3. For the stronger reason, the learned president erred in holding that there was no requirement for personal service on the holder of title or interest in the land.

4. The court *a quo* erred in holding that failure to serve the Surveyor General, the Registrar of Deeds, the Director of Physical Planning and the appropriate local authority within a reasonably time of the publication of the preliminary notice was not fatal because service on these functionaries was merely for their information.

5. The learned president erred in not finding that the failure to give the peremptory statutory period within which to object was not fatal.

6. The court *a quo* erred in refusing to consider the further preliminary point that the respondent had approached the court with dirty hands and ought not to be heard on the basis that the respondent had not been given adequate prior notice to respond to it or prepare adequately for it, when the factual premise was an intrinsic part of the pleadings and in any event the respondent did respond to the same. In any event, any prejudice would have been remedied by an appropriate order.
7. The learned president erred in holding that the acquisition was reasonably necessary in the public interest.

8. The learned President erred in not holding that the acquisition did not comply with s 16 of the Constitution to the extent that the same has not been undertaken against prompt and adequate compensation and to the further extent that there has not been a tender of compensation.

At the hearing of the appeal the respondent, in terms of an earlier notice to do so, raised certain objections *in limine* to the grounds of appeal.

The objections raised were, firstly, that with reference to ground 6, it was common cause that the issue of ‘dirty hands’ was raised by the appellant at the start of his

submissions to the court *a quo* towards the end of the hearing and without notice to the respondent. The court *a quo* refused to entertain this submission and did not consider it. Since the appellant did not appeal against the decision of the court *a quo* in terms of s 20 (1) of the Administrative Court Act [*Cap. 7:01*] the appellant had by conduct accepted the ruling of the court *a quo* on that issue and could not properly raise it before this Court. It was submitted that the raising of the issue before this Court amounted to an appeal by the back door. The procedure adopted by the appellant was incompetent and this ground of appeal should be struck off.

Secondly, grounds 1-5 raised issues related to non-compliance with the provisions of s 5 of the Land Acquisition Act, which grounds are not elucidated in terms of specificity. An omnibus approach had been adopted leaving the respondent to wonder what was the nature and extent of the alleged non-compliance. It was submitted that the grounds of appeal in view of their vagueness did not disclose any breach of s5 of the Act and that the issues raised therein ought to be dismissed.

Mr *Uriri*, in response, advised the Court that while he had no instructions to abandon the other grounds of appeal, it was his intention to confine himself to ground 7. Accordingly the appeal was argued solely on the basis of ground 7. I may mention that the court is of the view that the points *in limine* were well taken and the course adopted by Mr *Uriri* was proper in the circumstances. The objections *in limine* are therefore upheld and Grounds 1-6 as well as ground 8 of the grounds of appeal will not therefore be considered for the purposes of this appeal.

I turn to deal with the sole issue in this appeal which is whether the acquisition was shown to be reasonably necessary. The relevant enactments are s 16 of the Constitution of Zimbabwe and s 7 of the Land Acquisition Act [*Cap. 20:10*] ("the Act") the relevant provisions of which are set out hereunder.

Section 16 of the Constitution

"16 Protection from deprivation of property
(1) Subject to section *sixteen* A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that—
(*a*) requires—
(i) ….
(ii) in the case of any property, including land, or any interest or right therein, that the acquisition *is reasonably necessary in the interests of* defence, public safety, public order, public morality, public health, *town and country planning* or the utilization of that or any other property for a *purpose beneficial to the public generally or to any section of the public*;
and …."

Section 7 of the Act provides:

"7 Application for authorizing or confirming order where acquisition contested
(1) Where an objection to a proposed acquisition has been lodged in terms of subparagraph A of subparagraph(iii) of paragraph (*a*) of subsection (1) of section *five*, the acquiring authority shall—
(*a*) before any acquisition takes place; or
(*b*) not later than thirty days after the coming into force of an order made in terms of section *eight*;
apply to the Administrative Court for an order authorizing or confirming the acquisition, as the case may be.
(2) An application in terms of subsection (1) shall be accompanied by a statement setting out the purpose of
the acquisition.
(3) The acquiring authority shall give notice of an application in terms of subsection (1) to the owner of the land concerned and to every other person on whom the relevant preliminary notice has been served as soon as is
reasonably practicable after the application has been lodged with the Administrative Court:
(4) The Administrative Court shall not grant an order referred to in subsection (1) unless it is satisfied—
(a*) that the acquisition of the land is reasonably necessary in the interests of* defence, public safety, public order, public morality, public health, *town and country planning*

> or the utilization of that or any other *property for a purpose beneficial to the public generally or to any section of the public; ..*"(The italics are mine)

THE BACKGROUND TO THE DISPUTE

On 12 March 2010 the respondent, in terms of s 5 of the Act gazetted a preliminary notice of its intention to acquire 'certain piece of land in the District of Salisbury being The remainder of the Farm Odar, measuring six hundred and five comma eight zero nine two (605,8092) hectares' ("the property"). The property is registered in the name of the appellant and is held under Deed of Transfer 5816/85.

The appellant lodged an objection to the acquisition in terms of s 5 (1(a)(iii) of the Act. Thereafter on 23 April 2010, the respondent gazetted, and served on the appellant, an acquisition order and proceeded, in compliance with s 7 of the Act, to apply to the Administrative Court for an order confirming the acquisition of the property.

In its founding affidavit, the respondent alleged that the acquisition of the property was reasonably necessary for its utilization for urban development purposes. It was averred that currently over 1 500 000 people are residing in the City of Harare which has a capacity to accommodate only 300 000 people. The overpopulation has exerted a lot of pressure on the existing infrastructure such that more land needs to be acquired to sufficiently cater for the needs of the existing population. He attached to his affidavit a letter dated 5 March 2010, from the Director of Housing and Community Services, City of Harare, advising that:

> "The housing waiting list for the City of Harare as at the end of 2009 was 23 000 and 220000 for 2008. The housing backlog currently stands at 500 000. The City population as of 2002 Census was 1500 000."

What the respondent described as a case of "too many citizens chasing very few houses" has seen a steep increase in rentals and the erection of illegal slums posing a threat to State security, the economy, the environment and the general social public.

He averred that civil servants working in urban areas are among those hard hit by the shortage of accommodation. This has led the government to devise housing delivery programs in order to alleviate the suffering of urban workers. He stated that government workers from the lowest level to senior civil servants are residing in substandard accommodation. Accordingly, State land is required to provide affordable stands and housing for all categories of urban dwellers.

The provision in the Urban Councils Act [*Cap. 29:15*] for the designation by Local Authorities of pieces of land for urban acquisition on a willing seller/buyer basis, was proving insufficient to cater for the large number of applicants for accommodation because the owners of the pieces of land adjacent to and surrounding the local authorities had become very speculative and had raised their prices to levels which the Local Authorities could not afford thus inhibiting the local authorities from expanding their boundaries or developing peri-urban land.

It is for the above reasons that land in peri-urban areas is now earmarked for the construction of housing units to cater for different sectors of the society and Farm Odar, which is suitable for both residential and commercial development, has been identified for urban development by the City of Harare.

The Government, he stated, wished to acquire some 33 000 hectares of land for urban development to satisfy the need for both residential and commercial development. He submitted that the acquisition of the land in question is reasonably necessary for its utilization for urban development.

The appellant, on the other hand, contended that it was not necessary to acquire the land for urban expansion because the appellant had already obtained a permit from the City of Harare to develop the land. Besides, the land was zoned for industrial purposes and the appellant operated its business on the acquired land. It was alleged that the respondent had already allocated the property to the Odar Housing Consortium, a consortium of public and private companies, who were already occupying the property illegally. It was alleged that the consortium had instigated the compulsory acquisition in order to "purchase" the property from the Government at an amount far less than the real value of the land and so prejudice the owner in the compensation due to it. It was further alleged that in March 2009, after protracted efforts to resolve the dispute regarding the property, a valuation of the property was carried out and a value of some USD29 000 dollars was placed thereon which value was disputed by the respondent. The matter was settled by the Ministry of National Housing and Social Amenities when it granted the respondent the authority to conclude negotiations with individual members of the Odar Housing Consortium who were willing to pay compensation directly to the respondent owner. On the strength of this authority "at least one" consortium member paid compensation to the respondent. It was averred that the compulsory acquisition of the land pays scant regard to its effect on any third parties with whom the respondent lawfully negotiated and who will be prejudiced thereby. It was alleged that the compulsory acquisition was meant simply to legitimise the illegal occupation of the land by the consortium and that the Government had not shown due cause or reason for its

wish to acquire this particular property as no regard had been given to its own criteria for identification of land for compulsory acquisition or the identification of appropriate beneficiaries. It was not clear how the Government intends to grant fair compensation in the event of the acquisition succeeding when it is common cause that at present the government does not have funds to compensate the owner.

The appellant further contended that the acquisition was not reasonably necessary for urban development since the property was already being developed and the acquisition of the property will not extend the boundaries of the urban area under the municipal jurisdiction of the City of Harare nor would it result in any development which the appellant would not itself have undertaken. The acquisition was done in bad faith and was motivated by bias and malice.

In reply the respondent averred that from as far back as 2001 it has been the Government's intention to acquire the property which was first gazetted for acquisition in 2001 and 2003. However due to technical errors in gazetting by the acquiring authority the acquisition could not be confirmed. He said that while the consortium consisted of companies like ZESA, CBZ bank, etc, it was the employees who were in need of the stands and selling to the consortium at commercial prices would not assist the employees because they would be required to pay commercial market rates for the Stands. On the other hand, when the State purchases the land it bears the responsibility of compensating the land owner and the housing cooperatives or as in this case, the employees of the companies would enjoy the benefit of buying the Stands at affordable prices.

It was contended by Mr *Uriri*, on behalf of the appellant, that the respondent had not discharged the onus which lay on it to establish that the acquisition of the land was reasonably necessary as evidence had not been led in that regard and no proof had been given on the criteria chosen to identify the Appellant's farm for the purposes of urban development. The absence of such proof and the abundance of prior attempts to dispossess the appellant of the property was evidence of bad faith on the respondent's behalf.

However, Mr *Mutsonziwa*, for the respondent, submitted that the many attempts since 2001 to acquire the property do not exhibit bad faith but constitute evidence of the Government's long standing desire to acquire the property, their previous attempts having failed because the wrong procedure was followed.

The necessity of the acquisition, he submitted, has been clearly established on the affidavits. While the consortium comprises of a number of companies it is the workers of these companies, 6000 of them, whom it is sought to accommodate on the property and who form part of the members of the public for whom the Government is under a duty to provide accommodation. The need for land for residential stands is critical. The acquisition is meant to address a social problem and the beneficiaries are evident. The appellant's housing plans are unsuitable by reason of their unaffordability to those intended to benefit from the acquisition.

In terms of s 7(4) of the Act, the Administrative court could only grant an order confirming the acquisition if it was satisfied that the acquisition was reasonably necessary for, in this case, town and country planning. It seems to me that in considering the necessity or otherwise of an acquisition of property the rights of the individual needs to be

balanced against the public interest. On the appellant's evidence only one purchaser had paid for a parcel of the land. This fact would appear to support the respondent's averments that the stands are unaffordable to the people for whose benefit the acquisition is being done.

Indeed, the court *a quo* considered the submissions placed before it and concluded:

> "As the Odar Farm has been acquired for town planning and for a purpose beneficial to the public generally there is no doubt that section 16(1) of the Constitution of Zimbabwe and section 7(4)(a) of the Land Acquisition Act have been complied with. I have no doubt that the acquisition is reasonably necessary for urban development.
>
> It must be emphasized that the Minister referred to the demand for affordable housing. Government is obliged to cater for the needs of all its citizens, both the rich and the poor. This in my view is precisely where the respondent misses the point. Respondent may be able to build houses and sell them at a profit. But how many people will be able to afford buying those houses which respondent will sell at a profit? Not many, I think. On the other hand, many people earning very modest wages and salaries will be enabled to qualify to buy houses or build their own homes on land acquired by Government with a motive to provide affordable housing not to make profit.
>
> Respondent submitted that applicant is obliged to show that the acquisition of this particular piece of land was reasonably necessary. But it was submitted for the applicant that the State is in the process of acquiring three hundred and thirty thousand hectares of land for the expansion of Harare. Farm Odar, measuring slightly over six hundred and five hectares, is only one of many farms which the State is acquiring for the expansion of Harare. The particularity of this piece of land is therefore misplaced."

It is for the Administrative court to be satisfied that the acquisition is reasonably necessary for the purposes stated in the application. Once the acquiring authority has established to the satisfaction of that Court that the acquisition is necessary for the purposes stated in the Act and the Court has confirmed the acquisition, an appeal court can only interfere with the court's decision if it can be shown that the court misdirected itself in arriving at the conclusion that it did. No misdirection by the court *a quo* has been alleged or

established and I can find no fault with its reasoning. There is therefore no basis for interfering with the judgment appealed against.

The appeal is accordingly dismissed with costs.

GARWE JA: I agree

OMERJEE AJA: I agree

Kantor & Immerman, appellant's legal practitioners

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