

1. BON ESPOIR (PVT) LTD HC 9525/04
2. LYNDHUST ESTATE (PVT) LTD HC 9528/04
3. DANIEL DRENNAN DEWAAL HC 9529/04
4. H.DE FOIARD BROWN (PVT) LTD HC 9530/04
5. PETER BERNHARD HENNING CASE NUMBERS HC 9531/04
6. ESPERANCE ESTATES (PVT) LTD HC 9532/04
7. NGWINDI SUGAR ESTATES (PVT) LTD HC 9615/04
8. DENARII (PVT) LTD HC 9659/04
9. CHERRINGTON FARM (PVT) LTD HC 9730/04
10. N & B HOLDINGS (PVT) LTD HC 9731/04
11. CHIPOTO (PVT) LTD HC 9732/04
12. EMOBENI ESTATE (PVT) LTD HC 9734/04

versus

MINISTER OF SPECIAL AFFAIRS IN THE
PRESIDENT'S OFFICE IN CHARGE OF LANDS,
LAND REFORM AND RESETTLEMENT;

and

MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS;

and

THE MEMBER IN-CHARGE, CHIREDDZI POLICE STATION;

and

THE ATTORNEY-GENERAL FOR ZIMBABWE

HIGH COURT OF ZIMBABWE

KAMOCHA J

HARARE 12 and 24 August 2004

Urgent Chamber Application

Mr E.T. Matinenga with *Mr Reagan*, for the applicants
Mr E. Jena assisted by *Ms F. Maisva*, for the respondents

KAMOCHA J: The parties to all these 12 urgent court applications, which are all identical, signed a joint memorandum agreeing that they be consolidated and be dealt with by myself at the same time. The applications had been allocated to different judges. Since the issues in all the matters were the same I acceded to the request for the consolidation of all the applications into one matter.

Counsel representing all parties further agreed that the constitutional matter raised in all the applications is not frivolous or vexatious and

therefore deserves to be referred to the Supreme Court sitting as a constitutional court for determination. I acceded to that request as well.

The terms of the order being sought in the interim and final relief are these:-

"TERMS OF THE FINAL ORDER SOUGHT

That you show cause to this Honourable court why a final order should not be made in the following terms:

- (1) It is declared that the amendments to sections 7, 8, 9 and 10 of the Land Acquisition Act [*Chapter 20:10*] made in terms of the Land Acquisition Amendment Act 2002 and 2004, enacted at the behest of the second respondent are invalid and of no force and effect by reason of being in conflict with sections 11, 16(1)(b), 16(1)(c), (16(1)(d), 16A, 18(9) and 23(1) of the Constitution of Zimbabwe.
- (2) It is declared that the section 8 Acquisition Order signed in relation to the property known as: Hippo Valley Settlement Holding 25 owned by Denarii (Pvt) Limited measuring 179,4908 hectares Deed of Transfer No. 1914/73, be and is hereby declared invalid.
- (3) That the first and second respondents pay the costs of these proceedings jointly and severally the one paying the other to be absolved.

INTERIM RELIEF

It is hereby ordered that, pending the determination by this Honourable Court of the issues referred herein above, it is ordered that:

- (1) First respondent be and is hereby interdicted from further proceeding with the acquisition in terms of the Land Acquisition Act [*Chapter 20:10*] of the property known as Hippo Valley Settlement holding 25 in the District of Ndanga measuring 179,4908 hectares Deed of Transfer No. 1914/73 pending the final determination of this matter.
- (2) Further, the effect of any acquisition order in respect of the property known as Hippo Valley Settlement Holding 25 measuring 179,4908 hectares Deed of Transfer No. 1914/73 purportedly acquired for resettlement purposes in terms of section 8 of the Land Acquisition Act [*Chapter 20:10*] is hereby suspended pending the resolution of this matter, and such orders shall not preclude the applicant from occupying, holding or using the land including all improvements thereon and from continuing all farming operations, until the finalisation of this

matter including the right to reside in the homestead or the farm concerned.

- (3) It therefore follows that the applicant may continue cultivating, harvesting and selling all farm produce on and from aforementioned property during the currency of this order and shall not be liable to be prevented from doing so in any way whatsoever.
- (4) The third respondent is hereby ordered to render any and all lawful assistance to the applicant in ensuring its continued occupation, use and enjoyment of the aforementioned property."

On 2 July the first respondent hereinafter referred to as "the Acquiring Authority" compulsorily acquired all the above listed properties for resettlement purposes in terms of section 8(1) of the Land Acquisition Act [Chapter 20:10] "the Act" following its recent amendment. The applicants seek the above interim relief interdicting the Acquiring Authority from completing the acquisition process.

Requirements that need to be satisfied by an applicant before such an interim relief can be granted were stated as follows by CORBETT J (as he then was) in *L.F. Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969(2) SA 256(c) at 267 A-F.

- "(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established though open to some doubt;
- (b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief; and
- (d) that the applicant has no other satisfactory remedy."

What rights do the applicants have over the land that the Acquiring Authority has compulsorily acquired for resettlement purposes in terms subsection (1) of section 8 of the Act? MALABA JA clearly explained where the rights in the land lie in matters such as the present ones in the case of *Air Filed Investments (Private) Limited v The Minister of Lands Agriculture and*

Rural Resettlement and 4 Others S.C. 36/04 not yet reported. The learned judge of appeal had this to say at page 3 of the cyclostyled judgement.

"Subsection (1) of section 8 of the Act gives power to the acquiring authority to make an order not less than thirty days after the date of publication of the preliminary notice acquiring the land the nature and extent of which would be described therein. For the acquisition to be valid the agricultural land in question must have been taken for the resettlement purposes on payment of fair compensation with reasonable time. Upon service of the order of acquisition upon the owner or occupier of the land the rights of ownership are immediately taken and vested in the acquiring authority. Emphasis added.

To that extent subsection 3 of section 8 of the Act provides that:

"(3) Subject to section ten "A" the effect of an order made in terms of subsection (1) shall be that the ownership of the land specified therein shall, subject to subsection (5) of section seven, immediately vest in the acquiring authority whether or not compensation has been agreed upon, fixed or paid in terms of Part V or VA and, subject to section nine, shall be free of all rights and encumbrances." My underlining.

... Subsection (2) of s.8 gives the acquiring authority a discretion to exercise the rights of ownership in the acquired land such as demarcating or allocating it after the expiry of ninety days from the date of service of the order of acquisition upon the owner or occupier especially where the owner or occupier is in possession of and exercises the residual rights reserved for his enjoyment under s.9 and for the duration of the period prescribed therein."

What is clear from the foregoing is that the right of ownership in the land in all these 12 matters was, upon service of the order immediately taken away from the owners or occupiers and vested in the acquiring authority. The owners or occupiers were only left with residual rights to use the land for forty-five days and occupy the living quarters for not more than ninety days from the date of service of the order.

What admits of no doubt is that the owners or occupiers of all the above properties no longer have *prima facie* rights of ownership which the acquiring authority was about to violate since at the time they launched their applications for the interim relief all rights of ownership they had in the land had been taken away from them by means of the order of acquisition and vested in the acquiring authority. See pages 9 to 10 of the cyclostyled judgement.

The applicants seek the interim relief because they have challenged the constitutionality of sections 7, 8, 9 and 10 of the Act made in terms of the Land Acquisition Amendment Act 2002 and 2004. The acquiring authority, in opposing the relief sought, contended that the applications for the interim relief were ill-conceived as it (the acquiring authority) was acting in terms of the existing law. The fact that some of the provisions of the law were being challenged as being unconstitutional does not *per se* make the law invalid before it is declared invalid by the Supreme Court sitting as a Constitutional Court. The acquiring authority was acting lawfully in acquiring the land for settlement purposes. There is merit in the above contention which has the support of the Supreme Court in the *Airfield Investments (Private) Limited* case *supra*. MALABA JA had this to say at page 10 of the cyclostyled judgement.

"An interim interdict is not a remedy for prohibition lawful conduct. At the time the first respondent made the order by which the appellant was deprived of ownership of the land, he acted lawfully in the exercise of the power conferred upon him. Subsection (1) of s.8 of the Act gave him the power to make the order and its effect reflected the legal consequences of that lawful act.

To suspend the effects of the order of acquisition lawfully made and intended by the legislature would amount to striking down the Act of Parliament or rendering it completely ineffective, thereby creating a vacuum pending determination of the constitutionality of the impugned sections of the Act. That would be improper for the court to do because the clear intention of the legislature was that an order of acquisition, properly made in terms of subs (1) of s.8 of the Act, should have the effect of depriving the owner or occupier of the rights of ownership in the land and vesting them in the acquiring authority."

In the light of the foregoing I conclude that all the applicants have no rights of ownership over the land that is the subject of dispute in each case as such right was taken away from each of them and vested in the acquiring authority. The acquiring authority was acting lawfully in acquiring the said land for resettlement purposes. It therefore follows that the extraordinary remedy of an interim interdict cannot be granted in the circumstances. All the applications must therefore fail.

In the result I would make the following order:

It is ordered that;

- (1) all the 12 applications for an interim interdict be and are hereby dismissed with costs;
- (2) all the 12 matters be and are hereby referred to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe, for the determination of the constitutionality of the provisions of the Act that have been impugned.

Coghlan, Welsh & Guest and Honey & Blackenberg, applicants' legal practitioners

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