

AMOD MANDIVENGA TAKAWIRA
versus
MINISTER OF LANDS AGRICULTURE FISHERIES,
WATER & RURAL DEVELOPMENT N.O
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
MHURI J
HARARE, 19 July & 19 October 2022

Mr T G Chigudugudze, for the applicant:
Ms F R Gustin, for the 1st Respondent
No appearance for 2nd Respondent

Opposed application

MHURI J: A Mr Abraham Petros Louw Van Niekerk (Van Niekerk) by virtue of a Deed of Transfer 7477/73 was the registered owner of a certain piece of land situate in the District of Salisbury called the remaining extent of Lushof of Shinghaini measuring 428, 2613 hectares. (the property).

On 8 March 2001, Van Niekerk offered the property for sale to applicant. On 24 July 2001, first respondent issued to Van Niekerk a certificate of no present interest (Co N P I) which indicated that neither the President nor the Government had any intention to acquire the land in question. The Co N P I was valid for 12 months from date of issue. On 30 August 2001, Van Niekerk was issued with a certificate of compliance by first respondent. Consequently Van Niekerk transferred the property to the applicant on 17 October 2001 under Deed of Transfer 10480/2001.

On the 26 April 2002, by General Notice 198 A of 2002 published in the Government Gazette Extraordinary notice was given in terms of the Land Acquisition Act, [*Chapter 20:10*] of the President's intention to compulsorily acquire the property, which according to the schedule was No. 56 and it read as follows:-

“Deed of Transfer 7477/73, registered in the name of Abraham Petros Louw Van Niekerk in respect of certain piece of land situate in the district of Salisbury, being Lushof of Shanghai, measuring four hundred and twenty eight comma two six zero zero (428 2600) hectares.”

After some protracted enquiries and applications over the property by applicant with the first respondent's various departments dating as far back as July 2020 applicant was granted a 99 year lease over the property by a letter dated 23 March 2022 by first respondent.

This aggrieved applicant as a result of which he filed this application for a declaratur and consequential relief in terms of s 14 of the High Court Act [*Chapter 7:06*]. The application is seeking the following order,

“1. that the purported compulsory acquisition of a certain piece of land situate in the District of Salisbury called the Remaining extent of Lushof of Shinghaini measuring 48 2613 hectares held under deed of transfer 10480/2001 is invalid and is hereby declared null and void.

2. That it be declared that 1st Respondent and or the state are not entitled to alienate the piece of land described in (1) above in terms of the Land Commission Act (CAP 20:29) or any other law, it being owned by the Applicant and it not being state land.

3. The decision of the state as communicated by the Acting Director Land Management and Admnistartion in the letter of the 23rd March 2022 to the applicant to issue him with a 99 year lease in respect of the piece of land described in (1) above be and is hereby declared to be invalid and null and void consequent to the declarations made in (1) and (2) above , alternatively for not being made in compliance with the provisions of the Land Commission (Gazetted Land) (Disposal in lieu of Compensation Regulations, 2020 (Statutory Instrument 62/2020)

4. The 1st Respondent shall pay costs of this application.”

First Respondent is opposed to the granting of the application. Applicant averred in his founding affidavit that the matter involves existing or future and contingent rights. He is an interested party who has a direct and substantial interest in the matter which could be prejudicially affected by the judgment of the court. He averred that he purchased the property and took transfer from Van Niekerk hence he is the registered owner. As of 26 April 2020 when the property was identified and compulsorily acquired he and not Van Niekerk was the owner and at that date, the Deed of Transfer 10480/01 and not Deed of Transfer 7477/73 was the Deed in the Deeds Registry, therefore Van Niekerk could not be divested of any legal rights in the property. Applicant contended that to purport to compulsorily acquire the property from a non-owner was an exercise in futility and therefore void *ab initio*. He also contended that the issuance of a 99 year lease pursuant to his application in terms of SI 62 of 2020 is also null and void as he did not apply for that.

In its notice of opposition, first respondent averred that the property was acquired via s 22 of the Constitutional Amendment (No 17) Act 2005 which was to the effect that all of the farms listed in the General Notices published in the Gazette Extraordinary before 8 July 2005 were acquired and vested in the state. The property was acquired under General Notice 198 A

of 2002 and was acquired in terms of s 16B (2) (a) having been identified. It is the identification of the land and not the owner which is key when considering the gazetting of land. It contended that the property was clearly and correctly identified making the acquisition valid. It contended also that the errors in the notice and the non-endorsement on the deed of transfer cannot invalidate the acquisition. In terms of SI 62/2020, the Minister is not bound to grant title. It can either accept or reject it and the new title (99 year lease) that was granted is valid.

The following facts are common cause, as stated earlier in this judgment

- The property was owned by Van Niekerk under Deed No 7477/73 prior to 2001
- Van Niekerk then sold it to applicant after obtaining a certificate of no present interest and a certificate of compliance from first respondent.
- Applicant then took transfer of the property under deed of transfer No 10480/2001 on 17 October 2001
- On 26 April 2002 General Notice 198A 2002 to compulsorily acquire the property was published in the Government Gazette Extraordinary, the schedule there to under item 56 reads “Deed of Transfer 7477/73 registered in the name of Abraham Petrus Louw Van Niekerk, in respect of certain piece of land situate in the district of Salisbury being Lushof of Shanghai measuring four hundred and twenty eight comma two six zero zero (428.2600) hectares.”
- The acquisition of the property was not endorsed on the applicant’s deed No 10480/2001 at the third respondent’s Deeds office as required by law.

Applicant’s main bone of contention for seeking the acquisition declared invalid, null and void and for the state not be entitled to alienate the property is that the property is owned by him and is not State land. Reliance was made on the case of

1. KENNEDY GODWIN MANGENJE
versus
T B I C INVESTMENTS (Pvt) Ltd and 4 Ors
2. KENNEDY GODWIN MANGENJE
versus
MINISTER OF LANDS & RURAL RESETTLEMENT & 3 Ors HH 377/13

The C O N P I issued to Van Niekerk on the 24 July 2001 states in the last paragraph: “The effect of this certificate is that you are now free to sell the above- mentioned piece of rural land, since you have complied with subsection (3) of SI 297 of 1992. I should point out however, that this certificate expresses the Government’s present intention and must not be taken to mean

that the Government will never wish to acquire the rural land in question either by negotiation or compulsorily in terms of the Land Acquisition Act, 1992, should the need arise in the future.” True to this, the President compulsorily acquired the property hardly six months after the transfer of the property to applicant. The Government Notice also indicated that any owner or occupier or any other person who has an interest and right in the said land , and who wishes to object to the proposed compulsory acquisition , may lodge the same to the Minister of Lands, Agriculture and Rural Resettlement. (underlining my own)

On the 14 September 2005, the Constitution of Zimbabwe Amendment No 17 Act 2005 was promulgated. Section 16B reads:

“Agricultural land acquired for resettlement and other purposes.

- (1) In this section –
 - “acquiring authority” means the minister responsible for lands or any other Minister
 - “appointed day” means 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 of July, 2005, in the Gazette Extraordinary under the proviso to the 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 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 Extraordinary for whatever purpose, including , but not limited to –
 - A. settlement for agricultural or other purposes; or
 - B. the purposes of land re organisation, forestry, environmental conservation or the utilization or wild life or other natural resources; or
 - C. the relocation of persons dispossessed in consequences 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 sub paragraph (iii) , with effect from the date it is identified in the manner specified in that paragraph;
 - (b) no compensation shall be payable.....
- (3)
- (4).....
- (5) any inconsistency between anything contained in-
 - (a) a notice itemised in Schedule 7, or
 - (b) a notice relating to land referred to in subsection (2) (a) (ii) or (iii) ,
and the title deed to which it refers or is intended to refer, and any error whatsoever contained in such notice, shall not affect the operation of subsection (2) a or

invalidate the vesting of the title in the State in terms of that provision:

(6)

(7)"

Schedule 7 of the above Act identifies the General Notices under which certain properties were acquired .The General Notice 198 A of 2002 is shown as item 47. The Schedule reads;

“(Section 16B)

AGRICULTURAL LAND GAZETTED BEFORE THE 8TH JULY, 2005

The pieces of land identified in the General Notices specified in the second column on the following table that were published in the Gazette or Gazette Extraordinary on the date specified opposite thereto in the third column of the table constitute the land referred to in section 16B (2) (a) (i)

In this Schedule ‘‘piece of land’’ means a piece of land registered as a separate entity under any law providing for the registration of title over land’’

It is clear from the above and is not disputed that the property falls under section 16B (2) (a) of Act No 17 of 2005 it having been acquired before the appointed day that is 14-9-2005.

It is accepted , the Deed of transfer referred to in the Notice was 7477/73 and the owner Van Niekerk and not 104 80/2001 the owner being applicant. The piece of land however was correctly identified as Lushof of Shanghai measuring 428, 2600 hectares. First respondent contended which contention I am persuaded by, that what the Government gazettes is the land and not the farm owner and so the key consideration is the proper identification of the land.

I am further persuaded by first respondent’s submission that the errors in the Notice and the non-endorsement of title on the deed of transfer does not invalidate the acquisition. Sub section (5) of s 16B of the Act puts it clearly that any inconsistency between anything contained in the notice itemised in Schedule 7 and the title deed to which it refers and any error whatsoever contained in such notice shall not affect the operation of subsection (2) (a) or invalidate the vesting of title in the state in terms of that provision. (underlining for emphasis)

Support is found in the case of:

- (1) T B I C INVESTMENTS (PRIVATE) LIMITED (2) PAUL ISAU UPENYU
CHIDAWANYIKA
versus
(1) KENNEDY MANGENJE
(2) MINISTER OF LANDS
(3) RURAL DEVELOPMENT
(4) THE REGISTRAR OF DEEDS
(5) ATTORNEY GENERAL OF ZIMBABWE
(6) THE COMMISSIONER OF POLICE

SC13/18

At page 6 of the cyclostyled judgment BHUNU JA had this to say:-

“There can however be no denying that the process of identifying the disputed land for purposes of compulsory acquisition was brought with errors including the spelling of the name of the previous owner of the land, its exact size and extent as correctly found by the court *a quo*. These errors and more were not peculiar to this particular of piece of land.

The mistakes were many and varied relating to various other pieces of land, thereby threatening to derail the entire Land Reform Programme. In order to protect and keep the Land Reform Programme on course, Parliament in its wisdom amended the former constitution. The intention of the Legislature was to automatically validate acquisition of all agricultural land identified and listed under schedule 7 for purposes of the Land reform programme on or before 8 July 2005 regardless of any errors or mistakes that may otherwise have nullified the acquisition in the normal run of things”

At page 8 of the judgment the Judge of Appeal went further and held

“The land, having been identified and itemised in Schedule 7, it fell squarely within the ambit of section 16 B (2) of the former Constitution. By virtue of S 16 B (5) of the former Constitution the fact that at one time the notice expired or was withdrawn and that it was beset by other errors complained of by the appellant were of no force or effect. They could not invalidate or adversely affect the vesting of title the State whatsoever.”

See also the case of

- (1) NAVAL PHASE FARMING (PRIVATE) LIMITED
(2) BEACH FARMS (PRIVATE) LIMITED
(3) TAWANDA NYAMBIRAI
versus
(1) MINISTER OF LANDS AND RESETTLEMENT
(2) BERNARD MAKOKOVE
(3) STEPHEN CHIURAYI

(4) MALVERN DZVAIRO

SC 50/18

which endorsed the remarks by BHUNU JA in the T B I C case above.

In view of the above, I find that applicant cannot be granted the relief he is seeking. The property was acquired by the State, therefore the State and not the applicant is the owner of the property. In the result, it is ordered that the application be and is hereby dismissed in its entirety with costs.

Madanhe & Chigudugudze, applicant's legal practitioners
Civil Division of the Attorney General's Office, first respondent's legal practitioners