REPORTABLE (15)

(1) FRANCES BOWERS (2) BERNADETTE COSTAS
v
(1) THE MINISTER OF LANDS, AGRICULTURE, WATER FISHERIES AND RURAL RESETTLEMENT N.O (2) MARGIE SIZIBA (3) COLLIN SHIRICHENA (4) NYASHA MANYAKARA (5) TENDAI MUNEDZI (6) PEARSON NDORO (7) EMMANUEL MATIZANADZO (8) TARIRO MOYO

SUPREME COURT OF ZIMBABWE,
MAVANGIRA JA, UCHENA JA & CHATUKUTA JA
HARARE 23 MAY 2023.

T. Mpofu with *A. S. Ndlovu,* for the appellants

Ms *J. Shumba,* for the first respondent

T. Kamwemba, for the second to eighth respondents.

UCHENA JA:

INTRODUCTION

[1] This is an appeal against the judgment of the High Court dated 3 February 2023 in which it declined to exercise its jurisdiction over the applicant's application in which it sought the following orders:

> "1. The applicants' immovable property namely subdivision J and K of Mnyami Farm Gweru's acquisition by the state be and is hereby delisted.
>
> 2. The 1st respondent be and is hereby ordered to withdraw the offer letters issued to the 2nd - 6th respondents within 30 days of the date of this order.
>
> 3. If the 1st respondent fails to comply with paragraph 2 above, the offer letters issued to 2nd - 6th respondents should be deemed to have been procedurally withdrawn.

4. The 2nd - 6th respondents and anyone claiming occupation through them be and are hereby evicted from subdivision J and K of Mnyami Farm, Gweru.

5. The operation of paragraph 4 above be and is hereby suspended until the 2nd - 6th respondents' offer letters are withdrawn in terms of either paragraph 2 or 3 of this order

6. The respondents shall pay cots of suit."

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[2] This appeal was heard on 23 May 2023 after which the court gave an *ex-tempore* judgment dismissing the appellants' appeal.

[3] On 19 June 2024 the appellants' counsel wrote to the Registrar requesting for written reasons for judgment. These are they.

THE FACTS

[4] In 1981 and 1983 the first appellant and her late husband whose estate is represented by the second appellant bought: subdivisions J and K of Mnyami Farm, Gweru.

[5] In pursuit of the land reform programme the government acquired the farm in 2005 in terms s 16B as read with the 7th Schedule which were introduced into the1980 Constitution by the 17th Amendment to that Constitution. The first appellant alleges that in her conviction, the acquisition was erroneous and unlawful because the law did not and still does not allow the acquisition of land belonging to indigenous Zimbabweans.

[6] In 2006 the first appellant applied for the delisting of the farm. The Land Identification Committee and the Resident Minister supported her application on the basis that the farm was indigenously owned. She does not know the result of the application for delisting, but in 2011, the second to the eighth respondents' occupied parts of the farm having been issued with offer letters by the first respondent. She made numerous attempts to have

them ejected from the farm but to no avail. The then Resident Minister for the province advised her that the only reason why the settlers were not being removed from the farm was that government intended to find alternative land for them.

[7] The second to eighth respondents were cited in the application *a quo* because they are still in occupation of the farm, on the strength of offer letters issued to them between 2011 and 2013. During a period which she did not specify in her founding affidavit, the first appellant said she lodged a complaint in relation to the illegal takeover of the farm with the Land Commission. Her ground for doing so remained that the acquisition had been made in error because the farm was indigenously owned.

[8] In December 2018, the Land Commission in its determination of the dispute, found that:-

a. The first respondent who is the Minister of Lands, Agriculture, Fisheries, Water and Rural Settlement should withdraw the offer letters issued to the second to sixth respondents.

b. That the first respondent should find alternative land for the second to sixth respondents.

c. That the farm should revert to the first and second appellants.

[9] The appellants submitted that, despite these findings, the first respondent has failed to implement the resolutions of the Land Commission. The offer letters granted to the second to sixth respondents remain extant and on that basis they remain in occupation of the farm.

[10] The second to eighth appellants opposed the appeal on the basis that they are in occupation of the farm by virtue of offer letters lawfully issued to them by the first respondent.

DETERMINATION BY THE COURT *A QUO*

[11] In determining the appellants' application the court *a quo* after taking into consideration the provisions of s 16B (3) of the former Constitution and case law, held that it did not have jurisdiction to hear and determine an application for the delisting of land lawfully acquired by the acquiring authority.

[12] Aggrieved by the decision of the court *a quo* the appellants appealed to this Court on the following grounds of appeal.

GROUNDS OF APPEAL

1. The question of the constitutional validity of the acquisition of applicants' land having been raised by the application and that question being at law justiciable, the court *a quo* erred in declining jurisdiction to relate to the matter.
2. The court *a quo* erred in not holding that the sufficiency of the grounds upon which its constitutional review jurisdiction can be invoked is in the contemplation of ss 16A and 16B of the former Constitution a substantive issue.
3. The court *a quo* erred in concluding and doing so *in limine litis,* that agricultural land belonging to indigenous Zimbabweans can be acquired without compensation under the constitutional programme of land reform.
4. The court *a quo* erred in not coming to the conclusion that the potential availability of the remedy of compensation does not detract from the right of a subject of the state to seek more appropriate relief and that at any rate, s 295 of the Constitution of Zimbabwe, 2013 cannot be an answer to the validity of a process undertaken under the repealed constitution.

RELIEF SOUGHT

[13] **TAKE FURTHER** notice that the appellants seek the following relief:

1. That the appeal is allowed with costs.

2. That the judgment of the Court *a quo* is set aside and in its place is substituted the following:

   "The point *in limine* on jurisdiction is dismissed with costs."

3. That the matter is remitted to the High Court for it to be dealt with on its substance by a different judge.

4. Alternatively to (3) above:
   1. That the acquisition by the state of subdivision J and K of Mnyami Farm Gweru is declared invalid and is hereby set aside.

   2. That the offer letters or any other such tenancy documents issued to the second to eighth respondents are declared invalid and set aside.

   3. The second to eight respondents and all those claiming occupation through them be and are hereby immediately evicted from subdivisions J and K of Mnyami Farm Gweru.

   4. That costs of suit shall be borne by the respondents jointly and severally the one paying the others to be absolved.

SUBMISSIONS BEFORE THIS COURT

[14] Mr *Mpofu*, for the appellants submitted that the provisions of the former Constitution under ss 16A and 16B did not allow the state to acquire land owned by indigenous Zimbabweans. He further submitted that the court *a quo* erred in declining to exercise its jurisdiction as the acquisition of the appellants' farm had not been done in terms of the law.

[15] He submitted that the ouster of the jurisdiction of the courts by s 16B of the former Constitution only applied to white commercial farmers and does not apply to black indigenous farmers.

[16] In respect of s 295 of the 2013 Constitution he submitted that the provision for payment of compensation for land and improvements to indigenous Zimbabweans whose farms were acquired does not mean that the acquisitions were lawful.

[17] Ms *Shumba*, for the first respondent, in addressing the Court, said that the first respondent will abide by the decision of the Court.

[18] Mr *Kamwemba*, for the second to the sixth respondents submitted that the appellants' farm was lawfully acquired, and that the second to the sixth respondents were lawfully issued with offer letters entitling them to occupy and conduct their farming operations on the farm.

THE ISSUE

[19] The only issue which arises for determination in this appeal is whether or not the court *a quo* erred in declining to exercise its jurisdiction in this matter.

APPLICATION OF THE LAW TO THE FACTS

[20] The law applicable to the issue to be determined is s 16B (3) of the 1980 Constitution as amended by the 17th Amendment of 2005 (the former Constitution). It provides as follows:

> **"**(3) The provisions of any law referred to in section 16 (1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18 (1) and (9), shall not apply in relation to land referred to in subsection (2) (*a*) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2) (*b*), **that is to say, a person having any right or interest in the land shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge**." **(E**mphasis added)

[21] The meaning of this provision is clear. It simply means any person who has rights and interest in land acquired in terms of s 16B shall not apply to a court to challenge the acquisition and no court shall entertain a challenge to the acquisition. To add to the provision the exception in respect of indigenous Zimbabwean farmers, as suggested by Mr *Mpofu*, would be adding to the provision what the Legislature did not enact. Courts

of law do not add or subtract from the provisions of a statute. The words "a person having any right or interest in the land" are of general application to all such persons.

[22] Section 16B was interpreted in the case of *Mike Campbell (Pvt) Ltd & Ors* v *Minister of National Security Responsible for Land, Land Reform and Resettlement & Anor* 2008 (1) ZLR 17 (S) where MALABA JA (as he then was) at p 43F-G to 44A said:

> "By the clear and unambiguous language of s 16B (3) of the Constitution the Legislature, in the proper exercise of its powers, **has ousted the jurisdiction of courts of law from any of the cases, in which a challenge to the acquisition of agricultural land secured in terms of s 16B (2)(a) of the Constitution could have been sought.** The right to protection of law for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited, in effect, to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the *Gazette* in terms of s 16B (2) (a). **An acquisition of the land referred to in s 16B (2) (a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded**."

[23] The decision of the court in *Campbell* settles the issue before this Court. It confirms, the ouster of the right of the former owner to approach the courts challenging the acquisition of his or her land. It further confirms that the provision ousts the jurisdiction of the courts. It further confirms that an acquisition in terms of s 16B (2) (a) is a lawful acquisition.

[24] Once an acquisition is found to be lawful the provisions of s 16B (3) come into operation barring the former owner from challenging the acquisition in the courts and the courts from entertaining such a challenge.

[25] In the *Campbell* case (*supra*) at pp 16-17, the court went further to observe that:

> "It must be stated at this stage **that the law as embodied in the provisions of s 16 (B) (2) (a) (i) of the Constitution and the acquisitions of the pieces of agricultural land which resulted from its operation had no reference at all to the race or colour of the owners of the pieces of land acquired.** There

> was no question of violation of s 23 of the Constitution to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution."

This means, that the issue of the race, of the expropriatee, does not arise.

[26] In declining to exercise its jurisdiction the court *a quo* also referred to s 295 of the 2013 Constitution which provides as follows:

> "(1) Any indigenous Zimbabwean, whose agricultural land was acquired by the State before the effective date is entitled to compensation from the State for the land and any improvements that were on the land when it was acquired."

[27] The legislature is presumed to know the law under which the expropriation of the indigenous Zimbabweans' land took place. It indicates its awareness of the law under which such acquisitions took place by making reference to "before the effective date' after which it states what the law provides for those who were affected. The solution provided under s 295 (1) is not proffered as an alternative. It is proffered as the only solution to ameliorate the loss of the affected indigenous Zimbabweans. If there was more the legislature would have said so. Counsel for the appellants did not address us on the existence of the appellants' right to approach the courts challenging the acquisition of their farm nor the relaxation of the bar barring courts from entertaining such a challenge. It can therefore not be said that indigenous Zimbabweans whose land was acquired can challenge the acquisition of their farms before the courts.

DISPOSITION

[28] It is apparent from the above that the court *a quo* did not err when it declined to exercise its jurisdiction over the appellants' application.

[29] These are the reasons for the order that, the Court, granted on 23 May 2023.

MAVANGIRA JA : I agree

CHATUKUTA JA : I agree

Atherstone & Cook, 1st & 2nd appellants' legal practitioners.

Civil Division of the Attorney General's Office, 1st respondent's legal practitioners.

Tavenhave & Machingauta, 2nd to 6th respondents' legal practitioners.