

REPORTABLE (30)

Judgment No. SC 31/07
Civil Application No. 306/06

(1) MANICA ZIMBABWE LIMITED (2) CHIROBI (PRIVATE) LIMITED
(3) DUNDORI (PRIVATE) LIMITED (4) MUKOKO (PRIVATE) LIMITED

v (1) THE MINISTER OF STATE FOR NATIONAL SECURITY,
LANDS, LAND REFORM AND RESETTLEMENT IN THE
PRESIDENT'S OFFICE
(2) THE PRESIDENT OF THE ADMINISTRATIVE COURT OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA, ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, FEBRUARY 1 & NOVEMBER 5, 2007

A P de Bourbon, SC, for the applicants

E M Mwatse, with her *Mr Mutsonziwa* and *V Mabhiza*, for the respondents

CHIDYAUSIKU CJ: This is an application in terms of s 24(1) of the
Constitution of Zimbabwe, which provides:

“24 (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.”

The respondents have taken a point *in limine*. The point *in limine* taken is that this matter was heard and determined in the Administrative Court, after an application for referral to the Supreme Court in terms of s 24(2) of the Constitution was made to and refused by the Administrative Court. The respondents contend that it is not open to a litigant in a matter where a referral has been refused to make a direct application to this Court in terms of s 24(1) of the Constitution.

It is quite clear that s 24(3) of the Constitution, which provides:

“**24(3)** Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1).”

prohibits the making of such an application.

Consequently, the applicants can only approach this Court by way of an appeal for a review of the proceedings of the Administrative Court.

The applicants have raised two defences to the point *in limine*. Firstly, the applicants contend that the Administrative Court should not have refused to grant the application for referral to the Supreme Court because the application was neither frivolous nor vexatious. The refusal to refer the matter to the Supreme Court by the Administrative Court, it was argued, constitutes a violation of the applicants’

constitutional right to due process. Secondly, the applicants contend that the second, third and fourth applicants were not party to the proceedings before the Administrative Court. Consequently, s 24(3) of the Constitution does not apply to these three respondents.

It is common cause that the second, third and fourth applicants were not party to the proceedings before the Administrative Court. It admits of no debate that as the second, third and fourth applicants were not party to the proceedings before the Administrative Court, s 24(3) of the Constitution does not apply to them.

The first applicant's cause of action is identical to that of the second, third and fourth applicants. Thus, even if I were to uphold the point *in limine* in respect of the first applicant, that would not resolve the dispute in this matter. The second, third and fourth applicants are entitled to a determination of the same issue raised by the first applicant. This renders the issue of referral raised *in limine* academic. I do not intend to dwell on the issue of referral as it has been rendered academic. I leave that issue entirely open.

I will now proceed to deal with the substantive issues in this case.

The applicants contend that the Acquisition of Farm Equipment or Material Act [*Cap. 18:23*] (hereinafter referred to as "the Act"), which came into force in September 2004, is invalid by reason of its non-compliance with the Constitution of

Zimbabwe (“the Constitution”) and in particular with s 16 thereof. I note in passing that s 16 of the Constitution forms part of the Declaration of Rights. Consequently, its violation in respect of a party entitles such party to approach this Court directly in terms of s 24(1) of the Constitution.

The applicants seek the relief set out in the draft order, which reads as follows:

“IT IS DECLARED/ORDERED THAT:

1. The Acquisition of Farm Equipment (or) Material Act [*Chapter 18:23*] fails to comply with the requirements set out in section 16(1) of the Constitution of Zimbabwe and is accordingly void.

Alternatively

Sections 7, 9 and 10 of the Acquisition of Farm Equipment (or) Material Act [*Chapter 18:23*] are in conflict with section 16(1)(a)(ii), (c), (e) and (f) of the Constitution of Zimbabwe and are accordingly void.

The costs of this application be borne by the first respondent.”

The particulars of the cause of action in this application are set out in para 9 of the founding affidavit, which reads:

- “9. The Constitutional issues that were raised before the Administrative Court were:
 - a) That the Acquisition of Farm Equipment (or) Material Act did not provide that the acquisition of the farming equipment had to be in terms of legislation which provided that such acquisition was for one of the purposes set out in section 16(1)(a)(ii) of the Constitution of Zimbabwe;

- b) The legislation in question did not require the acquiring authority to pay fair compensation before or within a reasonable time after acquiring the property. In fact, the legislation makes no provision for such compensation to be paid before the acquisition. Furthermore, section 9 of the Act makes provision for the payment of one quarter of the compensation at the time of acquisition or within thirty days. The balance of the compensation is to be paid within five years in the case of farm equipment and one year in the case of farm material;
- c) The legislation makes no provision as required by section 16(1) of the Constitution to allow the owner of the property that has been acquired to apply to a court for prompt return of the property if the court does not confirm the acquisition, and makes no provision for an appeal to the Supreme Court;
- d) The legislation makes no provision to allow a claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation, and to appeal against such a decision to the Supreme Court.”

It is clear from the founding affidavit and the submissions made on behalf of the applicants that they impugn the Act on four grounds, namely –

- (1) that the Act does not provide for the acquisition of farm equipment for purposes provided for in the Constitution in terms of s 16(1)(a)(ii) of the Constitution;
- (2) that the Act does not provide for the payment of fair compensation within a reasonable time, as is required by s 16(1)(c) of the Constitution;
- (3) that the Act does not enable the person whose property has been acquired to apply to the High Court or any other court for the immediate return of the

acquired property or for fair compensation, as is required by s 16(1)(e) of the Constitution; and

- (4) that the Act does not enable an applicant to apply for compensation or to appeal to the Supreme Court, as is provided for by s 16(1)(f) of the Constitution.

In short, the contention is that the Act does not comply with s 16 of the Constitution.

Section 16(1) of the Constitution sets out the essential elements that should be contained in any law that provides for the compulsory acquisition of property of any description or interest or right therein. As I have already said, s 16 is part of the Declaration of Rights accorded special protection in terms of the Constitution.

As s 16 of the Constitution sets out the essential provisions that should be in any law that provides for the compulsory acquisition of property of any description, it follows that failure to provide for any of such requirements will render such law or enactment for compulsory acquisition invalid to the extent of the non-compliance or inconsistency. See s 3 of the Constitution.

I now turn to the specific grounds of challenge –

(1) **COMPLIANCE WITH S 16(1)(a)(ii) OF THE CONSTITUTION**

The applicants contend that the Act does not comply with s 16(1)(a)(ii) of the Constitution.

Section 16(1)(a)(ii) of the Constitution reads:

“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) ...; or

(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 utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public;” (the underlining is mine)

The critical issue here is whether the Act provides that the acquisition in terms thereof is for a purpose beneficial to the public generally or any section of the public.

The applicants argue that the Act permits the Executive to acquire property for private as opposed to public purpose in order to sell it for commercial advantage. The applicants argue that this is not permissible in terms of s 16(1)(a)(ii) of the Constitution.

The respondents, on the other hand, contend that the Act clearly spells out that the acquisition is in furtherance of the land reform programme, a programme that is beneficial to the public generally or a section of the public. This, it is contended, brings the Act within the ambit of s 16(1)a(ii) of the Constitution. The respondents' contention is based on the provisions of s 6, as read with s 10, of the Act.

Sections 6 and 10 of the Act in relevant part provide as follows:

“6 Acquisition of farm equipment or material by acquiring authority

“(1) Subject to this Act, the acquiring authority may, either by agreement or compulsorily, acquire any farm equipment or material not currently being used for agricultural purposes on any agricultural land, where the acquisition is reasonably necessary for the utilisation of that farm equipment or material on any agricultural land.

(2) - (3) . . .

10 Use of acquired farm equipment or material

(1) Subject to subsection (2), any farm equipment or material acquired in terms of this Act shall vest in the State for the benefit of the Land Reform Programme.

(2) The State may, subject to such conditions as are prescribed under section *twelve* sell or otherwise dispose of for valuable consideration any farm equipment or material acquired in terms of this Act to any private individual, institution or corporation requiring to use the equipment or material for agricultural purposes on any agricultural land:

Provided that if the person from whom the farm equipment or material was acquired by the State contests the acquisition, the State shall not sell or otherwise dispose of it in terms of this subsection until the matter is finally determined in accordance with section *eight*.”

While the language of the above two sections leaves a lot to be desired in terms of spelling out succinctly the purpose of the acquisition in terms of the Act, it is

however sufficiently clear that the compulsory acquisition in terms of the Act is for the purpose of furthering the land reform programme. The land reform programme is not a private activity but is a programme that is beneficial to the public generally and certainly to sections of the public.

It is on this basis that I am satisfied that the compulsory acquisition in terms of the Act is for a purpose beneficial to the public generally or to a section of the public.

Accordingly, I am satisfied that the first ground of challenge to the Act fails.

(2) **DOES THE ACT PROVIDE FOR OR FAIL TO PROVIDE FOR THE PAYMENT OF FAIR COMPENSATION WITHIN A REASONABLE TIME AS IS REQUIRED BY S 16(1)(c) OF THE CONSTITUTION?**

The second ground of challenge is that the Act does not comply with s 16(1)(c) of the Constitution, in that it fails to provide for payment of fair compensation within a reasonable time.

Section 16(1)(c) of the Constitution provides as follows:

“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) - (b) ... ; and

- (c) subject to the provisions of subsection (2), requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; ...”.

It is very clear that the Constitution requires that the Act should provide for the payment of fair compensation within a reasonable time. The Act in this case seeks to achieve this through s 9, which provides thus:

“9 Payment for farm equipment or material

(1) The acquiring authority shall pay to the owner or holder of any farm equipment or material acquired in terms of this Act the compensation offered, agreed or fixed therefor, as the case may be, within a reasonable time and, in any event, where the farm equipment or material is compulsorily acquired –

- (a) at least one quarter of the compensation payable shall be paid at the time the equipment or material concerned is acquired, or within thirty days thereafter; and
- (b) the balance of the compensation payable shall be paid within –
 - (i) five years after the acquisition thereof in the case of farm equipment;
 - (ii) one year after the acquisition thereof in the case of farm material.

(2) The compensation to be paid to the owner or holder of any farm equipment or material in terms of subsection (1) shall accrue interest at the prescribed rate from date of acquisition thereof.”

It is sufficiently clear from s 9 of the Act that payment of compensation can be made by way of instalments.

The applicants' contention in this ground of challenge is that s 16(1)(c) of the Constitution prohibits the payment of compensation in instalments, as is provided for in s 9 of the Act.

The plain language of s 16(1)(c) of the Constitution is that compensation should be fair and that it should be paid within a reasonable time. I see nothing in the language of the section or the context of the provision that suggests that such payment cannot be made in instalments. In my view, the fact that the Constitution is silent on this issue, that is, it does not specifically prohibit or specifically authorise payment in instalments, cannot be construed as prohibiting payment by instalments. The fact that previous constitutional enactments specifically authorised payment by instalments does not mean failure to make specific mention is prohibition.

I am not persuaded by the applicants' argument that s 16(1)(c) is to be construed as providing for one lump sum payment. As I have stated, s 16(1)(c) of the Constitution is intended to provide for two things –

- (1) payment of fair compensation; and
- (2) that such payment be made within a reasonable time.

To interpret the clear wording of s 16(1)(c) as outlawing payment in instalments would be doing violence to the plain language of a section that simply provides that the payment be fair and that it should be made within a reasonable time. The payment, in my view,

has to be made within a reasonable time. Whether the payment will be made in one lump sum or in instalments is something the Constitution chose not to prescribe.

The outside time limits set out in the Act are indications of what the Legislature considers as the outer limits of reasonable time for payment. They do not circumscribe the discretion of the court, which will decide the reasonableness of the time for payment on the basis of the facts of each case.

Accordingly, the second challenge fails.

- (3) **DOES THE ACT PROVIDE FOR THE PERSON WHOSE PROPERTY HAS BEEN ACQUIRED TO APPLY TO THE HIGH COURT OR ANY OTHER COURT FOR PROMPT RETURN OF PROPERTY IF THE COURT DOES NOT CONFIRM THE ACQUISITION AND THE RIGHT TO APPEAL TO THE SUPREME COURT?**

Section 16(1)(e) of the Constitution provides as follows:

“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) - (d) ...;
- (e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court; ...” (the underlining is mine)

Section 16(1)(e) of the Constitution requires the Act to provide for two things – (1) to allow the claimant to apply for the prompt return of the acquired property

if there is no confirmation and (2) to confer on the claimant the right to appeal to the Supreme Court.

The applicants contend that the Act does not provide for the above. The respondents contend that s 8 (5) and (6) of the Act meet the above requirements of the Constitution.

Section 8 (5) and (6) of the Act reads as follows:

“8 Application for order confirming acquisition of farm equipment or material

(1) - (4);

(5) Where the Administrative Court refuses to grant an order confirming the acquisition of farm equipment or material, it shall order the acquiring authority to return the farm equipment or material to the owner or holder thereof.

(6) Where the owner or holder of the farm equipment or material concerned or the acquiring authority is dissatisfied with any decision of the Administrative Court, whether in relation to the acquisition of the farm equipment or material or the compensation fixed therefor, either party may appeal to the Supreme Court against that decision.” (the emphasis is mine)

Both s 16(1)(e) of the Constitution and s 8 (5) and (6) of the Act deal with a situation where confirmation of the acquisition has been refused. In the event of that occurrence the Constitution confers on the claimant the right to apply to the High Court or any other court for the prompt return of the property. Although s 8(5) of the Act does not confer on the claimant (which s 16(1)(e) of the Constitution does) the right to apply to the High Court or any other court, it however directs the Administrative Court to order

the return of the property to the claimant upon its refusal to confirm the compulsory acquisition. Thus, whenever the Administrative Court refuses to confirm a compulsory acquisition, it is required as a matter of law to order the return of the acquired property to the claimant. The Administrative Court has no discretion in the matter. Thus, the claimant is granted the order for the return of the property without having to apply for such an order. Section 8(5) of the Act relieves the claimant of the burden of having to apply to the High Court or any other court for the return of the property. It is simply returned to him by operation of law.

I see complementarity and not conflict between s 16(1)(e) of the Constitution and s 8(5) of the Act. In my view, s 8(5) of the Act meets the requirements of s 16(1)(e) of the Constitution.

Section 8(6) of the Act confers on the claimant the right to appeal to the Supreme Court, as is required in terms of s 16(1)(e) of the Constitution.

I see no inconsistency between s 16(1)(e) of the Constitution and s 8 (5) and (6) of the Act that renders the Act invalid. If anything, the claimant is relieved of the need to apply to the High Court or any other court for the prompt return of property, because such return will be ordered as a matter of law, upon an order of refusal to confirm a compulsory acquisition. Accordingly this ground of challenge fails.

(4) **DOES THE ACT ENABLE A CLAIMANT FOR COMPENSATION TO APPLY TO THE HIGH COURT OR ANY OTHER COURT AS IS REQUIRED BY S 16(1)(f) OF THE CONSTITUTION?**

Section 16(1)(f) of the Constitution provides as follows:

“16 (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 – ...

- (f) enables any claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court:

Provided that the law need not make such provision where –

- (i) the property concerned is land or any interest or right therein; and
- (ii) the land is substantially unused or is used wholly or mainly for agricultural purposes or for environmental conservation or the utilisation of wild life or other natural resources; and
- (iii) the land or interest or right therein, as the case may be, is acquired for a purpose referred to in paragraph (a)(i).”

In terms of the above provision, the Act should enable an applicant or claimant to apply to the High Court or to any other court for the determination of any question relating to compensation and to appeal to the Supreme Court against such determination. The applicants’ contention is that the Act makes no provision for the claimant to make such an application.

It is common cause that the Act has no specific provision allowing a claimant to apply to the High Court or to any other court as the *dominis litis* in the determination of any question relating to compensation.

The respondents contend that, despite the absence of a specific provision enabling a claimant to apply to the Administrative Court, the claimant has access to that court. I assume that the respondents' argument is predicated on the provisions of s 8 of the Act, which I have already quoted above.

The issue, however, is whether s 8 of the Act constitutes compliance with s 16(1)(f) of the Constitution. Whenever property is compulsorily acquired, either the parties agree on all the issues relating to the acquisition, that is, the acquisition itself and the level and terms of payment of compensation for the property, or the compulsory acquisition and/or the compensation is contested. In the event of the compensation being contested, s 16(1)(f) of the Constitution requires that there be a provision in the Act that entitles a claimant to apply to the High Court or to any other court to determine the issue of compensation and the right of appeal to the Supreme Court thereafter.

Thus s 16(1)(f) of the Constitution guarantees a claimant the right to have the contestation for compensation to be adjudicated upon by either the High Court or by any other court. The section also guarantees the claimant the right to appeal, as of right, against that adjudication to the Supreme Court. The wording of s 16(1)(f) of the Constitution makes the claimant the *dominis litis*.

However, s 8 of the Act provides, among other things, that whenever compensation is contested the acquiring authority is required as a matter of law to apply within thirty days to the Administrative Court for the confirmation of the acquisition. Thus, in the event of a contestation relating to compensation, the contestation as a matter of law will be determined by the Administrative Court in terms of s 8 of the Act. The only variation between the Act and s 16(1)(f) of the Constitution is that whereas the Act makes the acquiring authority the *dominis litis*, s 16(1)(f) of the Constitution provides for the claimant to be the *dominis litis* in the proceedings.

The difference between the Constitution and the Act relates to procedure and not substance. What is important is that the contestation or compensation is determined by the High Court or by any other court and this is provided for in s 8 of the Act.

Section 8(6) of the Act confers on either party the right of appeal to the Supreme Court, if either party is not satisfied with the adjudication of the Administrative Court. In my view, the fact that the Constitution makes the claimant the *dominis litis* while the Act makes the acquiring authority the *dominis litis* does not amount to an inconsistency that would render the Act invalid.

The critical issue is that the dispute is subject to determination by the High Court or by any other court, and that is provided for in the Act. Accordingly, this ground of appeal must fail.

In the result, the application fails and is hereby dismissed. There will be no order as to costs.

CHEDA JA: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

Coghlan, Welsh & Guest, applicants' legal practitioners

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