DANIEL ALEXANDER HARTMAN N.O.
versus
THE MINISTER OF LANDS, AGRICULTURE, WATER, CLIMATE AND RURAL RESETTLEMENT
and
FLORENCE ZIYAMBI
and
CHIEF REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 4 November 2021 & 1 March 2023

Opposed Application – *Res Judicata*

D Ochieng, for the applicant
T Mutomba, for the 1st respondent
R Mabwe, for the 2nd respondent

MUSITHU J: The applicant seeks a *declaratur* and other consequential relief. The draft order aptly captures the relief sought in the following terms:

> "1. It is declared that:
>
> 1.1 As of August 2006, the piece of land known as subdivision G of Kinvarra situate in the District of Salisbury measuring 50.7910 hectares ("the property") did not constitute agricultural land that was liable to acquisition in terms of s 16B of the former Constitution of Zimbabwe, 1980.
>
> 1.2 Any purported acquisition of the property in terms of either s 16B of the former Constitution or s 72(2) of the current Constitution occurring after August 2006 is invalid and of no force and effect.
>
> 1.3 Consequently, the applicant, in his capacity as executor of the estate of the late Daniel Alexander Hartman who died at Hamilton, New Zealand, on 26 August 2018, is the true owner of the property.
>
> 2. Consequently, it is ordered that:
>
> 2.1 The purported acquisition of the property by the first respondent be and is hereby set aside.
>
> 2.2 The second respondent shall, within seven days of the grant of service of this order, expunge from his registers and from each of Deed of Transfer 5114/1980 and Deed of Transfer 956/1989 any entry therein or endorsement thereon cancelling the respective deeds or vesting ownership of the property in the State.
>
> 2.3 Any offer letter granted in respect of the property is hereby set aside and declared to be of no force and effect.
>
> 3. There shall be no order as to costs."

Factual Background and the Applicant's Case

The applicant deposed to the founding affidavit in his capacity as the executor testamentary of the estate of his late father who also answered to the same name as the applicant. The late Daniel Alexander Hartman (the deceased) was the registered owner of a piece of land situate in the District of Salisbury known as Subdivision G of Kinvarra (the property). The property is 50,7910 hectares in extent, and is located in the Mount Hampden area on the outskirts of Harare. It was held under two separate title deeds, with each confirming ownership of an undivided one half share. These Deeds of Transfer were No. 5114/1980 and No. 956/1989. According to the applicant, a local development plan approved in 2006 zoned the area for general industrial use.

In July of 2007, the deceased obtained a permit in terms of the s 40 of the Regional, Town and Country Planning Act[1], for the subdivision of the property into four stands. The condition of the permit was that each of the stands was to be used for agro-processing industrial purposes. The required developments were not undertaken due to innumerable challenges that ranged from the harsh economic conditions to ill-health on the part of the deceased. A decision was then made to lease the property to a party that would be responsible for payment of outgoings and the labour force resident at the property. Initially the deceased and his wife moved to Mazowe Valley for paid employment before relocating to New Zealand.

On 6 April 2012, the first respondent published a notice of acquisition of the farm for the purpose of settlement for agriculture in terms of s 16B (2)(a)(iii) of the old Constitution. The applicant maintains that the notice was defective as it just referred to one title deed attesting to ownership of only one undivided half share of the property. It was also defective as it alleged that the property was owned by Daniel Alexandra, who was not the deceased. Further, by the time the first respondent identified the property for acquisition for agricultural purposes, it had already been zoned for industrial purposes for about six years prior to the date of acquisition.

The deceased had acceded to the change in use and proceeded to plan the appropriate industrial designs. The necessary permit had also been granted. An expert report procured at the instance of the applicant also confirmed that the property formed part of the urban core of Mount Hampden Development Plan. The general development context was urban.

[1] [*Chapter 29:12*]

The applicant averred that it was only agricultural land that could be acquired validly in the manner that the first respondent professed to have done. The acquisition may have occurred as a result of an error since the area was historically farmland that was only zoned for industrial purposes in 2006. The applicant argued that the property could not, for the aforesaid reason, constitute agricultural land liable for acquisition under the old constitution. The purported acquisition was therefore invalid on account of that error.

Following the death of the deceased in New Zealand on 26 August 2018, the applicant claims that he was appointed executor of the deceased's estate in the High Court of New Zealand on 28 February 2019. He engaged legal experts to assist him in the affairs of the estate. His appointment was endorsed under the Zimbabwean laws in June 2019. It is at that stage that investigations into the affairs of the estate commenced. He instructed his legal practitioners to engage the second respondent in order to secure a reversal of the erroneous acquisition of the property. Correspondence was exchanged between the parties. In its response to one of the letters, the first respondent advised the applicant to approach the Zimbabwe Land Commission (the Commission) for resolution of the matter. The applicant contends that the Commission does not have the power to order the reversal of an erroneous acquisition of urban land. For that reason the applicant reckoned that a dispute existed in the absence of a reversal of the acquisition by the first respondent.

It was also at that point that the applicant got to know that the second respondent had been issued with an offer letter for the property. The applicant averred that the rights claimed by the second respondent under the offer letter were based on the impugned acquisition of the property by the first respondent. The second respondent's rights were of no effect the moment the first respondent's acquisition was invalidated by the court. It was for that reason that the second respondent had been cited in the proceedings.

First Respondent's Case

The opposing affidavit raised two preliminary points. The first was that the founding affidavit was irregular as it was not commissioned in accordance with the law. Affidavits commissioned outside Zimbabwe had to be authenticated in terms of the Justice of Peace and Commissioners of Oaths Act[2]. It was also averred that the words on the seal were not translated

[2] [*Chapter 7:09*]

into the English language as required by s 49 of the High Court Act.[3] The absence of a translation left serious doubts about whether the person who allegedly authenticated the founding affidavit was qualified to do so. For that reason, the first respondent argued that there was no proper application before the court.

The second preliminary point was that the applicant had approached the court prematurely, since administrative processes were not exhausted. Section 36 of the Land Commission Act clothed the Commission with dispute resolution powers. The applicant had still not approached the Commission with his grievance despite being advised to do so.

As regards the merits of the application, the second respondent commented as follows. The property was properly acquired in terms of the Constitution. The acquisition was never an error and it was for that reason that first respondent was under no obligation to reverse the acquisition. The property became State land following its compulsory acquisition. Ownership immediately vested in the State. Any developments which occurred prior to the compulsory acquisition were overtaken by events following the compulsory acquisition in 2012.

The first respondent argued that any inconsistencies contained in the notice relating to the description of the property and the title deed to which it referred did not invalidate the State's title to the land concerned. Such errors were immaterial to the extent of being *deminimis non curex lex*. The first respondent also dismissed the expert report alluded to by the applicant as immaterial in the face of the compulsory acquisition of the land by the State. The property was acquired lawfully and for agricultural purposes. Any alleged dispute had to be brought before the Commission for resolution.

The first respondent also averred that this court had no jurisdiction to order the upliftment of an endorsement of a property that was compulsorily acquired in terms of the Constitution. The court could not invalidate a constitutional process, being itself a creature of the Constitution.

Second Respondent's Case

The notice of opposition raised three preliminary points. The first was that the matter was *lis alibi pendens.* The relief sought in *casu* was also the subject of proceedings under HC 8559/17. The parties were similar and the subject matter was the same. The second preliminary point was that following the demise of the deceased, the applicant should have simply proceeded in terms of

[3] [*Chapter 7:06*]

r 85A of the rules for the substitution of a party that was deceased. The third point was that the applicant lacked *locus standi* as he claimed to be an executor based on an appointment by a foreign institution. The deceased could not appoint an heir to property that had already been gazetted for agricultural purposes.

Concerning the merits, the second respondent averred that the land remained rural agricultural land even though the master plan showed that it was going to be earmarked for industrial development. That did not automatically make it urban land though. It was further averred that there was a difference between land which was incorporated by presidential proclamation for urban expansion and that which had always been rural land. The zoning of agricultural land for industrial purposes did not on its own bar the State from acquiring it for agricultural purposes. What was barred was the acquisition of urban land. The subdivision permit never saw the light of day as the land was subsequently acquired for agricultural purposes. The second respondent further averred that every former land occupier or owner who lost title by operation of law could only claim compensation and not title.

As regards the anomalies in the description of the land, it was argued that the land identified in the gazette measured exactly the same as the land claimed by the applicant. It was also registered in the name of the former owner and therefore nothing was substantially different. The expert report was dismissed as inadmissible. The second respondent further argued that the applicant could not use a master plan from a Rural District Council to stifle land acquisition as the State was within its powers to change use of the said land and maintain its rural agricultural status. The land was never urban land and it was never subdivided in as much as there appeared to have been such intention to do so. The court had no jurisdiction to stop the acquisition save to decide on the question of compensation.

The Answering Affidavit

The answering affidavit was deposed to by the applicant's legal practitioner of record, Kevin John Arnott. In his response to the first respondent's opposing affidavit, he denied that the founding affidavit was not properly authenticated. He insisted that though it was ungrammatical, the notarial attestation was in the English language. He denied that the Commission had powers or jurisdiction to grant the relief sought herein. Therefore, there was no basis for the court to decline jurisdiction in the matter.

The deponent further averred that unbeknown to the applicant, the deceased had challenged the validity of the acquisition under HC 12276/16. In that matter, the first respondent deposed to an affidavit in which he stated that Subdivision G of Kinvarra was urban land zoned for industrial purposes prior to its purported acquisition by the State. For that reason, the land could not be acquired for resettlement purposes. He went on to state that the purported acquisition of the farm in 2012 was therefore null and void and of no force and effect. The court granted an order declaring the invalidity of the purported acquisition. For that reason, the first respondent was therefore estopped from advancing a contradictory position.

In HC 8559/17, the deceased challenged the acquisition of the property. That application had since been deemed abandoned for want of prosecution. It was for that reason that the applicant was persisting with the present application. The correct position, which the first respondent had confirmed was that the status of the property had changed making it incompetent for it to be acquired in the manner it was done.

As regards the averments in the second respondent's opposing affidavit, the deponent submitted that the applicant was unaware of the proceedings in HC 8559/17, at the time that it launched the present application. Investigations revealed that the application had been made during the deceased's lifetime, unbeknown to the applicant. The application was deemed abandoned and there was nothing pending at court.

The submissions and the analysis

The first respondent's preliminary points were abandoned in the heads of argument. The position was confirmed by the first respondent's counsel, Mr *Mutomba* at the commencement of the oral submissions. The court will thus deal with the second respondent's preliminary points. Ms *Mabwe* for the second respondent added three more preliminary points to the ones already raised in the second respondent's opposing affidavit. These are that: the matter was *res judicata*; the matter had prescribed; the answering affidavit was not properly before the court and that the relief sought was incompetent. To these I shall now turn.

Res judicata

Ms *Mabwe* submitted that this court had already granted a final and definitive order in the matter and it was therefore unnecessary to further plough on ground that had already been tilled.

Paragraph 1.2 of the draft order herein was a recast of para (a) of the order granted by MUREMBA J in HC 12276/16. There was an extant cause order which disposed of the question of the acquisition of the property.

In his response, Mr *Ochieng* for the applicant submitted that the order in HC 12276/16 merely set aside the acquisition of the property. What was sought *in casu* was a *declaratur* as regards the very power to acquire the land. The applicant's argument was that any purported acquisition was invalid. While the applicant was aware of the 2012 acquisition, the basis of seeking the setting aside of that acquisition remained the same. The first respondent had effected a second acquisition. The relief sought therefore was also concerned with any future acquisition.

In her brief reply Ms *Mabwe* maintained her position that the relief sought in the two matters was essentially similar. The current application did not make an enquiry into whether there was compliance by the first respondent. It sought to reverse the acquisition of the property. An acquisition could not be challenged or set aside by the court. Reference was made to the case of *Mangenje* v *TBIC Investments (Private) Limited & Ors*[4]. Ms *Mabwe* further submitted that although the relief sought herein was intended to forestall any future acquisition, nothing in the founding affidavit made reference to any such future threat. The applicant could not claim relief that was not pleaded in his own case.

The *res judicata* rule has been traversed in innumerable decisions of this jurisdiction and beyond. In the case of *Evins* v *Shield Insurance Co Ltd*[5], the court said:

> "Closely allied to the "once and for all" rule is the principle of *res judicata* which establishes that, where a final judgment has been given in a matter by a competent court, then subsequent litigation between same parties, or their privies, in regard to the same subject-matter and based upon the same cause of action is not permissible and, if attempted by one of them, can be met by the *exceptio rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions (Caney *Law of Novation* 2nd ed at 70)…"

The requirements for the defence of *res judicata* are therefore that the prior action:

- must have been between the same parties or their privies;
- must have concerned the same subject matter; and
- must have been founded on the same cause of action.[6]

[4] HH 377/13
[5] 1980 (2) SA 814 (A) at 835F-G.
[6] *Kawondera* v *Mandebvu* SC 12/06

The object of the *res judicata* principle is to put a limit to needless litigation and to prevent the repetition of the same claims in diverse litigation. Such a scenario if not curbed through the *res judicata* rule would result in conflicting and contradictory decisions by the same court. Unnecessary confusion in the management and disposal of related cases is therefore avoided. The principle thus saves as a necessary hedge against forum shopping and multiplicity of proceedings.

In HC 12276/16, the court granted the following order on 8 February 2017:

"IT IS ORDERED THAT:

a) The acquisition of subdivision G of Kinvarra situate in the district of Salisbury held under deed of transfer 956/89 be and is hereby declared null and void and the said property is hereby delisted/removed from being State land.
b) The 2nd respondent uplifts/cancels the endorsement on deed of transfer 956/89 and registers title of the said farm in the name of the applicant.
c) There be no order as to costs."

It is common cause that the subject matter of the dispute in both HC 12276/16 and the present application, is the property already referred to earlier in the judgment. In HC 12276/16 the applicant was the deceased, and he was represented by one Wayne Douglas Parham who acted as the applicant's agent through a power of attorney. The first and third respondents herein were the first and second respondents in HC 12276/16. The second respondent was not a party therein. It is the court's view that para (a) of the order under HC 12776/16, effectively disposes of para(s) 1.1 and 1.2 of the order sought in the present application. This is because once the court ordered that the acquisition of the property was null and void, and that it ceased to be State land, then it followed that the property was not agricultural land that was liable to acquisition in terms of s 16B of the Constitution.

It also followed that any purported acquisition of the property in terms of s 16B of the old Constitution was of no effect. The said para (a) also disposes of para 2.1 of the of the draft order herein. In para 2.1, the applicant requires the court to set aside the acquisition of the property by the applicant. That was already achieved when in HC 12776/16 the court declared that the acquisition of the property was null and void.

Paragraph (b) of the order under HC 12776/16 directed, the Registrar of Deeds, the third respondent herein to cancel the endorsement on deed of transfer 956/89 and register the title of the said property in the name of the applicant. In para 2.2 of the draft order herein the applicant requires the court to direct the second respondent herein to expunge from his register and from each of deed of transfer 5114/1980 and 956/1989 any entry or endorsement cancelling the

respective deeds or vesting ownership in the State. In his founding affidavit, the applicant states that he owned this property under the two deeds of transfer, each attesting to ownership of an undivided one half share. It is now common cause that through the General Notice 134 of 2012 published in the Government Gazette of 6 April 2012, the first respondent sought to acquire the property held under deed of transfer 956/89. That is the same acquisition that the court then outlawed in para (a) of the order under HC 12776/16. It follows that para 2.2 of the draft order is already catered for by para (b) of the order in HC 12776/16.

What then remains of the order sought in the current proceedings is para 2.3, in which the court is required to order that any offer letter granted in respect of the property be set aside and declared to be of no force and effect. The papers before me do not disclose when exactly the second respondent was issued with an offer letter pertaining to the property. However, it emerged during oral submissions that the first respondent issued another notice of acquisition for the same property on 4 August, 2017 under General Notice 456 of 2017. In his submissions, Mr *Ochieng* argued that the discovery of this 2017 acquisition validated the present application to the extent that it sought to impugn any future acquisition of the property by the first respondent. In response, Ms *Mabwe* argued that an application had to stand or fall on the founding affidavit. The applicant's founding affidavit did not deal with any future acquisition of the property. Rather, it dealt with the 2012 acquisition. The *declaratur* was therefore being sought on a wrong basis.

What I inferred from Mr *Ochieng's* argument is that he accepted that the order granted in HC 12276/16 all but dealt with the acquisition of the property under the 2012 notice. The gravamen of the applicant's complaint herein was the 2012 acquisition of the property by the first respondent. The applicant never alluded to the 2017 acquisition in the founding affidavit. The reference to the first respondent's opposing affidavit in HC 12276/16 was only made in the applicant's answering affidavit.

It emerged during submissions that the applicant herein sought the eviction of the second respondent herein from the property in HC 7204/17. It claimed so on the basis that this court in HC 12276 /16 had reversed the 2012 acquisition of the property by the first respondent. In para 11 of the founding affidavit deposed to by Wayne Douglas Parham in HC 7204/17, the applicant made this bold declaration:

> "I am advised that the Order of court made in HC 12276/16 declared Aldan Farm to be private land and accordingly that gives the Applicant a real right to the use, possession and occupation of Aldan Farm and further gives the Applicant *locus standi* to approach this Honourable Court and seek

> eviction of the said 1st Respondent and all those who claim occupation through her from Aldan Farm."

In para 3 of her opposing affidavit in HC 7204/17, the second respondent herein argued that the order granted in HC 12276/16 had been overtaken by events. The first respondent had regazetted the same property having realised that he had been mistaken about its legal status. The land was not urban land. It was rural land. It was on that basis that the second respondent was issued with an offer letter on 4 August 2017. That offer letter from the first respondent is annexure B to her opposing affidavit in that matter. The first respondent herein also deposed to an opposing affidavit in HC 7204/17. He averred that the same land was now State land by virtue of its reacquisition through the General Notice 456 of 2017.

I have already observed that from a closer reading of the applicant's affidavit herein, his gripe was with the 2012 notice of acquisition issued by the first respondent. That this is the position is clear from para 11 of the founding affidavit which reads as follows:

> "Thereafter, on 6 April 2012, the first respondent professed to have identified the property for acquisition in terms of s 16B(2)(a)(iii) of the former Constitution of Zimbabwe by publishing a notice to that effect in the Government Gazette…."

In para 16 of the founding affidavit, the applicant further states as follows:

> "I therefore contend that the property did not constitute agricultural land that was liable to acquisition for settlement for acquisition purposes in terms of the former Constitution, and that the purported acquisition was, consequently, invalid on account of that error."

Attached to the founding affidavit is a copy of General Notice 134 of 2012 published in the Government Gazette of 6 April 2012. The submission by Mr *Ochieng* that this application must be broadly interpreted to incorporate any future acquisition, which would include the subsequent 2017 acquisition is in the court's view without merit. An application must stand or fall on the basis of the founding papers. It only emerged well after the present application was filed that there were in fact other matters that had a huge bearing on the present matter. It is in those other matters that it was disclosed that the property was regazetted for agricultural purposes in 2017, and that the second respondent had been issued with an offer letter pursuant to that process. The dispute before me is not about the lawfulness of the 2017, but it is rather concerned with the lawfulness of the 2012 acquisition.

The court determines that the issues arising for determination in the present matter were judicially determined by this court in HC 12276/16. This court cannot therefore render another

determination on the same issues. As a matter of principle, this court is permitted to take judicial notice of its own record. The proceedings in HC 7204/14 show that the offer letter that this court is being called upon to set aside in para 2.3 of the draft order, was issued pursuant to the 2017 acquisition of the property by the first respondent. The court cannot set aside the offer letter under the current proceedings, which are based on a challenge of the 2012 acquisition of the land. From the papers before the court, it is not clear whether any offer letter had been issued pursuant to the 2012 acquisition. If ever it was, it would at any rate have been superseded by the 2017 offer letter.

The 2017 acquisition of the land was challenged under HC 8559/17. In that matter the parties are the same as they are herein save for the inclusion of the Zimbabwe Land Commission as one of the respondents. The Registrar has not yet expressed a position on the fate of the matter following its removal from the roll by MUNANGATI MANONGWA J on 24 September 2018. The court therefore further determines that the fate of the offer letter issued pursuant to the acquisition of the land in 2017 can only be dealt with in proceedings challenging the 2017 acquisition of the said property.

In view of the foregoing observations, the court concludes that there is merit in the preliminary point based on the *res judicata* principle. The application must fall on that score.

COSTS

The general rule is that costs follow the event. The first respondent urged the court to dismiss the application with costs. No meaningful submissions were made in support of the first respondent's position. In fact it is the first respondent's conduct that torched the confusion which prompted the current and other similar proceedings. It does not deserve to be rewarded with an award of costs in its favour. In her heads of argument, the second respondent urged the court to dismiss the application with costs on the punitive scale. I found no basis for an award of costs at that level.

DISPOSITION

Resultantly it is ordered that:

1. The application is hereby dismissed.
2. The applicant shall pay the second respondent's costs of suit.

Kevin J. Arnott, applicant's legal practitioner
Civil Division of the Attorney General's Office, first respondent's legal practitioners
Chatsanga & Partners, second respondent's legal practitioners