REPORTABLE (64)

Judgment No. S.C. 111/2001
Civil Application No. 204/2001

(1) THE MINISTER OF LANDS, AGRICULTURE AND RURAL RESETTLEMENT

(2) THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING

(3) THE MINISTER OF RURAL RESOURCES AND WATER DEVELOPMENT

(4) THE MINISTER OF HOME AFFAIRS

(5) THE COMMISSIONER OF POLICE

(6) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

v

THE COMMERCIAL FARMERS UNION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, EBRAHIM JA, CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, SEPTEMBER 19, 20, 21 & 26 & DECEMBER 3, 2001

B Patel, with him *M Majuru*, for the applicants

A P de Bourbon SC, with him *J B Colegrave SC*, for the respondent

CHIDYAUSIKU CJ: In December 2000 the Commercial Farmers Union made an application to this Court. The present applicants were the respondents in that application. In that case, *Commercial Farmers Union v The Minister of Agriculture, Land and Rural Resettlement and Ors* SC-132-2000, hereinafter referred to as "the *CFU* case" this Court issued the following order:

"1. It is declared that the rule of law has been persistently violated in the commercial farming areas of Zimbabwe since February 2000, and it is imperative that that situation be rectified forthwith.

2. It is declared that persons in the commercial farming areas have been denied the protection of the law, in contravention of section 18 of the Constitution; have suffered discrimination on the grounds of political opinions and place of origin in contravention of section 23 of the Constitution; and have had their rights of assembly and association infringed in contravention of section 21 of the Constitution.

3. It is declared that there is not in existence at the present time a programme of land reform as that phrase is used in section 16A of the Constitution.

4. It is declared that the purported amendment of section 5(4) of the Land Acquisition Act [*Chapter 20:10*] by section 3(b) of Act 15/2000 is null and void as being in conflict with the requirement of reasonable notice in section 16(1)(b) of the Constitution.

5. Accordingly it is ordered –

A. that the respondents comply immediately with the order of this Court, made by consent of the parties thereto, on 10 November 2000 in Case No. SC 314/2000, and with the order of the High Court (GARWE J) made on 17 March 2000.

B. That an interdict prohibiting the first, second and third respondents from taking any further steps in the acquisition of land for resettlement is hereby granted, but its operation is postponed until 1 July 2001, to enable the first, second and third respondents to produce a workable programme of land reform, and to enable the fourth and fifth respondents to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe."

In July 2001 this Court delivered the judgment in *The Minister of Lands, Agriculture and Rural Resettlement v Demetrios Paliouras* SC-55-2001, hereinafter referred to as the *Paliouras* case. Although that case involved different parties except for the first applicant, it necessitated an interpretation of the Court order in the *CFU* case as regards the import of the interdict and its impact on applications

for the confirmation of acquisition orders which were pending before the Administrative Court at that time. The *Paliouras* case, like the *CFU* case, also concerned the constitutional significance of the land reform programme. Both decisions contain various observations on that subject.

After 1 July 2001 questions were raised before the Administrative Court as to the coming into effect of the interdict. The learned Presidents of the Administrative Court refused to answer those questions, principally on the basis that they lacked competence to make any ruling interpreting the decisions of this Court. As a result all applications pending before the Administrative Court could not proceed. Faced with this situation the applicants initially approached this Court by way of an urgent application seeking directions and a further postponement of the operation of the interdict. I summoned both parties to my Chambers to discuss the timetable for the filing of papers and the possible date of set down. I indicated to the parties that it would be desirable to deal with the issues arising from the *CFU* judgment in a holistic as opposed to a piecemeal fashion. I suggested that the parties draw up an exhaustive list of issues, file all the papers, and then approach me for a date of set down. Both parties agreed to this as the best way forward. The respondent, for some unknown reason, now denies having agreed to this procedure. The parties subsequently approached me for a date and I constituted this Court for the hearing. This is how the matter came to be before this Court.

It was contended by Mr *de Bourbon* for the respondent that the applicants should have appealed against the decision of the Administrative Court as a way of vesting this Court with jurisdiction to hear this matter. I do not agree with

this submission. The applicants could only appeal against the determination by the Administrative Court that it had no jurisdiction to interpret this Court's order in the *CFU* case. That would be the only issue this Court would be seized with for determination on appeal. The effect and meaning of the Court order in the *CFU* case would not have been adjudicated upon by the Administrative Court. No appeal could therefore lie against a determination that was never made. The only course open to the applicants was the one they took, namely to apply to this Court for guidance as to the meaning and effect of its order in the *CFU* case.

On 18 September 2001, the day before the hearing of this matter, the respondent gave notice of its intention to apply for a reconstitution of this Court. The application was headed "Notice of an application for reconstitution of Court and ancillary relief". The draft order attached to the application reads:

> "IT IS ORDERED THAT –
>
> 1. For the purposes of hearing of Supreme Court Application No. SC 204/2001 the Court be constituted by all the Judges of the Supreme Court other than the Chief Justice".

After hearing the submissions from both counsel, the Court dismissed the application and indicated that the reasons for so dismissing the application would be included in the main judgment. The following are the reasons.

Section 3 of the Supreme Court Act [*Chapter 7:13*] vests power and authority to constitute a Constitutional Court in the Chief Justice and the Minister of Justice, Legal and Parliamentary Affairs. Section 3 of that Act provides as follows:

> "**3 Composition of Supreme Court**

> For the purposes of exercising its jurisdiction in any matter, the Supreme Court shall be duly constituted if it consists of not less than three judges of whom one shall be –
>
> (a) the Chief Justice; or
>
> (b) a judge of the Supreme Court other than an acting judge of the Supreme Court:
>
> Provided that –
>
> (i) …;
>
> (ii) …;
>
> (iii) where the Chief Justice or the Minister so directs, in any case involving a question of the application, enforcement or interpretation or an infringement of the Constitution, the Supreme Court shall not be duly constituted unless it consists of not less than five judges of whom either –
>
> (a) one shall be the Chief Justice and at least two others shall be judges of the Supreme Court, other than acting judges of the Supreme Court; or
>
> (b) at least three shall be judges of the Supreme Court, other than acting judges of the Supreme Court."

Given the explicit and clear language of the above provision this Court has no authority or power to constitute itself. The power to constitute this Court in any case involving the interpretation, application or enforcement of a constitutional right is, as stated above, vested in the Chief Justice or the Minister of Justice, Legal and Parliamentary Affairs. No authority was cited for the proposition that this Court has the authority to constitute itself or review the decision of the Chief Justice or the Minister of Justice, Legal and Parliamentary Affairs. I do not believe there is authority to that effect.

The application to this Court to reconstitute itself is therefore misconceived and without any legal foundation.

It was also argued in the alternative that the Chief Justice should recuse himself. The reasons submitted in support of that submission are essentially the same as those advanced in the application for the reconstitution of the Court. This application is just a disguised attempt to have the Court reconstituted and should be dismissed for the same reasons. The main thrust of the respondent's argument is that it does not like the political background of the Chief Justice and by implication it would prefer a Court made up of judges with political backgrounds of its own liking.

I would like to assure legal practitioners that they are most welcome to make representations on the composition of the Court whenever they feel constrained to do so. Such representations will receive due consideration whenever they are properly made. Such applications or representations must be made with the professionalism and dignity we have become accustomed to expect from legal practitioners as officers of this Court.

The unbridled arrogance and insolence with which the application for the reconstitution of this Court was made in this case is simply astounding and, to say the least, unacceptable. This is the first and the last time that such contempt of this Court will go unpunished. Legal practitioners are reminded that this Court has an inherent disciplinary power over legal practitioners as officers of this Court in matters of misconduct or unprofessional conduct – see *De Villiers and Anor v McIntyre NO* 1921 AD at 435. This Court will in future deal with contempt of this Court firmly

and decisively. The only reason why stern action was not taken *in casu* is that this case is of extreme national importance and distraction from the main issue was to be avoided at all costs.

The Court also granted the following interim order:

> "Pending determination of this matter and without in any way pre-judging any of the preliminary issues raised in the application, but recognising the importance of lawful land reform, the applicants are granted the following relief:
>
> 1. The first applicant is hereby granted leave to proceed, in terms of section 7 of the Land Acquisition Act [*Chapter 20:10*], with applications for confirmation orders in the Administrative Court, and the said court is hereby directed to proceed to hear the said applications in terms of the law.
>
> 2. For the avoidance of doubt, the adjudication on applications in respect of which preliminary notices of compulsory acquisition were issued after 1 July 2001 is not authorised in terms of this Order."

The Court indicated at the time of handing down the interim order that reasons for the order were to follow. The following are the reasons.

The Court order issued in the *CFU* case is set out above.

The Court also concluded in the *CFU* case that the existence of a land reform programme was a pre-requisite to the compulsory acquisition of land for resettlement. This is what the Court had to say at p 18 of the cyclostyled judgment:

> "It is clear therefore that it is a prior requisite for the compulsory acquisition of agricultural land for resettlement, that there must be a programme of land reform."

Put differently, in terms of this judgment compulsory acquisition of the land without the prior existence of the land reform programme is *ultra vires* the Constitution of Zimbabwe and therefore unlawful. The Court, however, in terms of the above order authorised the applicants to continue acquiring land despite the non-existence of the land reform programme thus authorising them to do what the Court had found, in effect, to be unlawful. The dispensation to act unlawfully was to come to an end on 1 July 2001. During that period applications in terms of s 7 of the Land Acquisition Act [*Chapter 20:10*] for the confirmation of acquisition orders made in terms of s 8(1) of the same Act were filed, and had been, filed with the Administrative Court.

The interim order merely permitted or authorised the continued hearing of those applications already filed and pending before the Administrative Court while this judgment was awaited. Put differently, this Court merely authorised the continuation of a process that had already commenced. In the light of the above, I have some difficulty in understanding the reported attitude of the respondent's legal practitioner in questioning the independence of this Court in allowing due process already commenced to continue when he raised no complaint to this Court's authorisation of the applicants to continue acquiring land in the absence of a land reform programme contrary to s 16A of the Constitution. The inescapable conclusion is that those utterances were a criticism, not of the order itself, but of the Court which issued it.

The above are the reasons for the interim relief that was granted by the majority of this Court. The interim order merely allowed due process already begun

to continue. The same considerations that moved this Court in the *CFU* case to allow the applicants to continue for six months with conduct which it had concluded was unlawful apply with equal, if not more, force, to the decision of this Court to allow due process to continue while it considered judgment in this matter.

I now wish to deal with the several issues raised in the main application. In my view, the following are the issues which fall for determination –

(1) Contempt of Court by the applicants;

(2) Jurisdiction or competence of this Court to hear this matter;

(3) The land reform programme;

(4) The meaning and effect of the Rural Land Occupiers (Protection from Eviction) Act, and its constitutionality;

(5) The rule of law – whether or not it has been restored to the commercial farming areas.

The first two issues are of a preliminary nature and the rest of the issues go to the substance of the matter. I will deal with the issues in the order I have listed them above.

CONTEMPT OF COURT

The respondent contends that the applicants have failed to obey Court orders. In particular it is alleged that the applicants failed to comply with the High Court order of GARWE J made on 17 March 2000, the order of this Court in case No.

SC-314-2000, and the order in the *CFU* case *supra* made on 21 December 2000. The respondent contends that the applicants should purge their contempt before the Court hears them. The applicants, on the other hand, contend that the operation of the High Court orders and this Court's orders referred to above has been suspended by operation of law, namely, the Rural Land Occupiers (Protection from Eviction) Act [*Chapter 20:26*], and that they have complied with the order of this Court in the *CFU* case. The Rural Land Occupiers (Protection from Eviction) Act in subss (2) and (3) of s 3 provides as follows:

> "(2) Notwithstanding anything to the contrary in any other law, but subject to this Act, no court shall issue any order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, or the payment of damages by such protected occupier in respect of the occupation or trespass of such land during any period referred to in section *four*.
>
> (3) Any order referred to in subsection (2) that was issued in relation to any protected occupier before the date of commencement of this Act shall be suspended and of no force or effect during any period referred to in section *four*."

The provisions of the above section expressly suspend the operation of the eviction orders issued by the High Court and this Court. The respondent has challenged the constitutionality of the above Act. The issue of the constitutionality of the Rural Land Occupiers (Protection from Eviction) Act is dealt with elsewhere in this judgment. However, the applicants, who are relying on the above Act, cannot be said to be in contempt of the Court order. They lack the *mens rea* if they *bona fide* believed the Rural Land Occupiers (Protection from Eviction) Act was valid. Their *bona fides* in this belief has not been challenged.

The other ground advanced is that the applicants are in contempt because they failed to comply with the order of this Court in the *CFU* case. In particular it is alleged that the applicants failed to restore the rule of law in the farming areas; failed to produce a land reform programme by 1 July 2001; and continue to acquire land despite the interdict having come into operation on 1 July 2001. The applicants, on the other hand, contend that they had restored the rule of law to the farming areas before 1 July 2001, produced a land reform programme before that date and indeed have done everything that constitutes compliance with the order of this Court in the *CFU* case. The order of this Court in the *CFU* case is set out in full above. Can it be said the applicants deliberately failed to comply with that order and consequently are in contempt of this Court?

C J Miller, in his book *Contempt of Court* 2 ed at pp 423-424 has this to say on the issue of contempt of court:

> "Before a finding of contempt can be made it is necessary to determine whether there has been a factual breach of an order or undertaking on the part of the body or person brought before the court. This necessarily demands that the terms of the order be expressed in clear unambiguous language and, insofar as is possible, the person should know with complete precision what it is he is required to do or to abstain from doing."

Similarly, the following observations were made in the case of *Collins v Wayne Iron Works* 227 P 326, 76A 24, 25 (1910):

> "(It, the court order) should be as definite, clear and precise in its terms as possible so that there may be no reason or excuse for misunderstanding it or disobeying it, and, when practicable, it should plainly indicate to the defendant all of the acts which he is restrained from doing without calling on him for inferences or conclusions about which persons may well differ."

SIR JOHN DONALDSON MR equally observed in *Chiltern District Council v Keane* [1985] 2 All ER 118 at 119:

> "(What) is required is that the person alleged to be in contempt shall know, with sufficient particularity to enable him to defend himself, what exactly he is said to have done or omitted to do which constitutes a contempt of court."

In terms of the Court order in the *CFU* case the first, second and third applicants are interdicted from taking any further steps in the acquisition of land for resettlement. The operation of the interdict against the first, second and third applicants was suspended until 1 July 2001 to enable the first, second and third applicants to produce a workable programme of land reform; and to enable the fourth and fifth applicants to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

It is certainly arguable that the Court order in the *CFU* case is stated in unambiguous terms. For instance, the first, second and third applicants are required to produce a workable land reform programme. It is not clear to whom, if anyone, the land reform programme was to be produced by the first, second and third applicants. It is also unclear from the order how the fourth and fifth applicants were to satisfy this Court that the rule of law had been restored. It is not clear what sanction, if any, would befall the fourth and fifth applicants for failure to restore the rule of law to the commercial farming areas. Nor is it clear from the Court order that the first, second and third applicants would be sanctioned for the failure of the fourth and fifth applicants to restore the rule of law to the commercial farming areas. Apart from this, the interdict did not make it clear what would happen come 1 July 2001. This is particularly significant in the light of the applicants' contention that by 1 July

2001 the land reform programme had been produced and the rule of law had been restored in the commercial farming areas. The merits of this contention will be discussed under the heading "Rule of Law" but for the purpose of considering the contempt I am satisfied that the contention is made in good faith and does constitute a defence to a charge of contempt of court.

In considering whether contempt has been established the Court has also to bear in mind that proof of contempt is a very demanding one, being pitched at a level normally associated with criminal proceedings. Hence the breach of the order and the clarity of its terms must be proved beyond reasonable doubt. See *Re Bramblevale Ltd* 1970 ChD 128 [1969] 3 All ER 1062.

In casu all we have before us is evidence in affidavit form with one party alleging contempt and the other denying the allegations. In my view, there is no evidence establishing beyond reasonable doubt firstly the meaning of the order allegedly violated and secondly that the applicants clearly understood the meaning of that order and took a conscious and deliberate decision to disobey it.

Even if the respondent had established that the applicants were in contempt, the Court has a discretion whether or not to bar the contemner. In the exercise of that discretion, courts are very reluctant to deny a contemner a hearing unless there are cogent grounds for doing so. The question whether there is a rule that an alleged contemner ought to be denied a hearing is debated in Barrie & Lowe's *Law of Contempt* 2 ed at p 460. The learned authors conclude that the modern application of the rule reflects the court's general reluctance to refuse to hear a party.

They rely for this proposition on the often quoted remarks of DENNING LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 574. After reviewing the history of the rule and the decisions in recent cases, including *Leavis v Leavis* (1921) P 299 and *Gordon v Gordon* [1904] 163, CA, he came to the conclusion that:

> "Those cases seem to me to point to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."

Thus a party will be heard to support a submission that upon the true construction of the order alleged to be disobeyed, his actions did not constitute a contempt or that, having regard to all the circumstances, he ought not to be treated as being in contempt – *Hadkinson's* case *supra*. Even in those cases where the rule is *prima facie* applicable, the better view is that the court nevertheless has a discretion whether or not to hear the party – see *Leavis supra* and *Gordon supra*.

The modern rule, as expounded by DENNING LJ in *Hadkinson's* case *supra* has been followed in our courts as well as in South African courts. See for example *Minister of Home Affairs v Bickle* 1983 (1) ZLR 99 (SC); *Sabawu v Harare West Rural Council* 1989 (1) ZLR 47; and *Di Bona v Di Bona and Anor* 1993 (2) SA 682.

In the result, we were satisfied that the applicants were not in contempt.

JURISDICTION

The respondent has submitted that this Court has no jurisdiction to hear the matter because it has duly pronounced itself on the issues before the Court. It was contended that the Court was *functus officio*. The respondent argued that the Court has a wide and unfettered power to grant an appropriate remedy in terms of s 24 of the Constitution of Zimbabwe when a breach of the Constitution has been established. For this proposition reliance was placed on a number of cases, such as *Re Mlambo* 1991 (2) ZLR 339 (SC) at 355C; *Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Ors* 1993 (1) ZLR 242 (SC); and *TS Masiyiwa Holdings (Pvt) Ltd v Minister of Information* 1996 (2) ZLR 754.

I agree with this submission and the contention that this Court in the *CFU* case in December 2000 had not only the jurisdiction but the duty to issue an order relevant to the rights of the respondent. I also find myself in agreement with the contention by the respondent that a final judgment, which correctly expresses the decision of the Court, cannot, once given, be altered by the same Court which pronounced it. In the case of *Brits and Ors v Engelbrecht and Ors* 1907 TS 876 the court intimated that it had no jurisdiction to vary its own order as to costs. In the case of *Bell v Bell* 1908 TS 887 at 894 INNES CJ said:

> "Courts will not lightly vary their own orders, even though they may be of an interlocutory character. And the cases in which such orders will be altered cannot be numerous."

See also *Saypoint Textile (Pvt) Ltd and Anor v Girdlestone* 1983 (2) ZLR 322 (HC).

This Court will therefore not seek to revisit, in this case, any issue that was finally adjudicated upon in the *CFU* case.

A proper reading of the judgment and the order issued in the *CFU* case reveals that on some issues the Court duly and finally pronounced itself but left other issues open and indeed by implication indicated that those issues would be adjudicated upon by this Court at some future hearing of this case.

For instance, in the *CFU* case this Court finally pronounced itself on whether or not a land reform programme was a pre-requisite for the compulsory acquisition of land for agricultural resettlement. It concluded it was. That issue cannot be revisited in the same case (this case is arguably the same as the *CFU* case) although it can be revisited in a different case in terms of s 26(2) of the Supreme Court Act [*Chapter 7:13*].

The Court in the *CFU* case also finally pronounced itself on the issue of whether or not there was in existence a land reform programme as at December 2000. The Court concluded that there was no land reform programme as of that date. This Court is *functus officio* on that issue. This Court cannot revisit the issue of whether there was in existence a land reform programme in December 2000.

As to whether there was in existence a land reform programme on 1 July 2001 the Court did not decide that issue. In fact it is clear from the order that that issue was left open and was to be determined by this Court in the future. The order of the Court suspended the operation of the interdict in order to enable the first, second and third applicants to produce a land reform programme. What is in dispute is whether the interdict required the first, second and third applicants to come to this

Court to produce the land reform programme and, if so, when. I will deal with that aspect of the matter later.

Similarly, the effective date of the interdict in the *CFU* case was postponed to 1 July 2001 to enable the fourth and fifth applicants to satisfy this Court that the rule of law had been restored in the commercial farming areas of Zimbabwe. This Court is not *functus officio* on the issue of whether or not the rule of law had been restored in the commercial farming areas of Zimbabwe by 1 July 2001.

In my view, this Court is *functus officio* on the question of the date by which the land reform programme had to be produced and the rule of law restored in the commercial farming areas of Zimbabwe. It is arguable whether this Court can extend the date of compliance beyond 1 July 2001. If the applicants were to contend that they produced the land reform programme and restored the rule of law in the commercial farming areas of Zimbabwe after 1 July 2001 they would have very little prospect of persuading this Court that it has jurisdiction to extend the date of compliance. The applicants' case is that the conditions of the interdict were met prior to 1 July 2001.

The applicants argue that it is not clear from the order whether, after complying with the order, the applicants were required to approach this Court. I agree with the contention that the order itself is not clear in that regard. The commonsense view is that they should have approached the Court before 1 July 2001.

I am satisfied, however, that the date on which the applicants were required to come to this Court if so required is not one of the conditions upon which the interdict was postponed. The production of the land reform programme, and the restoration of the rule of law in the commercial farming areas of Zimbabwe were the two critical conditions upon which the operation of the interdict was postponed. This Court is not *functus officio* in respect of whether or not a land reform programme was in existence as of 1 July 2001 and whether the rule of law in the commercial farming areas of Zimbabwe had been restored as at that date.

I also hold the view that this Court has jurisdiction, and the applicants are properly before the Court, because this matter involves the interpretation of an order of this Court. The applicants were obliged to approach this Court for an interpretation of its order to avoid interference by a lower court with the jurisdiction and authority of this Court – see *Commercial Farmers Union v Samson Mhuriro and Ors* SC-131-2000.

Apart from the above, this Court's order in the *CFU* case virtually or by implication invited the parties to come back to this Court over the production of the land reform programme and the restoration of the rule of law in the commercial farming areas of Zimbabwe. They have done so and it would be absurd to dismiss the matter on the basis that they are not properly before the Court.

In any event, the propriety of the applicants' presence before this Court is a matter of procedure in respect of which this Court has a wide inherent common law jurisdiction to do anything which the law does not forbid and which discretion

this Court should exercise in favour of hearing the applicants, having regard to the importance of this case.

Finally, I have come to the conclusion that this Court has the jurisdiction to adjudicate upon any of the issues not finally determined in the *CFU* case and that the applicants are properly before the Court.

THE LAND REFORM PROGRAMME

As I have already stated, in the *CFU* case the Court concluded that a land reform programme was a pre-requisite for the compulsory acquisition of agricultural land for the resettlement programme. The Court also postponed to 1 July 2001 the operation of the interdict to enable the first, second and third applicants to produce a land reform programme. The Court did not pronounce itself finally on whether there was a land reform programme in existence on 1 July 2001. Indeed it could not have done so, as such a pronouncement would relate to the existence of such a programme at some future date. This Court is clearly not *functus officio* on the issue of the existence or otherwise of the land reform programme as of 1 July 2001.

The first applicant, in his affidavit, avers that a land reform programme was produced in February 2001. It was subsequently refined and then revised in June 2001. The applicants produced as Annexure "B" the land reform programme. The respondent disputes that a land reform programme was produced before 1 July 2001.

The respondent also contended in the alternative that even if the Court accepts Annexure "B" as a land reform programme produced before 1 July 2001, that document is totally inadequate and does not represent what is happening on the ground. Put differently, Annexure "B" does not constitute a land reform programme in compliance with s 16A of the Constitution.

In the circumstances, two issues arise from the conflicting stances adopted by the litigants in respect of the land reform programme. These are: Was Annexure "B" produced before 1 July 2001; and if it was produced before then, does it comply with the requirements of s 16A of the Constitution and is its implementation justiciable?

The first applicant clearly states in his affidavit that Annexure "B" was produced in February 2001 and that the document was subsequently revised and refined in June 2001. The respondent merely disputes the averments without providing the factual basis for so disputing. Consequently, the Court has no hesitation in accepting that Annexure "B" was produced in February 2001 and refined in June 2001. It was therefore in existence on 1 July 2001.

I now turn to deal with the issue of whether Annexure "B", the land reform programme, constitutes sufficient compliance with s 16A of the Constitution of Zimbabwe.

Section 16A in part provides as follows:

"(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance –

…

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable –

…".

Annexure "B" is a fairly comprehensive document. It opens by giving a background to the land dispute in the following terms:

"**CHAPTER 1: INTRODUCTION**

1.1 Agrarian Reform

This Land Reform Resettlement Programme – Revised Phase II document supersedes the Land Reform and Resettlement – Phase II document of September 1998. It summarizes the revisions and amendments to the policy and the implementation plan of Phase II of the Land Reform and Resettlement Programme since its launch in October 1998. It also incorporates relevant features of the Inception Phase Framework Plan (1999 to 2000) and the Accelerated Land Reform and Resettlement Implementation (Fast Track) Plan.

At independence, Zimbabwe inherited a racially skewed agricultural land ownership pattern where the white large-scale commercial farmers, consisting of less than 1% of the population occupied 45% of agricultural land. Seventy-five (75) percent of this is in the high rainfall areas of Zimbabwe, where the potential for agricultural production is high. Equally significantly, 60% of this large-scale commercial land was not merely under-utilised but wholly unutilised.

Agrarian reform in Zimbabwe therefore revolves around land reform where the systematic dispossession and alienation of the land from the black indigenous people during the period of colonial rule are adequately addressed. The Zimbabwean Agrarian Land Reform involves restructuring of access to land, and an overall transformation of the existing farming system, institutions and structures. It includes access to markets, credit, training and access to social, developmental and economic amenities. It seeks to enhance agricultural productivity, leading to industrial and economic empowerment and macro economic growth in the long term."

The policy objectives of the programme, as set out in Annexure "B", are to ensure equitable and socially just access to land; to democratise land tenure systems and security of tenure for all land holdings; to provide participatory management of the use and planning of land use; and to promote sustainable and efficient use and management of land.

It is also clear from the programme that redistribution of the land is intended to achieve the following objectives –

(a) decongestion of over-populated communal areas through the Fast Track Programme; and

(b) indigenisation of the large scale commercial farming sector through the Model A2 Scheme which involves the acquiring of land from the white commercial farming areas and dividing it into small, medium and large scale farms for indigenous farmers.

Annexure "B" sets out in some detail how it is intended to achieve the above policy objectives. It starts by recognising that Zimbabwe has a land area of 39 million hectares of which 33 million hectares are reserved for agriculture. Of the total of 33 million hectares of agricultural land about 14 million hectares of the best agricultural land is owned by about 4 000 white commercial farmers who are fully utilising only 40% of that land. The rest of the population, some 13 million black people, have available to them about 19 million hectares of agricultural land. It is apparent from the land reform programme that the applicants intend to acquire 8 million hectares of agricultural land belonging mainly to the respondent's members

for redistribution in terms of the Fast Track and Model A2 Scheme. This will leave about 6 million hectares of agricultural land in the hands of the 4 000 or so members of the respondent.

The respondent, on the other hand, according to Mr Hasluck, has offered 1 million hectares for the land reform programme. This, the respondent contends, is what the applicants should be satisfied with for the land reform programme to be workable. Acquisition of land in excess of that offered by the applicants would make the programme unwieldy and unworkable.

Thus, looked at from these standpoints of the litigants, the core issue at the centre of this litigation is a mathematical one. The applicants contend that they need 8 million hectares for the land reform programme or redistribution. The respondent is offering 1 million hectares and contends that that should be enough. Indeed, if members of the respondent were willing to offer the applicants 8 million hectares instead of 1 million hectares there would be no litigation. Conversely if the applicants were willing to scale down their land requirements from 8 million hectares to 1 million hectares there would be no litigation. In a way, it would appear the core issue in this litigation is a question of how the applicants can fit a size 8 foot into the size 1 shoe that is being offered.

Taken as a whole, Annexure "B" is fairly comprehensive in terms of its policy framework and guidelines. It incorporates the resettlement models to be followed and an implementation plan with broad time-frames. It also sets out the

relevant institutional, monitoring and evaluation arrangements to be applied. It also sets out a budget outline covering a period of ten years.

The main thrust of the respondent's criticism of the programme, as set out in Annexure "B", is that the document does not constitute a holistic programme capable of lawful implementation in fact and that stakeholders were not consulted in its formulation. The applicants dispute these contentions and through the affidavits of the first applicant contend that the programme was devised primarily by government with input from interested external agencies. National and international non-governmental organisations and the international donor community were also involved in its formulation. The whole implementation programme devolves down from central to provincial to district levels because of its multi-sectoral effects and the need for proper co-ordination.

The process of identifying properties for acquisition is not rigid and is unavoidably subject to occasional errors, which errors were highlighted by the respondent in the affidavit of Mr Hasluck and other supporting affidavits. The programme is intended as a guideline and has guided officials and committees operating at local levels in the implementation of the programme. The government contends that it has the requisite technical and logistical capacity to implement the programme, a claim disputed by the respondent. Training centres and networks for infra-structural development have been established.

The applicants contend that the selection of settlers for empowerment is conducted without discrimination on the ground of affiliation to a political party or

otherwise. The respondent contends there is discrimination and land is being given to those affiliated to a political party. That factual dispute cannot be resolved on the papers without hearing oral evidence. The probabilities are that a certain amount of favouritism would inevitably find its way into a process of this magnitude, but because of the large number of people involved it is highly unlikely that only members of one political party are benefiting from this programme. It is also apparent on the papers that the whole resettlement process is being continually improved and professionalised.

On the basis of the above, the question that needs answering is whether Annexure "B" constitutes a land reform programme in terms of s 16A of the Constitution. In determining this issue, the critical consideration is the intention of parliament in enacting s 16A. The issue is not what is the best land reform programme. I have no doubt that there is substance in some of the criticisms by the respondent, but does it follow then that the programme is inadequate for the purposes of s 16A of the Constitution?

In determining the intention of parliament in enacting s 16A, it would be instructive to have regard to the history of s 16A of the Constitution. The amendment was introduced in April 2000, following the rejection in a referendum of a draft Constitution prepared by the Constitutional Commission of 1999. Section 16A was uplifted from that draft Constitution verbatim. The mischief that s 16A intended to deal with was the lack of resources to carry on a land reform or redistribution programme on the scale currently taking place in accordance with the land reform programme set out in Annexure "B". There simply was no money to pay

compensation in terms of s 16 of the Constitution for the amount of land that was required for a programme such as envisaged in Annexure "B".

Parliament decided to place the obligation to pay compensation on the British government. That was the main purpose and objective in introducing s 16A of the Constitution. The objective of s 16A was not to ensure that an ideal land reform programme was in place before the programme was carried out. Obviously it is desirable that the land reform programme be an ideal, but an ideal programme is something that the litigants in this case would never agree on. It would appear to me that the concept of a land reform programme was introduced into s 16A in order to avoid arbitrary and unplanned acquisition of land. Thus it must have been envisaged that it would be undesirable to acquire one farm this year and ask the British government to pay for that one farm, then wait another year or so and acquire yet another farm and ask the British government for payment for that farm.

In my view, what must have been intended by the legislature by the use of the words land reform programme was to introduce the concept of a comprehensive, as opposed to a piecemeal, approach to land acquisition requiring a general plan on how the government intended to proceed in the acquisition and redistribution of the acquired land, identifying which land was to be acquired, who would be the recipients, how much of the land they would receive, and how government intends to finance the programme.

While it is impossible to define in precise terms what constitutes a land reform programme in terms of s 16A of the Constitution, I am satisfied Annexure "B"

certainly provides sufficient detail of the applicants' plan of acquiring and distributing land for agricultural purposes to constitute such a land reform programme. In particular, Annexure "B" sets out in some detail the policy framework and guidelines. It sets out the resettlement models to be followed in the implementation of the programme. It sets out the institutional, monitoring and evaluation mechanisms. It also sets out a budget, giving an estimation of the cost and how the money for resettlement is to be raised.

On the basis of the foregoing, I am satisfied that Annexure "B" does constitute a land reform programme in terms of s 16A of the Constitution of Zimbabwe and that it was in existence as at 1 July 2001.

It has been contended that the land reform programme, as set out in Annexure "B", is not being implemented. In other words, what is happening on the ground and what is contained in Annexure "B" are two different things. This, of course, raises the broader legal issue of whether the implementation of a land reform programme is justiciable. Again one has to go back to the issue of whether parliament intended that implementation of the programme be justiciable. I do not think it was ever the intention of parliament to make the implementation of the land reform programme the subject of scrutiny by the courts.

The whole purpose and intention of introducing s 16A of the Constitution, as I have already stated, was to accelerate the pace of land acquisition and its redistribution to diffuse an explosive situation that had built up over the years as a result of the slow pace or progress in the land acquisition and redistribution. The

last thing that the legislature would have intended was to tie its hands and slow down the process of land acquisition and redistribution by the introduction of judicial scrutiny into the minute details of implementation such as whether the right person has been appointed to the committee for the identification of the land and the recipients. More importantly, land acquisition and redistribution is essentially a matter of social justice and not strictly speaking a legal issue. The only legal issue of substance is whether the acquisition is done within the procedures set out by the law.

Apart from this, I find myself in agreement with Mr *Patel's* submission that questions of economic and social policy are matters within the domain of the executive discretion and the courts should exercise great restraint in delving into the details of policy instruments or directing the precise manner of their implementation. In the case of *Nyambirayi v NSSA and Anor* 1995 (2) ZLR 1 (S) this Court concluded that courts should not intrude into governmental assessments as to the adequacy of any programme unless they are convinced that the assessment in question is manifestly without reasonable foundation.

A perusal of Annexure "B" reveals that the land reform programme, as presently applied by the applicants, has been derived from earlier programmes on the basis of past experience. It was formulated under the aegis of an executive appreciation of societal needs within the rural areas of Zimbabwe. The respondent has not tendered anything plausible to suggest that the government's assessment of the public interest as captured in the programme is manifestly unreasonable so as to justify the exercise of review jurisdiction by this Court.

In the result, the Court is satisfied that implementation of Annexure "B" is not justiciable but reviewable and no case has been made out for a judicial review of the manner in which the programme is being implemented.

THE RURAL LAND OCCUPIERS (PROTECTION FROM EVICTION) ACT

In the *CFU* case this Court concluded:

> "A huge problem has been created. Thousands of people have been permitted and encouraged to invade properties unlawfully. They have no right to be there. That situation will not be easy to resolve, but it must be resolved. Either their presence must be legalised, or they must be removed." (The underlining is mine).

This Court gave the applicants two options to regularise the unlawful farm occupations. The occupiers' presence on the land had to be legalised; or they were to be forcibly removed from the land, in order to put an end to their illegal occupation and restore the rule of law in the commercial farming areas of Zimbabwe.

The applicants, through the government, chose the former. In pursuance of the chosen option, the government enacted the Land Occupiers (Protection from Eviction) Act with the object of legalising the previously unlawful presence of the occupiers on commercial farms belonging to members of the respondent. The Act in s 3(3) also suspended the operation of the orders of both the High Court and this Court for the eviction of settlers. To that extent, the Act restored the rule of law in the commercial farming areas of Zimbabwe.

The Act provides, in s 3(2), protection against eviction and civil liability for damages in respect of trespass during the prescribed period of protection.

Section 3(4) of the Act protects the occupiers from criminal liability for trespass or unauthorised entry. The Act addresses what would otherwise constitute unlawful occupation, unauthorised entry or trespass. The effect of the Act is to legalise all the rural land occupations that are presently under consideration to the extent that they fall within the ambit of the Act.

The main thrust of the respondent's argument was that the Act was unconstitutional and consequently of no force or effect. The respondent also argued that this Court has no jurisdiction to consider the constitutionality of the above Act because no-one has invoked the provisions of s 24(1) of the Constitution of Zimbabwe, which provide that:

> "(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."

In the circumstances, this Court has really two options – either to invoke the principle of *omnia praesumuntur rite esse acta* and hold that the Act is constitutional until such time as it will have determined otherwise in proceedings brought under s 24 of the Constitution; or, in the alternative, assume jurisdiction on the basis that this issue is a procedural one in that the applicants are seeking a *declaratur* that the Act is *intra vires* the Constitution as opposed to seeking an order remedying a violation of a fundamental right. And in such a case this Court has jurisdiction. The *declaratur* is sought in circumstances where this Court in effect invited the fourth and fifth applicants to satisfy it that the rule of law has been restored

to the commercial farming areas of Zimbabwe. The applicants contend that they have legalised the invaders' occupation by enacting the Act while the respondent contends that the Act is unconstitutional. In view of the immense importance of the issues the Court should exercise its discretion and assume jurisdiction and issue a *declaratur* on the constitutionality or otherwise of the Act. In any event, detailed submissions on the issue of the constitutionality of the Act have been made by both counsel.

The respondent challenges the constitutionality of the Act on the grounds that the Act –

(1) contravenes s 16 of the Constitution, in that it takes away or suspends the owner's right to evict and also constitutes a positive act of placing persons on land thereby taking that interest or right away from the landowner, without compensation;

(2) contravenes s 17 of the Constitution which protects every person against arbitrary entry of others onto his premises;

(3) contravenes s 18(1) and s 18(9) of the Constitution guaranteeing protection of the law, in that it renders ineffective judgments given and prohibits a court from determining the existence or extent of the civil rights of the owner since his right to recover possession of his property and eject persons therefrom is removed;

(4) contravenes s 21 of the Constitution in that it forces the farmers to associate with occupiers in violation of the owner's right to freedom of assembly; and

(5) overturns decisions of this Court and the High Court.

It is quite clear that the alleged infringements of the respondent's members' constitutional rights are predicated on the assumption that a member of the respondent from whom a property is acquired in terms of s 8(1) of the Land Acquisition Act [*Chapter 20:10*] remains the owner of such property. This is clearly wrong. Section 8(3) of that Act vests the ownership of the acquired land in the acquiring authority, leaving the original owner an ordinary occupant with no greater right than any other occupant. His status as owner is only regained upon the refusal by the Administrative Court to confirm the acquisition order. The acquiring authority becomes the new owner of the property upon its being acquired in terms of s 8(1) and remains the owner during the subsistence of the order.

The only derogations from the acquiring authority's ownership are contained in s 9 of the same Act, which has been amended since the hearing of this matter. This aspect of the matter is discussed in greater detail later on in this judgment under the heading "The Restoration of the Rule of Law". In short, the respondent's members lost the rights, which they allege are abridged by this Act, upon their property being acquired in terms of s 8(1) of the Land Acquisition Act.

It is also argued that the Act provides for compulsory acquisition without compensation. This argument would have been tenable prior to the

amendment of s 16 of the Constitution by the insertion of s 16A. The meaning and effect of s 16A is to allow for compulsory acquisition of land for agricultural purposes without compensation by the Zimbabwean government. The payment of compensation in respect of the land but not the improvements is now the responsibility of the British government in terms of s 16A of the Constitution.

In the result, I am satisfied that the Rural Land Occupiers (Protection from Eviction) Act is *intra vires* the Constitution of Zimbabwe.

THE RESTORATION OF THE RULE OF LAW IN THE COMMERCIAL FARMING AREAS

The interdict granted against the first, second and third applicants prohibiting them from taking any further steps in the acquisition of land for resettlement had its operation postponed until 1 July 2001 to enable the fourth and fifth applicants to satisfy the Court that the rule of law had been restored in the commercial farming areas of Zimbabwe.

Although Part A of the order required all the applicants to comply with the court orders of 17 March 2000 and 10 November 2000 the interdict, the operation of which was suspended until 1 July 2001, was not granted against the fourth and fifth applicants. It was granted specifically against the first three applicants. No mandatory interdict was granted as such against the fourth and fifth applicants to restore the rule of law in the commercial farming areas. The fourth and fifth applicants were to satisfy the Court on a matter they were not obliged by the Court order to bring about in the first place. They averred, however, that although they did

not approach the Court before 1 July 2001 they nevertheless satisfied the conditions of the postponement of the operation of the interdict before the deadline date.

The fifth applicant deposed to an affidavit in which he said that the police had substantially restored the rule of law in the commercial farming areas. He said in response to the interdict police increased patrols in the affected areas. They attended to all reports of criminal acts committed in these areas, arrested and prosecuted the culprits. Annexed to his supplementary affidavit were sitrep reports from police stations in different parts of the country on cases of violence that took place on commercial farms under their respective areas of jurisdiction. The reports showed the number of cases reported and how they were disposed of.

The respondent alleged through its Chief Executive, Mr Hasluck, that the rule of law had not been restored in the commercial farming areas. Attached to the opposing affidavit were sitrep reports from farmers in different parts of the country. The reports referred to fresh farm invasions, interruption of farming operations, demarcation of farms into plots and allocation thereof to people occupying the farms, assaults on farm workers, burning of their houses, driving of cattle from grazing land, and theft of livestock. The farmers admitted, however, that police had attended to some of the reported cases and apprehended the culprits.

The respondent and its members alleged that the rule of law could only have been restored in the commercial farming areas of Zimbabwe before 1 July 2001 if the applicants had done the following things, that is to say, they had:

(a) complied with the order of the High Court of 17 March 2000 in case HC-3544-2000;

(b) complied with the order of the Supreme Court of 10 November 2000 in case SC-314-2000;

(c) prevented the interruption of farming operations;

(d) stopped the demarcation and allocation of the occupied land; and

(e) prevented the commission of criminal acts on farmers and farm workers and their property.

The question, therefore, is whether these things had been done by the applicants before 1 July 2001. Before considering the question under the headings (a) Court Orders, (b) Property Rights, and (c) Criminal Acts, it is necessary to set out the general principles of the concept of "Rule of Law".

There are many facets in the meaning of the expression but its essence is that the law is supreme over decisions and actions of government and private persons. There is, in short, one law for all. The concept postulates that the exercise of all public power must find its ultimate source in a legal rule. In other words, the rights enjoyed and powers exercised must derive from duly enacted or established law. Put another way, the relationship between the State and the subject must be regulated by law. So must the relationship between subjects in order to prevent resort to self-help. The rule against self-help is necessary for the protection of the individual against arbitrary and subjective decisions and conduct of an adversary –

C*hief Lesapo v North West Agricultural Bank and Anor* 2000 (1) SA 409 at 416 para 18.

In *Re Language Rights Under The Manitoba Act 1870* 19 DLR (4th) 1985 the Supreme Court of Canada at p 22 said:

> "The rule of law … must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals and thereby preclusive of the influence of arbitrary power. … Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. The Rule of Law in this sense implies … simply the existence of public order."

(a) Court Orders

Compliance with the court orders is now considered. When the land hungry people first moved onto commercial farms on 16 February 2000 the law of trespass prohibited any person from entering another's land and remaining in occupation thereof without permission of the owner. The court orders of 17 March 2000 and 10 November 2000 declared the occupation of the commercial farms by land hungry peasants, unlawful acts and directed government to remove the illegal occupiers. Cases of groups of subjects resorting to self-help against other subjects had arisen and the enforcement of court orders was intended to restore the rule of law.

In an effort to restore the rule of law the applicants opted against the forcible removal of occupiers and decided to enact a law the provisions of which had the effect of legalising, albeit temporarily, the occupation of commercial farms. This Court had, as already stated, directed the applicants in the *CFU* case to either legalise the presence of the people on the affected farms or remove them.

As a way of restoring the rule of law in the occupied commercial farms Parliament enacted the Rural Land Occupiers (Protection From Eviction) Act [C*hapter 20:26*]. The law protected from eviction any person who occupied rural land by 1 March 2001 in anticipation of being resettled by an acquiring authority on that or any other land for agricultural purposes and was in occupation on the date of commencement of the Act. The power of a court to issue an order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, during the period referred to in the Act was removed.

As the provisions of the Rural Land Occupiers Act became the source of legal authority for dealing with the incidents of the occupation of commercial farms by the land hungry peasants, the Court orders could not continue to be sources of the same legal authority. Section 3(3) of the Rural Land Occupiers Act declared those court orders suspended and of no force or effect during periods of occupation of rural land by the protected occupiers referred to in the Act.

The enactment of the Rural Land Occupiers Act was an enforcement of the rule of law. Government could not have created a vacuum by suspending court orders and declaring them of no force or effect before enacting the Act. The enactment of the Act was done before 1 July 2001. The fourth and fifth applicants could not comply with court orders once they were suspended and declared of no force or effect.

(b) Property Rights

The first applicant over the last two years has issued preliminary notices of intention to acquire many of the occupied commercial farms in terms of section 5(1) of the Land Acquisition Act [*Chapter 20:10*] ("the Acquisition Act"). It would appear that the first applicant issued orders for the acquisition of most of these farms in terms of section 8(1) of the Acquisition Act. It is common cause that at least 2 345 properties had been listed for acquisition as of 7 November 2000.

It is clear from the number of commercial farms placed under preliminary notices and section 8(1) orders that government used the provisions of the Acquisition Act as the constitution governing its relationship with farm owners or occupiers. It is also clear that government used the provisions of the Acquisition Act to restore the rule of law on the commercial farms.

The respondent and its members say that the rule of law was not restored before 1 July 2001 because farming operations were being interrupted by the settlers. They do not say under which dispensation the farming operations were being carried on. At the same time they do not deny that the affected farms were subject to section 8(1) orders.

The Acquisition Act was the law governing the land use and control at the time. Section 8(3) of the Acquisition Act provides that subject to confirmation by the Administrative Court the effect of an order of acquisition made in terms of section 8(1):

> "… shall be that ownership of the land specified therein shall … immediately vest in the acquiring authority whether or not compensation has been agreed

> upon, fixed or paid … and shall be free of all rights and encumbrances". (The underlining is for emphasis).

Once land was acquired under a section 8(1) order the farmer had no property rights in the land. The acquiring authority had the *dominium.*

The farming operations that members of the respondent engaged in would have been at the pleasure of the acquiring authority. How then could the government which had the power to prohibit these farming operations be accused of encouraging the protected occupiers to interrupt the farming operation in breach of the rule of law? In permitting the respondent's members to carry on with farming operations on farms it had acquired government placed itself in the position in which it is being accused of fanning conflict between the settlers and the former farm owners now occupiers.

By hindsight government must have realised that the best way of resolving conflict between the former owners, now occupiers, and the previous invaders, now occupiers, on the acquired commercial farms would be the prohibition of the respondent's members from continuing to use the land. In a move designed to reduce conflict between members of the respondent and land occupiers and to restore law and order on these farms government has enacted the Presidential Powers (Temporary Measures) (Land Acquisition) (No. 2) Regulations 2001 Statutory Instrument 338 of 2001.

Section 9 of the Act has been repealed and in its place substituted subsection (9)(b) which provides that in relation to any agricultural land acquired for

resettlement purposes, the making of an order in terms of subsection (1) of section 8 shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land immediately on the date of service of the order upon the owner or occupier.

Change in the law is to be deemed to have come into operation on 23 May 2000. What this means is that members of the respondent who had claimed rights to carry on farming operations on farms acquired by government in terms of section 8(1) of the Act before 1 July 2001 had, in effect, no right at all to use the land. They cannot claim that the applicants were in breach of the rule of law by not protecting their rights when they did not have the rights in respect to which they claimed protection of the law.

The respondent's members complained that government officials pegged or demarcated the rural land into plots and allocated them to the settlers. They claimed that these activities were unlawful and therefore in breach of the rule of law.

Mr *Patel* conceded that demarcation of land into plots and allocation to settlers was taking place. He also conceded that where these acts took place before the acquisition of the land had been confirmed by the Administrative Court they were unlawful. It is important to note, however, that even if the demarcation of the rural land into plots and allocation of the same to settlers were unlawful the acts had no effect on the rights of the respondent's members whose farms had been acquired under section 8(1) orders. Ownership of such land was vested in the acquiring

authority free of all rights and encumbrances. The respondent's members would have no rights in the expropriated land to be affected by the unlawful pegging.

We would have held the acts of demarcation of the acquired land and allocation thereof to have been in breach of the rule of law because the acts were prohibited by law. The government has, however, removed the derogation from the rights of ownership it had imposed upon itself. Section 3 of the Regulations repealed subsection (2) of section 8 of the Act and substituted in its place subsection (2)(b). The subsection provides that in relation to any agricultural land required for resettlement purposes the acquiring authority may exercise any right of ownership, including the right to survey, demarcate and allocate the land concerned for agricultural purposes. As the demarcation of the acquired land and its allocation which took place after 23 May 2000 is deemed to have been done under the authority of the new section, demarcation and allocation of the land were done in accordance with law. The question of breach of the rule of law did not arise.

(c) Criminal Acts

The last matter to be dealt with under the restoration of the rule of law in the commercial farming areas relates to steps which the fourth and fifth applicants say they took to prevent criminal acts being committed on commercial farms. It is common cause that violent clashes took place between settlers and farmers and their workers at commercial farms in different parts of the country. The sitrep reports made by the respondent's members show that in some instances farm houses have been destroyed and serious assaults committed.

Whilst acknowledging the occurrence of these criminal acts, the fourth and fifth applicants aver that the police took steps to contain them. They increased patrols; attended to all reported cases and brought to book the culprits. The respondent's members are not satisfied with the adequacy of the measures taken by the police to restore the rule of law in this regard although they admit that the police did their best to deal with a difficult situation. Criminal acts are by their nature sporadic and unpredictable in occurrence. The presence of the rule of law does not mean a totally crime-free environment. By definition the concept of rule of law foresees a situation in which behaviour proscribed as criminal will occur. To expect the fourth and fifth applicants to bring about a totally crime-free environment in the commercial farming areas of Zimbabwe would be inconsistent with the concept of the rule of law and its practical application. It simply means that government must take adequate measures to enforce law and order.

The test for the restoration of the rule of law in the commercial farming areas is, in our view, not the number and gravity of the criminal acts committed but rather all the measures including policing and prosecution adopted by government in the land reform exercise.

Taking an overall view of the developments in the commercial farming areas as at the deadline date of 1 July 2001, I am satisfied the measures taken by the fourth and fifth applicants met the requirements of the condition of suspension of the interdict granted against the first, second and third applicants.

In the result, I am satisfied that the first, second and third applicants produced a land reform programme in terms of s 16A of the Constitution of Zimbabwe before 1 July 2001 and that the fourth and fifth applicants restored the rule of law to the commercial farming areas of Zimbabwe before 1 July 2001. I am also satisfied that it would have been prudent for the applicant to have approached this Court before 1 July 2001. Such a course would have avoided the apparent confusion in this matter. However, a proper reading of the order in the *CFU* case reveals that the applicants' approach to this Court before 1 July 2001 was not a condition of the postponement of the interdict.

In the result, the Court makes the following order:

(1) It is declared that the applicants have complied with the conditions of the suspension of the interdict in the *CFU* case and the continued acquisition of the land by the applicants is and has been lawful.

(2) There will be no order as to costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

MALABA JA: I agree.

EBRAHIM JA: I have read the judgment prepared by the learned CHIEF JUSTICE. I respectfully disagree with it.

This application is brought by the Minister of Lands and the other parties who were the respondents in *Commercial Farmers Union v Minister of Lands and Ors* S-132-2000, not yet reported in the Zimbabwe Law Reports although it has been reported in the South African Law Reports: see 2001 (1) SA 925 (ZS). The background to this whole matter is fully set out in the judgment and there is no need to traverse it again.

In that case, this Court made the following order:

"1. It is declared that the rule of law has been persistently violated in the commercial farming areas of Zimbabwe since February 2000, and it is imperative that that situation be rectified forthwith.

2. It is declared that persons in the commercial farming areas have been denied the protection of the law, in contravention of section 18 of the Constitution; have suffered discrimination on the grounds of political

opinions and place of origin in contravention of section 23 of the Constitution; and have had their rights of assembly and association infringed in contravention of section 21 of the Constitution.

3. It is declared that there is not in existence at the present time a programme of land reform as that phrase is used in section 16A of the Constitution.

4. It is declared that the purported amendment of section 5(4) of the Land Acquisition Act [*Chapter 20:10*] by section 3(b) of Act 15/2000 is null and void as being in conflict with the requirement of reasonable notice in section 16(1)(b) of the Constitution.

5. Accordingly it is ordered –

   A. that the respondents comply immediately with the order of this Court, made by consent of the parties thereto, on 10 November 2000 in Case No. SC 314/2000, and with the order of the High Court (GARWE J) made on 17 March 2000.

   B. That an interdict prohibiting the first, second and third respondents from taking any further steps in the acquisition of land for resettlement is hereby granted, but its operation is postponed until 1 July 2001, to enable the first, second and third respondents to produce a workable programme of land reform, and to enable the fourth and fifth respondents to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

6. Costs, including the costs of three counsel, are awarded to the applicant."

The order made by consent, referred to above (Case No. SC 314/2000), was sought by the Commercial Farmers Union in an action in which the present applicants, with the exception of the President, were the respondents. In addition, all eight provincial governors were respondents in that case. The order read as follows:

"1. It is declared that resettlement of commercial farming lands implemented by the first, second and third respondents and the sixth to the thirteenth respondents inclusive, insofar as it has involved the entry of persons who are not the invitees of the owners or lessees of properties, before all requirements set out in paragraph 4 of this Order have been fulfilled, has contravened the fundamental rights, contained

in section 17(1) and section 16(1) of the Constitution of Zimbabwe, of the owners and the lessees in occupation of those properties.

2. Each of the respondents, and every officer or employee of the State responsible to him or acting on his behalf, is hereby interdicted from in any way or form –

(a) causing;

(b) facilitating;

(c) participating in; or

(d) giving sanction to:

the entry upon or continued occupation of any property owned or occupied by a member of the Commercial Farmers Union until all the requirements set out in paragraph 4 of this Order have been fulfilled, by any person or persons engaging in, publicising or promoting any activity related to resettlement or the laying out of any housing or plots on that property.

3. This Order shall not prevent –

(a) a policeman entering upon the property in the course of carrying out his police duties, in a way which does not involve his acting in a manner which is in contravention of the Order made in paragraph 2 above;

(b) any person or persons entering upon the property with the consent, freely given before the entry is made, of the owner of the property which is the subject of the entry; or

(c) any officer, employee or agent of the first, second or third respondents, named and duly authorised under written notice given by or on behalf of the first respondent to the owner or occupier of the property, entering the property at reasonable times, with necessary equipment and personnel to assist him, in the course of carrying out any necessary investigation as to the suitability of the land for acquisition by the first respondent or its value or extent, under sections 11 or 29B of the Land Acquisition Act [*Chapter 20:10*]; or

(d) any officer, employee or agent of the first, second or third respondents, named and duly authorised under written notice given by or on behalf of the first respondent to the owner or occupier of the property, entering the property to survey and demarcate the lands

in order to enable allocation of the same for resettlement purposes, PROVIDED in relation to the property concerned all the requirements set out in paragraphs 4 (a) (i), (ii) and (iii) and also 4(b) of this Order have first been fulfilled and PROVIDED FURTHER:

(i) such activities shall not interfere with the operations of the owner or occupier of that property or his employees; and

(ii) until all the requirements set out in paragraph 4 of this Order have been fulfilled in relation to the property, nothing contained in this Order shall permit any person claiming to have been allocated land or seeking the allocation of land thereon to enter upon, take up or remain in occupation of any part of the property by virtue of its survey and demarcation as aforesaid.

4. The Order made in paragraph 2 above shall apply to each property owned or occupied by a member of the Commercial Farmers Union until each of the following requirements have been complied with in relation to such property:

(a) (i) a preliminary notice of acquisition of the property by a competent acquiring authority has been given to the owner and other persons required in terms of section 5(1)(b) of the Land Acquisition Act; and

(ii) an order of acquisition of the property in terms of section 8(1) of the Land Acquisition Act has been served upon the owner by the acquiring authority; and

(iii) the owner or occupier has been given written notice to vacate by the acquiring authority, occurring after the date of notice as aforesaid of the order of acquisition; and

(iv) at least three months have expired from the giving of notice as aforesaid to vacate to the owner or, if some other person is in occupation under a lease agreement with the owner, such lesser period has expired, equivalent to the period of notice provided in the lease agreement; and

(v) if the owner or occupier fails to vacate the property upon expiry of the said notice to vacate given to him, a court of competent jurisdiction

has issued an eviction order against him, having the effect of a final order; and

(b) if in terms of the Land Acquisition Act [*Chapter 20:10*] the owner or occupier has within thirty days after publication of the preliminary notice of acquisition served upon the first respondent or any officer in his employ the owner's objection to compulsory acquisition of the property, an order of court of competent jurisdiction, having the effect of a final order, has been made confirming the compulsory acquisition of the property, or the objection filed to the compulsory acquisition has been withdrawn by the owner or occupier who filed such objection.

5. The fifth respondent and every police officer, whose geographical area of duties covers any property referred to in paragraph 2 of this Order, is hereby ordered to use all means and authority available to him, upon complaint to him or his becoming aware of the occurrence of any unlawful entry upon any of the said properties or the likelihood of such occurring, to ensure that no breach of the peace shall occur upon any such property covered by this Order, and that all persons found to have unlawfully entered or conducted themselves upon any such property be removed therefrom.

6. Service of this Order upon the Officer Commanding the Province, within which police officers referred to in paragraph 5 above carry on their duties, shall constitute valid and effectual service, forty-eight hours after the first mentioned service, upon all police officers who from time to time carry on their duties within that Province.

7. The second respondent is hereby ordered:

(i) to cause the terms of this Order and the second respondent's instructions that they be complied with to be communicated to each Provincial Administrator and each District Administrator within Zimbabwe, within forty-eight hours of service of this Order upon him; and

(ii) within the following period of forty-eight hours to confirm in writing to the Registrar of this Honourable Court that such communications have been made.

7. The first, second, third and fourth respondents, jointly and severally, are hereby ordered to pay the applicant's costs of suit."

The order granted by GARWE J on 17 March 2000, referred to above, was also granted by consent. The order, in brief, declared that the occupation of every commercial farm and ranch in Zimbabwe was unlawful. It required that persons who had occupied such land to vacate the land within twenty-four hours, and it required the Commissioner of Police to ensure that the order was carried out. The Commissioner of Police later attempted to get the High Court to reverse the order, claiming an inability to comply with it. The Commissioner's application was refused by CHINHENGO J. See *Commissioner of Police v Commercial Farmers' Union* 2000 (1) ZLR 503 (H).

In the *CFU* case this Court, having found (and it was really not disputed by counsel for the respondents in that case) that the occupation of commercial farms was unlawful, that there was no "programme of land reform" as envisaged by s 16A of the Constitution of Zimbabwe, and that the land reform "exercise" (to use a neutral term) was in several ways unconstitutional, and interdicted the respondents in that case from taking any further steps in the acquisition of land for resettlement. This Court took the unusual step, however, of postponing the operation of the interdict until 1 July 2001, to enable the first, second and third respondents (the Ministers concerned in the land reform exercise) to produce a workable programme of land reform, and to enable the fourth and fifth respondents (the Minister of Home Affairs and the Commissioner of Police) to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

As I see it, the meaning of the order was simple. On 1 July 2001 the interdict would have come into effect unless the respondents were able to satisfy this

Court that there was indeed a workable programme of land reform *and* the rule of law had been restored to the commercial farming areas of Zimbabwe. It was necessary for both requirements to be fulfilled.

The meaning and effect of the order in the *CFU* case was brought into question, as the Administrative Court declined to hear certain cases brought before it. In *Minister of Lands v Paliouras and Anor* S-55-01 this Court held, by a majority, that land compulsorily acquired for resettlement is acquired in terms of the Land Acquisition Act [*Chapter 20:10*], rather than in terms of the Constitution. It was misleading to talk of acquisition in terms of s 16 or 16A of the Constitution. The acquisition must, however, be in conformity with the Constitution. As to the meaning of s 16A of the Constitution, it was held that those provisions of the Act which allow for acquisition without compensation depend for their validity on s 16A. In order for acquisition to be lawful under s 16A, there must be in place a programme of land reform. If there is no such programme, then s 16A does not apply, and the acquisition must be legitimised by s 16.

CAN THIS COURT REVISIT ITS PREVIOUS DECISION?

Under s 80 of the Constitution, this Court "shall have such jurisdiction and powers as may be conferred upon it by or in terms of this Constitution or any Act of Parliament". Those powers are set out in the Supreme Court Act [*Chapter 7:13*]. It is clear that this Court is a court of appeal only; it does not even have the power to enforce its judgments, which are enforced as though they are judgments of the court appealed from (see ss 7 and 24).

It is only in respect of constitutional cases that this Court has original jurisdiction. Its powers are set out in s 24 of the Constitution, the meaning of which has been considered in numerous cases, such as *Salem v Chief Immigration Officer and Anor* 1994 (2) ZLR 287 (S). Once the Court has made the determination that one of the rights guaranteed by the Constitution has been contravened, it has no option but to enforce the right at the instance of the aggrieved party. There is no provision for delaying the enforcement of the right: *Retrofit (Pvt) Ltd v Minister of Information* 1995 (2) ZLR 422 (S).

Once the Court has made a decision, can it in any way revisit that decision? I will deal later with the question of adherence to precedent, where a similar case comes before the Court. But in respect of a particular case, what is the situation? There is, of course, no appeal from any decision of this Court (see s 26(1) of the Act), so there is no question of this Court amending or reversing the decision in the *CFU* case. I do not, though, see any reason why the Court should not clarify its decision, where there is doubt as to the meaning of that decision. See *Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co Ltd* 1998 (2) ZLR 229 (H) at 231, where CHINHENGO J said:

> "The issue placed before me is in essence a request for the court to supplement its order. It does not raise the problem whether I am *functus officio* or not. The clarification sought is an accessory or consequential matter which was overlooked because of the manner in which the case being a stated case came before me. It is consequential or accessory also because, whilst the claim for interest was in fact made, the only defect was that the date from which such interest must be calculated was not specified in the summons, declaration or prayer. I am therefore not *functus officio* in respect of this matter."

I respectfully agree with CHINHENGO J's reasoning, and would apply it to the present application. This Court made an order in the *CFU* case, but suspended the

operation of the order until 30 June 2001 provided certain conditions were met. If the conditions are met, the order falls away; if they are not, it comes into effect. It is therefore necessary for the applicants to show this Court that the conditions have been fulfilled. To that extent, this Court is not *functus officio*.

INTERIM ORDER

In these proceedings, the applicants initially sought direction as to how to proceed next. This was done on 16 July 2001 after the interdict granted by this Court had come into effect. They then, only a week (11 September 2001) before the application was due to be heard, sought an interim order, granting leave for the first applicant to proceed, in terms of s 7 of the Land Acquisition Act [*Chapter 20:01*], with applications for confirmation orders in the Administrative Court, but not in respect of any notices of acquisition issued after 1 July 2001 (the date on which the interdict came into operation). This order was granted "pending determination of this matter and without in any way pre-judging any of the preliminary issues raised in the application, but recognising the importance of lawful land reform".

I did not agree to this order and dissented in its granting. In my view, none of the well-established requirements for the grant of interim relief were present. There was no urgency justifying the grant of the order, given that land reform is an on-going process and that, in view of how long this process has been taking place, a delay of a few months will make little difference either way. In any event, the application filed on 11 September 2001 was not filed in terms of the Rules. There was no certificate of urgency and it was moved for before the respondent was required to reply.

I realise that, because the operation of the interdict was suspended until the end of June 2001, the applicants were not until that date interdicted from taking lawful steps to acquire land. These steps would include the notice of intention to acquire, objections, confirmation hearings before the Administrative Court and so on. However, it seems to me to be quite inappropriate to treat those matters differently from those arising after the end of June 2001. The whole subject should be treated as one, and the government's actions as a whole should determine this Court's approach to the matter. If this Court were to find that, although the government had gone through an ostensibly lawful process to acquire land, the rule of law had otherwise not prevailed at all, we would be condoning the breach of the rule of law if we were to say, in effect:

> "It does not matter that you did not obey the orders of the courts; that unlawful occupations and other unlawful activities continued until 30 June 2001. You may still go ahead with your applications to the Administrative Court as though all the other illegal activities had not occurred."

Since the applicants were interdicted from continuing with land acquisition unless certain conditions were met, to allow them to now continue – even in respect of the notices of acquisition issued before 1 July 2001 – without having decided whether the conditions were in fact met gives the impression that the Court is pre-judging the issue as a whole, irrespective of the words given in the interim order.

JUSTICE OR LAW?

During argument the view was expressed that justice was on the applicants' side, but the law was on the respondent's side. Admittedly law and justice do not always coincide. Examples of oppressive and unjust laws can be found in many countries. But this does not mean that the courts, which are sworn to uphold the law, can ever allow their personal, subjective view of what constitutes justice to override the clear provisions of the law.

It is not the function of the courts to support the government of the day, or the would-be government of tomorrow. It is not their function to support the State against the individual, or the individual against the State. The courts' duty is to the law and to the law alone. Judges, as individuals, have their own political, legal and social views and opinions. But it is the sworn duty of every Judge to apply the law, whatever he or she may think of the law. If a law is patently unjust, the courts can seek to ameliorate matters as far as possible, within the law, but they may never subvert the law. The remedy for an unjust law lies, not with the courts, but with the legislature. If the law does not allow the State to proceed as it apparently wishes in respect of land acquisition, the remedy is in its own hands. The legislature has, as it always has had, the power to pass laws which would enable land reform to take place in a lawful, organised and constructive, rather than in an unlawful, chaotic and destructive, manner. But until the law is changed, all we expect is that the State will follow its own laws. See *Fedsure Life Assurance Ltd and Ors v Greater Johannesburg Transitional Metropolitan Council and Ors* 1999 (1) SA 374 (CC), 1998 (12) BCLR 1458 (CC) where in a joint judgment CHASKALSON P, GOLDSTONE J and O'REGAN J stated:

> "(It) is a fundamental principle of the rule of law, recognised widely, that the exercise of public power is only legitimate where lawful."

Later in the same judgment it is said that:

> "(It) seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law."

See also *Olmstead et al v United States* 277 US 438, 485 (1928) where JUSTICE BRANDEIS stated:

> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. … Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. … If the government becomes a law unto himself, it invites anarchy."

There seems to be no dispute about the justice of land reform. There can be no doubt that the communal lands are over-crowded, that the land there has been degraded, that there is a genuine need for more land to be made available, that some commercial farms are under-utilised, and so on.

PRECEDENT

Counsel for the applicants pointed out that this Court is not bound by the decisions of any other court, or its predecessors, nor is it bound by its own decisions. This is, of course, true: see s 26(2) of the Supreme Court Act. The High Court is bound by the decisions of this Court, but this Court is bound by no other. While this Court is not bound by its own previous decisions, and on occasion has to revisit them, this does not mean that it should blithely disregard its own decisions. On the contrary, in my view, the policy should be that we should follow our previous

decisions unless they are distinguishable on the facts or are, on careful analysis and sound reasoning, shown to have been erroneous. To act otherwise would create huge uncertainty in the law, and this Court would truly deserve the epithet that was once attributed to the short-lived Rhodesia and Nyasaland Court of Appeal, that it should be abolished under the Lotteries Suppression Act. See E Khan, *Law, Life and Laughter Encore* p 269.

A change in personalities in this Court, or any other, should not mean a wholesale change in its approach. As I have said, the Judges of this Court, as of the other courts, have their own personal viewpoints on a number of topics, whether those topics be politics, religion, social *mores* and so on. But we are all sworn to uphold the law, and when we do so our personal views take second place. We must follow precedents unless those precedents are clearly wrong.

By repeating the arguments that were previously rejected by this Court, counsel for the applicants is trying to convince us that we should reverse this Court's previous decision. I cannot agree. There is nothing new in what he says, and all the points made were carefully considered and that Court came to the conclusion it did.

HAVE THE APPLICANTS COMPLIED WITH THE REQUIREMENTS OF THE INTERDICT?

(1) Is there a workable programme of land reform?

The applicants contend that they have complied with the two requirements imposed by this Court, namely that there is a workable programme of land reform, and that the rule of law has been restored to the commercial farming

areas of Zimbabwe. It is also argued on their behalf that, even if this Court was correct in saying that a programme of land reform is a requirement, the details of such programme and its implementation in practice are matters beyond the bound of judicial scrutiny. It is correct, of course, to say that the courts may not inquire into policy matters, in the sense of not deciding whether one policy is better than another, but they may certainly inquire into whether legal requirements have been fulfilled and whether what is being done is in conformity with the law. Policy matters as to who should be resettled, how they are to be selected, and so on, are not matters on which this Court can express an opinion. Those are matters for the executive. Provided that there is no discrimination in the choice of people to be resettled, and provided that the law is followed, we cannot inquire into the efficacy or otherwise of any policy.

The applicants have submitted that a number of criteria show that there is indeed a workable programme of land reform capable of lawful implementation. There may well be such a programme and it may well be capable of lawful implementation. But the real question is this: Is it being implemented lawfully? In my view, the evidence placed before us by the respondent has not been controverted.

If a piece of land is to be lawfully acquired for resettlement purposes, there are legal processes which must be followed: notices of intention to acquire the land must be given; time must be given for objections; if there are objections, these must be heard and decided. Only after these processes have been followed and resulted in the land being acquired by the State is it lawful for resettlement to begin,

unless the landowner has previously, and genuinely, consented to such resettlement. Haphazard squatting cannot form part of a lawful programme of land reform.

(2) Has the rule of law been restored?

Even if it is accepted that the applicants have produced a workable programme of land reform, there is still the question of whether the rule of law has been restored in the commercial farming areas of Zimbabwe.

Here, the applicants argue, among other things, that:

(a) The government has endeavoured, as far as possible, to follow the procedural requirements of the law in implementing the land acquisition and resettlement process;

(b) It is not the government's policy to stop farming operations by landowners;

(c) Offers by farmers of alternative land have been considered and accepted or rejected on their merits;

(d) Pegging and allocation has taken place on some farms in anticipation of acquisition in order to avoid chaotic occupation patterns and the potential breakdown of law and order;

(e) All police officers have been instructed to comply with and give effect to court orders, subject to the position of protected occupiers being safeguarded.

The starting point, which the applicants cannot avoid, is that until a commercial farm has been lawfully acquired in terms of the Land Acquisition Act any trespass, pegging, farming and other activities by persons other than the owner of the farm are unlawful, not only in terms of the civil law, but also in terms of the criminal law. Indeed, this was conceded by counsel for the respondents in the previous cases – hence the grant of orders by consent. The Rural Land Occupiers (Protection from Eviction) Act is also based on the premise that the land occupations have been, and continue to be, unlawful. If they were not, the Act would have been unnecessary.

It is not lawful, and never was lawful, for any "occupiers", whether acting of their own accord or under instructions, to be on the land at all, let alone cut down trees, build homes, till land, graze their cattle and so on. To cut down a tree on someone else's land is a criminal offence. Even to help oneself to thatching grass is a criminal offence. To plough up the landowner's crops is criminal. To prevent the landowner from carrying out lawful activities is criminal. To harass the landowner or his employees and by threats coerce them, or attempt to coerce them, to leave the farm is criminal.

It is not lawful for anyone to peg and allocate themselves land on some farms, and the applicants' attempt to justify this on the grounds of avoiding the breakdown of law and order is untenable. The pegging and other activities are themselves examples of the breakdown of law and order and cannot be justified on the grounds given.

The evidence from the respondent is that in numerous cases farmers are in fact being prevented from conducting farming operations and that, contrary to the applicants' assertions, the police are not doing their duty under the law. That detailed evidence is not in any way contradicted and must be accepted. See *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127, where McNALLY JA said:

> "The simple rule of law is that what is not denied in affidavits must be taken as to be admitted."

Without oral evidence, this Court cannot in good conscience, in the face of the detailed answering affidavit submitted by the respondent and not rebutted by the applicants, accept the applicants' very generalised statements averring that the rule of law has been restored. In no way have the applicants produced sufficient evidence to satisfy the Court that the second of the requirements we laid down for the uplifting of the interdict has been fulfilled.

I would also like to make some general observations about the rule of law and what it means. The subject has, regrettably, had to be raised many times in the superior courts in recent years. See, for example, the words of CHINHENGO J in *Commissioner of Police v CFU supra* at 525-526. There are several criteria for showing whether the rule of law is being followed in a particular country. One of those criteria is, of course, that the orders of the courts are obeyed by all. It is not for one party or another to decide which courts orders to obey and which not to. If the party is the government, its remedy, if it does not agree with the decision of the courts, is to amend the law. But until the law is amended, the government, like everyone else, is obliged to obey the law. Where the government, or its agencies,

does not obey the law, the rule of law cannot be said to apply. See *Minister of Home Affairs and Anor v Austin and Anor* 1986 (1) ZLR 240 (S) at 245, where DUMBUTSHENA CJ said:

> "When the executive ignores the orders and judgments of the courts there is the inevitable break-down of law and order, resulting in uncivilised chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of judgment."

In the present situation, there have been two orders from the superior courts, both by consent, and the third one, which has given rise to the current application. The evidence indicates that the orders have not been obeyed, except spasmodically and in a few isolated instances. Generally speaking, though, the orders have not been obeyed, and there has been no attempt by the State to comply with them. The State has not come back to this Court to show that it has attempted to comply with the orders made by this Court and why it has been impossible to comply with them, and in these circumstances it is impossible to accept that the rule of law has been restored.

CONSTITUTIONALITY OF THE RURAL LAND OCCUPIERS (PROTECTION FROM EVICTION) ACT [*CHAPTER 20:26*]

I have dealt with the issue of the rule of law and the return to the rule of law. There appears, however, to be a perception that by passing laws the government can satisfy this requirement. There has been a reliance on the Rural Land Occupiers (Protection from Eviction) Act [*Chapter 20:26*] to meet this goal.

It was submitted by the applicants that the effect of this Act was that it suspends certain aspects of the decisions of the courts as well as orders of eviction

obtained by disgruntled farmers. It also prevents the eviction by the owner of land of persons who have come onto his property without his permission. Such an occupier cannot be sued for damages emanating from his uninvited occupation. It also entitles such an occupier to remain on such land against the will of the owner of the land and thus enforces an association between the parties whether the owner likes it or not.

Does the Act contravene s 16 of the Constitution of Zimbabwe (a freedom from acquisition without compensation)? In my view, it does. The Act does not simply take away or suspend a right to evict but constitutes a positive act of placing people on land, thereby taking away the landowner's right or interest in that land. The landowner is deprived of his right or interest in the land, without compensation being paid. Whilst the Act does not purport to transfer the property to the State, it does provide for the alienation of a right in the property acquired. The right of use and occupation is taken away from the owner and is left to the occupier, supported as he is by the State, the potential acquiring authority.

The Act was also attacked on the basis that it contravenes s 17 of the Constitution (i.e. protection from arbitrary search and entry). It was submitted that the land invasions and unauthorised trespass onto premises constitutes an entry by those persons onto the farms in question. Although s 17(2)(c) of the Constitution derogates from the general protection provided by s 17, the Act is not a law that provides for the taking possession of or acquisition of any property or interest or right therein. I would therefore hold that s 17 is not contravened.

Does the Act contravene s 18 of the Constitution (protection of the law)? It seems to me that there can be no doubt that the rights of the landowners to the protection of the law have been effectively removed by the Act. People who are accepted by all – including the legislature – as being in breach of the law are protected, while those who are victims of illegality are left without a remedy. The Act is regarded in some quarters as being expedient, but one has to conclude that the constitutional rights of the landowners under s 18(1) and s 18(9) have been negated. Section 18 does not provide any derogation which would justify the Act.

Section 3(2) of the Act provides:

> "(2) Notwithstanding anything to the contrary in any other law, but subject to this Act, no court shall issue any order for the recovery of possession from a protected occupier of any rural land, or the ejectment therefrom of a protected occupier, or the payment of damages by such protected occupier in respect of the occupation in respect of the occupation or trespass of such land during any period referred to in section *four*."

Section 3(3) of the Act provides:

> "(3) Any order referred to in subsection (2) that was issued in relation to any protected occupier before the date of commencement of this Act shall be suspended and of no force or effect during any period referred to in section *four*."

Not only do these provisions abrogate the protection of the law but it purports to suspend and render of no effect judgments given by the courts. It clearly removes the right for a court to determine the existence of a civil right of the owner since his right to recover possession of his property and to eject persons therefrom is removed.

Section 3(2) of the Act gives immunity from damages claims during the "protected period" in respect of the occupation and trespass. This covers a situation where the occupier destroys or damages property, or uses the property of the owner without his consent, or hinders the owner in his farming activities. The Act extends the right of the occupier beyond mere presence and gives him immunity from any damage he may cause whilst in occupation and yet does not give the owner the right to exercise his rights of redress enshrined in s 18(9) of the Constitution. This clause in the Constitution provides:

> "(9) Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

The right to have damages adjudicated upon cannot be removed by legislation save where such is permitted under s 18(13), which provides as follows:

> "(13) Nothing contained in or done under the authority of any law shall be held to be in contravention of –
>
> (a) subsection (2), (3)(e) or (9) to the extent that the law in question makes reasonable provision relating to the grounds of privilege or public policy on which evidence shall not be disclosed or witnesses are not competent or cannot be compelled to give evidence in any proceedings;
>
> (b) subsection (3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;
>
> (c) subsection (3)(e) to the extent that the law in question imposes reasonable conditions which must be satisfied if witnesses are called to testify on behalf of an accused person are to be paid their expenses out of public funds;
>
> (d) subsection (6) to the extent that the law in question authorizes a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of

that member under the appropriate disciplinary law, so, however, that any court so trying such a member and convicting him shall in sentencing him to any punishment take into account any punishment awarded him under that disciplinary law; or

(e) subsection (8) to the extent that the law in question authorizes a court, where the person who is being tried refuses without just cause to answer any question put to him, to draw such inferences from that refusal as are proper and to treat that refusal, on the basis of such inferences, as evidence corroborating any other evidence given against that person."

Section 18 does not provide any derogation which would justify the Act.

Does the Act contravene s 21 of the Constitution (freedom of association)? In two cases in the High Court – *Igudu Farm (Pvt) Ltd v Commissioner of Police and Ors* HH-143-01 and *Roper Trust v District Administrator, Harungwe and Ors* HH-200-01 the court held that the landowners and the occupiers had to reach some sort of *modus vivendi*. That is indeed the effect of the Act, and it is thus clear that s 21 is breached by forcing a landowner into an unwanted association with persons who have occupied his land. The farmers do not have to associate with the occupiers and there is nothing in s 21 which allows parliament to derogate from that position. See the *CFU* case at p 938D.

It was also submitted on behalf of the respondent that the Act is discriminatory in that it only applies to commercial farmers. Accepting, for the purpose of argument, that the Act is discriminatory against commercial farmers, does this mean s 23 is breached? The relevant parts of s 23 read as follows:

"23 (1) Subject to the provisions of this section –

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced –

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, creed or gender of the persons concerned."

Commercial farmers are a class of people, but in my view they are not persons of a "particular description by race, tribe, place of origin, political opinions, colour, creed or gender". Admittedly, they are predominantly white, but that is all. I do not think s 23 has been contravened.

In my view, there is merit in the submission made on behalf of the respondent that parliament cannot overturn any ruling or relief given by this Court in terms of s 24 of the Constitution other than by a duly enacted amendment of the Constitution itself. This has certainly been what the legislature has done in the past to overrule decisions of this Court – see *S v A Juvenile* 1984 (2) ZLR 61 (SC); *Catholic Commission for Justice and Peace Commission in Zimbabwe v Attorney-*

General 1993 (1) ZLR 242 (SC), 1993 (4) SA 239 (ZS) which led to s 15(3) and s 15(5) and (6) of the Constitution.

It is for these reasons that I conclude that the Rural Land Occupiers (Protection from Eviction) Act [*Chapter 20:26*] must be declared unconstitutional.

THE PRESIDENTIAL POWERS (TEMPORARY MEASURES) (LAND ACQUISITION) (N0. 2) REGULATIONS 2001

What of the Presidential Powers (Temporary Measures) (Land Acquisition) (No. 2) Regulations 2001? The immediate difficulty I have in connection with these Regulations is that none of the parties have had an opportunity to make submissions on their effect and validity on the issues in this case.

It seems to me that the lawfulness and constitutionality of these Regulations is bound to be the subject of debate in the future. In my view, *prima facie*, the following questions arise: Was it necessary to pass these Regulations without waiting for parliament to sit? These Regulations were promulgated on 9 November 2001. Parliament sat on 20 November 2001, a mere eleven days later. In this context, the question then arises: Was there really a situation of emergency justifying the exercise of the powers in terms of the Presidential Powers (Temporary Measures) Act [*Chapter 20:10*]? There is also the question on the reasonableness or otherwise of the Regulations. One of the issues being whether the Regulations can be said to be irrational or otherwise.

As I see it, the object of the Land Acquisition Act is to ensure the equitable redistribution of land, redressing the manifest injustices of the past, while

fairly addressing the rights of landowners, and preserving the economic well being of Zimbabwe. The Act at least arguably met these criteria prior to the recent amendment. What the amendment now does is to make occupation of land lawful immediately on designation and thereby negates any right of the owner to contest acquisition. It could be argued that the lawmakers are simply trying to make the "law" equate with what is prevailing on the ground rather than managing the land redistribution process to achieve its aims while preventing economic meltdown.

The effect of the Regulations is to allow occupation immediately on designation, and this makes a mockery of the right to contest such designation – unless the Administrative Court hearing to consider the correctness of the acquisition is heard within days of the land being occupied. This is something which is unlikely. If there is a substantial delay and the owner successfully challenges the acquisition, his victory in the face of his land having long since been resettled will be hollow and meaningless.

GENERAL

Before concluding I make the following observations.

I was party to the decision reached in the *CFU* case. In that matter it was made clear that there was an urgent need for land reform and land redistribution. We said:

> "But that does not mean that we can ignore the imperative of land reform. We cannot punish what is wrong by stopping what is right."

I continue to subscribe to those views.

During the course of the submissions in this matter, it has been said that the wording of the interdict which emanated from the *CFU* case is vague and ambiguous. The wording used was the following:

> "B. That an interdict prohibiting the first, second and third respondents from taking any further steps in the acquisition of land for resettlement is hereby granted, but its operation is postponed until 1 July 2001, to enable the first, second and third respondents to produce a workable programme of land reform, and to enable the fourth and fifth respondents to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe."

In my view, the wording is clear, unequivocal and unambiguous. What was called for was –

1. That the respondents produce a workable programme of land reform;

2. That the respondents satisfy this Court that the rule of law has been restored;

3. That the respondents had until 1 July 2001 to do so.

Once these requirements were satisfied, it was to this Court that the applicants had to come to say that the conditions set by this Court had been met. If they were met, the process of land reform would proceed.

In my view, there is also no difficulty on what the cut-off date was to be. There is nothing unclear on what was intended. By 1 July 2001 the conditions laid down by this Court had to be satisfied. A failure to meet this deadline would and did bring the cut-off date for continuation of the land exercise into effect.

It follows from what I have said in this dissenting opinion that I hold the view that the application must fail and that the costs should be awarded to the successful party, namely the respondent.

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

Coghlan, Welsh & Guest, respondent's legal practitioners