ABEL DAVID GANDARY

Versus

MINISTER OF LANDS, AGRICULTURE, FISHERIES,

WATER AND RURAL RESETTLEMENT

AND

THE REGISTRAR OF DEEDS N.O

IN THE HIGH COURT OF ZIMBABWE

KABASA J

BULAWAYO 13 MARCH and 10 April 2025

Opposed Application

J Tshuma, for the applicant

S Jukwa, for the 1st respondent

No appearance for 2nd respondent

KABASA J: This is an application for a declaratory order in which the applicant seeks the following order: -

> "1. A certain piece of land in extent 1 106, 6744 hectares being Doone Valley Estate situate in the District of Nyamandhlovu, registered under Deed of Transfer No. 3317/80 in the name of Abel David Gandary born on the 9th day of February 1944, be and is hereby declared the sole property of Abel David Gandary.
>
> 2. The Registrar of Deeds be and is hereby directed to uplift and cancel any caveat registered pursuant to the purported acquisition of the aforesaid property.
>
> 3. There be no order as to costs, unless opposed".

The background of this matter is this: - Sometime in 1980, applicant purchased and took transfer of a certain piece of land in extent of 1 106, 6744 hectares being Doone Valley Estate situate in the District of Nyamandhlovu. Applicant took occupation of the farm and started cattle ranching and horticulture cropping. On 22 March 2002, under General Notice 118A of 2002, a notice was published in the Government Gazette, in terms of section 5(1) of the Land Acquisition Act (Chapter 20:10), of the intention to compulsorily acquire applicant's farm. Applicant found this to be irregular as he was an indigenous black Zimbabwean who was fully utilizing the farm. The applicant engaged legal practitioners who directed him to see the Chairperson of the Lands Committee who advised that a mistake had been made to gazette the farm, as it was assumed the farm belonged to a white person. Applicant was advised to proceed to the District Administrator who would ensure that the farm was de-listed. Upon meeting with the District Administrator, applicant was informed that the state was not proceeding with the acquisition of the farm and that applicant could continue as normal as the objection noted by the applicant had been accepted. Having been so advised, applicant continued in peaceful and undisturbed occupation of the farm. Applicant continued to work on the farm. In 2005, applicant was able to use the title deed of his farm as security to borrow money to finance his farming activities. Further no people were ever resettled on the farm or attempted at any given time to take occupation of the farm. Sometime in 2019, applicant decided to subdivide the farm for the purposes of selling a portion of the farm. In order to give effect to his intentions, applicant sought a certificate of no present interest from the 1st respondent. Applicant did not receive a response. Applicant then visited the provincial offices of the 1st respondent to seek guidance and he was advised that the farm had been gazetted, was state land and he could not subsequently be granted the certificate of no present interest. Applicant wrote a letter to the Deputy Director of Resettlement seeking further directions as he was of the understanding that his farm had not been gazetted and sought the cancellation of the gazetting. Following the letter,

officers of the 1st respondent went to applicant's farm to confirm that he was indeed engaged in activities thereon and that no people had been settled on the farm. Subsequently, the 1st respondent, advised the applicant that they would be offering him a 99-year lease in respect of the farm. It is against this background that the applicant seeks to be declared the owner of the farm.

The application is opposed by the 1st respondent. The 2nd respondent did not file any opposing papers and did not take part in the proceedings, therefore, the 2nd respondent is taken to have decided to abide by the decision of the court.

In opposing the application, the 1st respondent took a point *in limine* to the effect that the court's jurisdiction was ousted and so could not deal with matters where the acquisition of land was being challenged. This point was later abandoned with counsel for the 1st respondent acknowledging that a litigant could challenge the legality of the process and not acquisition *per se.* The court's jurisdiction is not ousted if the issue to be determined is whether the acquisition was done in terms of the law. The matter was then heard on the merits.

Counsel for the applicant argued that, the Minister in acquiring land is exercising administrative authority and that authority is given in terms of the Constitution. He further argued that, the procedure for acquisition is spelt out in s 5 of the Land Acquisition Act thus, if the Minister does not act in terms of the Act the procedure of acquisition will be deemed irregular and therefore illegal and can be impugned. Counsel went further to state that, the procedures were not followed as no acquisition order was issued because 1st respondent had not made an application to the Administrative Court for such order.

In response, counsel for the 1st respondent argued that s 16B (2) (a) of the former Constitution is set out clearly. He contended that in accordance with this section, what is to be

complied with is s 5(1) of the Land Acquisition Act which provides for preliminary notice of compulsory acquisition to be given in order for land to be confirmed as lawfully acquired.

It is my considered view that the issue for determination in this matter is whether or not there was lawful acquisition of the farm in question.

The farm in question was acquired under the former Constitution of which s 16B (2) as amended provides as follows:

> "(a) All Agricultural land –
> (i) That was identified on or before the 8th July 2005, in the government Gazette or Gazette Extraordinary under section 5 (1) Of the Land Acquisition Act [Chapter 20:10], and which is itemized in Schedule 7 being agricultural land required for resettlement purposes is acquired by and is vested in the State with full title therein with effect from the appointed date.
>
> (5) Any inconsistency between anything contained in –
> (a) a notice itemized in schedule 7; or
> (b) a notice relating to land referred to in subsection (2) (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 title in the State in terms of that provision."

This section came in as an amendment to the Constitution which required for a certain procedure to be followed for compulsory acquisition of land. The amendment was to the effect that for an acquiring authority to compulsorily acquire land, it simply had to gazette the land. This meant that, once land had been gazetted and listed in

schedule 7 it would automatically have been acquired by the State with full title, by operation of law.

The effect of the above section was to revive, resuscitate and validate the acquisition of all identified agricultural land listed in the 7th schedule for resettlement purposes prior to 8 July 2005 regardless of any errors or withdrawals in the acquisition process. No limitation can be imposed on the acquisition process once the land is shown to have been gazetted and listed in the 7th schedule prior to 8 July 2005. See *TBIC Investments (Pvt) Ltd and Ors vs Minister of Lands and Rural Development and Ors* SC 469/13.

In *Mike Campbell (Pvt) Ltd and Ors vs Minister of Security Responsible for Land, Land Reform and Resettlement and Another* 2008 (1) ZLR 17(S) the court had this to say:

> "It is to be noticed that under the new procedure for compulsory acquisition of agricultural land for public purposes a number of restrictions and conditions imposed in the process of the acquisition have been removed. There is no requirement for a notice of intention to acquire to be given to the owner of the land before acquisition. The acquiring authority does not have to state that the acquisition is reasonably necessary for utilization of the land for resettlement purposes. Reasonable necessity of the acquisition would have been a judicial question, the determination of which would have required the exercise of judicial power. The acquiring authority is no longer under a duty to apply to a court of law for an order confirming the acquisition. Acquisition in terms of s 16B(2)(a) of the Constitution is a lawful acquisition of the agricultural land affected. As the acquisition of agricultural land in terms of s 16B(2)(a) is lawful, s 16B (3) provides that sub 18 (1) and (9) of the Constitution, which provide the right to protection of law and appropriate remedies against unlawful interference with or infringements of fundamental rights, shall not apply to the acquisition. An application to a court of law to challenge a lawful acquisition would in effect be an abuse of the right to protection of law. The provisions of s 16B (3) would not afford protection from the application of the provisions of subs 18 (1) and (9) of the Constitution to an acquisition of agricultural land which is not in terms of s 16B(2)(a) of the Constitution. The section does not apply to an acquisition of property in any other land which is not agricultural land. The provisions of s 16(1); 18(1) and (9) of the Constitution continue to regulate the acquisition of any property other than agricultural land".

In *casu*, the applicant sought to challenge the lawful acquisition of 1 106, 6744 hectares being Doone Valley Estate situate in the District of Nyamandhlovu. The applicant argued that the procedure for compulsory acquisition had not been followed as the 1st respondent did not make an application to a court of law for an order confirming acquisition. However, in accordance with s 16 B (2)(a) of the Constitution, the acquiring authority no longer has a duty to apply to a court of law for an order confirming the acquisition. Acquisition in terms of s 16B (2) (a) of the Constitution is a lawful acquisition of the agricultural land affected. Consequently, I am not persuaded by the applicants' counsel that the 1st respondent did not act in accordance with s 5 of the Land Acquisition Act. This is because section 16B of the 2005 Constitution removed some procedures which were in s 5 of the Act and only left the requirement for preliminary notice to be given. Such notice was given as the farm in question was gazetted and listed under schedule 7. I therefore, find the acquisition by the 1st respondent to be lawful.

I must also briefly comment on counsel for the applicant's submission that the Minister made a mistake in acquiring the land in question but he can not correct that mistake but only the court can. There can be no doubt that, by offering the applicant a 99 year lease the Minister was confirming the acquisition, the state now owns the land and that is why it can offer a lease. Only the owner of property can offer a lease to another. If, as counsel submitted, the Minister is desirous to have the land revert to the applicant because it ought not to have been acquired in the first place, why was the applicant's application opposed? The order sought could have been granted by consent if indeed the process was flawed thereby achieving that which the applicant asserts had always

been the authorities' intention, a reversal of the error allegedly committed in acquiring the agricultural land in question. The law was followed, legally consummating the acquisition. If this court were to reverse the acquisition it would not be because the law was not followed. Such reversal would be venturing into the very area which the court no longer has power to venture into as its jurisdiction was ousted where a litigant seeks to challenge a lawful acquisition of agricultural land.

Disposition

Accordingly, it is ordered that:

1. The application be and is hereby dismissed.

2. The applicant shall bear the costs of this application on an ordinary scale.

Webb Low and Barry, applicants' legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners