GETTHROUGH INVESTMENTS
versus
MINISTER OF LANDS, AGRICULTURE
WATER AND RURAL RESETTLEMENT
and
ATTORNEY GENERAL OF ZIMBABWE N.O
and
ZIMBABAWE CATHOLIC BISHOPS CONFERENCE
and
THE TRUSTEES FOR THE TIME BEING OF
FAMBAI NASHE TRUST
and
FATHER RONGAI CHAWASARIRA
and
THE REGISTRAAR OF DEEDS N.O.
and
THE SHERIFF OF THE HIGH COURT OF
ZIMBABWE N.O.

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 3 February 2022 and 16 March, 2022

OPPOSED APPLICATION

Advocate Musarurwa, for the applicant
*RT Nyamutata,*for the 1st and 2nd respondent
*TK Mudzimbasekwa,*for the 3rd, 4th and 5th respondents
No appearance for the 6th and7th respondents

BACHI-MZAWAZI J: This is a contested application for a declaratory order brought in terms of s 14 of the High Court Act [*Chapter 7:06*] wherein applicant seeks the following relief:

WHEREUOPN, after reading documents filed or record and hearing counsel

IT IS ORDERED THAT

1. The application for a declaratory be and is hereby granted.

2. The failure or delay by the first respondent in rendering a decision on the application made by the application in 2018 and in 2020 in terms of Statutory Instrument 62/2020 be and is hereby declared unlawful and unconstitutional.
3. The purported gazetting of Lot 3 Mbebi Jersey, Mazowe held under Deed of Transfer 6687/20 for compulsory acquisition both in 2001 and 2005 by the first respondent be and is hereby declared null and void and of no force or effect as against the applicant.
4. The letter dated 19 March purportedly handing over the said farm being Lot 3, Mbebi Jersey, Mazowe held under Deed of Transfer 6687/20 be and is hereby declare of no legal effect or force as against the applicant.
5. The applicant is hereby declared the sole holder of title and rights to the farm called Lot 3, Mbebi Jersey, Mazowe held under Deed of Transfer number 6687/20.
6. The sixth respondent be and is hereby ordered to reinstate Deed of Transfer 6687/20.
7. The third to fifth respondents and all those claiming occupation through them are ordered to vacate Lot 3, Mbebi Jersey Farm, Mazowe within 14 days of this order.
8. The 7th respondent at the expense of the 3rd to 5th respondents is ordered to enforce this order to allow applicant to regain unfettered possession of the property being Lot 3 Mbebi Jersey Farm, Mazowe held under Deed of Transfer number 6687/20.
9. The respondents shall pay costs on a higher scale of legal practitioner client scale.

Central to this dispute is a piece of agricultural land named lot 3 Mbebi Jersey Farm,Mazoe which was compulsorily acquired through the Land Acquisition and Reform program in 2001.It was subsequently gazetted in terms of the governing laws in 2005. Applicant a duly constituted Company registered in terms of the laws of Zimbabwe happened to be the titled owner of the same. The first respondent is the Minister of Lands, Agriculture, Water and Rural Resettlement, who represents the State and is at law the responsible authority over the land. The second respondents are the State lawyers. Cited as the third to the fifth respondents, are representatives of a diocese of the Roman Catholic Church, who were given permission to settle on the acquired farm in contention by the fourth respondent. The fifth and sixth respondents have been incorporated to the suit in their official capacities being the Registrar of deeds and the Sheriff of the High Court of Zimbabwe, respectively.

The short historical narrative is that, it is not in dispute that the Applicant through its representative bought and acquired legal title to the farm, known as Lot 3 Mbebi, Jersey, Mazoe from its original, White owner in 2000 as reflected on the Deed of Transfer No.6687/200 dated 19, July 2000. It is also common cause that this farm was taken over by the State in 2001, in terms of the Lands Acquisition Act [*Chapter 20:10*], soon after the applicant had taken ownership and vacant possession of the same, and for the second time in 2005, in view of Constitutional Amendment Act No.17 of 2005. Thereafter it was listed and gazzetted in terms of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:08]. A further common ground is that consequent to the gazzetting, the farm was formerly allocated to the fourth respondent in 2013, who had since been in occupation of the farm from 2008 through the third and the fifth respondents. Another common feature is that the applicant leased the property to a third party resulting in confrontations between its representative herein and the third to fifth respondents. This wrangle culminated into an aborted High Court application in case number HC10361/19, instituted by the applicant for the eviction of the said respondents.

As a company wholly owned by indigenous people, the applicant commenced a legal battle to reclaim title to the land and have the property delisted through the then Resident Minister of lands sometime in 2001. Nothing tangible materialized even after a promising response from the then resident Minister. Applicant again made a fresh application for delisting, capitalizing on the then newly promulgated, S.I 62.2020 through the Minister of lands, fourth respondent. His application for delisting has not yet been considered by the fourth respondent even after several follow-ups giving rise to this application. In this application the applicant, in reiteration, is seeking the declaration of certain rights and ancillary relief as outlined in his draft order.

The preliminary objection that had been raised by the applicant that the first respondent was gagged by an automatic bar for failure to file their opposing papers on time and had no right of audience until they make an application for condonation and upliftment of the bar was disposed of by mutual consent of the parties. The court simultaneously, condoned and uplifted the bar and admitted the papers that had been filed of record.

It is the applicant's submission that its farm should not have been compulsorily acquired as it is comprised of black indigenous owners. Further they state that, the fourth respondent should be compelled to delist the farm and restore their title. In its submissions applicant through counsel

argues that at one stage the then Resident Minister had recommended the delisting of its farm pursuant to the first acquisition and before the gazzetting of the same. It is their further averment that the fourth respondent has taken too long to respond to their application contrary to the dictates of the Administration of Justice Act [*Chapter 10:28*], as read with s 68 of the Constitution of Zimbabwe, Amendment Act No.20 of 2013. Notably, this last averment was highlighted in the applicant's heads of argument and brought to the fore in their oral submissions but was never pleaded.

One of the ancillary reliefs initially sought by the applicant was the eviction of the third to the fifth respondents whom they allege did not have the requisite permit to stay on gazzetted land. This line of argument was quickly shot down, at the commencement of the hearing leading to the applicant conceding defeat on two fronts. Counsel for the applicant acknowledged, firstly, the doctrine of privity of contract as propounded in the case of *TIBC(Private)Limited & Anor v Mangenje & Ors* SC -13 -18, and admitted that he had no right to challenge a contract giving rise to the permit of the said respondents as he was not privy to the contract between the two. Secondly, applicant admitted that they lost title of the property under contention, the moment it was listed and gazetted. The implication is that by their own admission ownership of the land from then on was vested in the fourth respondent, the State. Inevitably, this entails that applicant had no right of *rei vindicatio* to evict the third to fifth respondent. See *Airport Game Park (Pvt) Ltd & Anor v Karidza& Anor* SC -18-04.

Basically what then remains of the applicant's case was the declaration of the remaining rights stated in their draft order. The applicant asserted that is within this court's jurisdiction to delist the acquired farm and restore its rights to the farm.

In light of the admissions made by the applicant in respect of the third to the fifth respondent, the case against them, automatically fell away since it was agreed that they had no case to answer.

In opposition, Counsel for first and second respondents countermanded that, to begin with, in the face of the admissions made by the applicant, it lost its rights to the appropriated farm in question which now vests in the State. Further, it has no legal standing to bring an action in terms s 14 of the High Court Act *[Chapter 7.06*]. They argue that applicant no longer has any direct, or substantial existing, future and contingent rights and interests in the acquired farm. Therefore the

only route it should have capitalized on is through the Administrative Court to compel the speedy resolutions to its application for delisting pending before the fourth respondent. They contend that since the applicant cannot bring fresh arguments based on the Administration Act [10:28] and s 68 of the Constitution, which they had not pleaded in their founding affidavit. It is their argument that their failure to do so, denied them an opportunity to research and respond accordingly. They therefore, move for the expunging of any submissions related to that line of argument, arguing that the applicants should be restricted to their founding affidavit as a case stands and falls on its founding affidavit.

In response to the issue of the jurisdiction of this court to determine land acquisition disputes, counsel for the first respondent argued that the Supreme court in the *Campbell* case above settled that position as captioned by MUREMBA J in the case *of CMAL, (Private) Limited* v Minister of Lands, And Rural Development and Another HH561-16citing MAFUSIRE J in the case of *Mangenje v TBIC Investments [Pvt] Ltd &Ors,*2013 (2) ZLR 534, wherein it was stated that , under the Constitutional amendment provision 16B the jurisdiction of the courts to adjudicate on any aspect of land acquisition other than on the amount of compensation payable was expressly ousted. The Respondents also relied on the authorities of *Mike Campbell (Pvt) Ltd & Anor V Minister Of National Security Responsible for Land, Land Reform & Resettlement & Anor 2008 (1) ZLR 17(S) and Commercial Farmers Union & Others v Minster Lands and Others 2010 (1) ZLR 576 (S).*

With regards to S.I. 62/2020 counsel for the first and second respondents submitted that the applicant is a company, a legal persona, with no human form, so it cannot call itself black indigenous in order to qualify under the exemption provided by that Statutory instrument. As such the right to grant or refuse delisting is the prerogative of the Minister in compliance with the provisions stated there in. They further contend that courts have no power to summon a commission as the said enactment states that the final say in such disputes rests with the Minister. I must hasten, at this juncture to state that the respondents misconstrued the S.I.62/2020 with respect to the legal standing to sue as a company. SI 2020-062 Lands Commission (Gazzetted Land Disposal in Lieu of Compensation) regulations, 2020[CAP20:29] reads;

Identification of persons to whom these regulations apply:

4(1) these regulations apply to the following persons who, before agricultural land owned by them was compulsorily acquired under the Land Reform and Resettlement program , were the owners thereof under

a deed of grant or title deed or had completed the purchase of their farms from the state in terms of a lease with an option to purchase –

(a)-…….

(b)-…….

(d) Private Companies whose shareholding is wholly or predominantly owned by

(i) indigenous individuals, or (ii) ….)

So in my view, the respondents where within their rights as the said section speaks to their situation as a private company owned by indigenous people.

From that perspective, the issues that arise for determination are whether or not the applicant has satisfied the requirements of a declaratur and whether or not he is entitled to the relief sought? The determination of the first issue will inevitably dispose of the second. However it is pertinent to note that the admissions made by the applicant automatically disqualifies the relief sought in paragraphs four, six, seven and eight of his draft order. These inevitably, fall away.

On analysis, this is an application for a declaratory order statutorily provided for by the High Court Act [*Chapter, 7:06*] s 14. In terms of this section the High Court is bestowed with the powers to exercise its discretion to enquire into and then determine, existing, future and contingent rights and obligations if so called upon by any person with any of those vested rights and obligations notwithstanding that the person cannot claim any consequential relief. This has found expression in several authorities in this jurisdiction as well as in South Africa.

Section 14 High Court Act [*Chapter 7.06*], reads;

The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.

See the cases of *Agricultural bank of Zimbabwe t/a Agribank v Clemio Machingaifa and Anor*,SC-61-07 and *Johnsen v Agricultural Finance Corp* 1995 (1) ZLR 65(SC). In M*unn Publishing (Pvt) Ltd v ZBC 1994,(1) 337 (S) 343*, it was held that,

> "any interested person with a direct and substantial interest may approach the court for the determination of an existing, future and contingent right which could prejudicially affected by the decision of the court as the first step. The second rung of the test, is that the court must decide whether or not the case in question is one it should properly exercise its discretion."

The case of *Adbro Investment Co .Ltd v Minister of the Interior & Others* 1961(3) and *Johnson v AFC* 1995(1) ZLR 65(H) is illustrative of the position, that, despite the fact that no consequential relief is sought, justice or convenience demands that a declaration be made as to the existence of or the nature of a legal right claimed by the applicant or the respondent.

GREENLAND J, enunciated, in the case of *Mushishi v Lifeline Syndicate & Anor* 1990(1) ZLR 289 (H) at 289

> "…..Still as the facts reveal a competition for rights in respect of claims, justice, common sense, and good order require judicial confirmation as this issue and the seeking of a declaratory order was indicated."

Logically the applicant herein has an interest in the farm in question not only as a former holder of title but also because the delisting of the farm is a subject pending determination before a competent Statutory Functionary. So it cannot be overemphasized that he has a direct and substantial interest and that he has the right to invoke the powers of this court in terms of section 14 of [*Chapter. 7.06*].

Section 14 above, then enjoins this court to make an enquiry as to the existence of a current, future or contingent right and then make a determination. It thus follows, that in judiciously exercising my discretion in light of the above authorities, I am of the view that the applicants had indeed correctly conceded that the State after the listing and gazetting of the farm in question, is the current owner. Clearly, from the facts, evidence and submissions made by the parties, there are no more existing rights to talk about. The appropriation of the applicant's farm by operation of the law terminated whatever rights applicant had. Applicant cognizant of this undisputed fact, after putting up some battle as to the legality of the acquisition, tacitly acquiesced by then exploiting the avenue created by the promulgation of S.I. 62/2020 ,to have a second go at title. See, Na*val phase farming (Pvt) Ltd v Minister of Lands and Rural Resettlement and Others* SC50/18.

Having established the non-existence of any rights on the part of the applicant what remains is the enquiry of the future and contingent rights. Whilst semantically the words *current* and *future* are straight forward, the word *contingent* may need some elaboration. In common parlance,the word *contingent* is defined as dependent upon. This court cannot determine future rights. The future and contingents rights of the applicant are dependent on the outcome of their application for delisting pending before the fourth respondent. In turn it means that at this stage they are beyond

the scope of the jurisdiction of this court. The fourth respondent is seized with the prerogative of determining these rights. This court cannot jump the gun and snatch a matter before a competent functionary. In this case the applicant's right is contingent upon the succcess of its appeal to the Minister against the listing of its property.

In rendition, it suffices to note, whatever rights applicant had over the property terminated by operation of law, further augmented by the fact that they made an application to the fourth respondent which is pending determination. Sections 5(2) and 8(5) of SI 2020-062 Land Commission (Gazzetted Land Disposal in Lieu of Compensation) regulations, 2020 [*Chapter 20:29*] says, respectively that it is the Minister who chooses a committee to preside over such applications and it is the Minister with the final say.

In my view, this court can only confirm and not confer rights. The conferring of rights, *in casu*, is a preserve of the Minister who is the fourth respondent in terms of the piece of legislation that has been referred to and observed above. I am fortified in this stance by the dicta of SMITH J, in the *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt)* Ltd 1998 (1) ZLR (H), wherein, with reference to a declaratory relief, pronounced that, " it confirms the right of applicants, it does not confer rights".

It is crystal clear and agreed to by the counsel for the respondent in their opposing papers that, Applicant no longer has any rights to the property in question. As already stated he still awaits the restoration of the same but the discretion to grant or not is the domain of the fourth respondent. Whilst it is appreciated that the applicant may have a vested interest in the subject matter which is also pending before the Minister, it is irrefutable that it lost its rights over the same. This court therefore cannot declare rights that are not there. It cannot override the enactment which has vested the fourth respondent with the powers to deny or restore those rights unless it is sitting as a court of review when there are irregularities. As it stands the court cannot interfere with the un-terminated proceedings before a *quasi judicial* functionary. This was amply stated in *Doctors' for Life International* v *Speaker of the National Assembly and Or*s 2006(6) SA 416(CC) at para 37:

> "Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the process of other branches of government unless to do so is mandated by the Constitution."

The same was reiterated in. *International Trade Administration Commission* v *SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) at para 95:

> "Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government; courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy laden as well as polycentric."

The applicant's initial averment of challenging the legality of the acquisition lost steam along the way when they admitted that they did indeed lost their claim at the delisting of the farm stage. Moreover, by their very act of then submitting a fresh application in terms of the then new legislation which spoke to the redressing of land acquisitions of agricultural land previously owned by indigenous people, S.I 62 of 2020, they were tacitly acquiescing that the acquisition was proper. This line of argument was not developed and propagated at the hearing. As a result nothing turns on it.

Also see the comments made by Mafusire J in the *Mangurenje* case ,*supra* .where he stated that

> " …s 16B of Constitutional Amendment No. 17, in September 2005, was meant to have, and did have, retrospective application. It went as far back as 2000. All land as might have been identified by means of listing in the old Gazettes or Gazettes Extraordinary now belonged to the State." See *Vukutu (Private) Limited v Pride Kwinje and The Minister of Lands and Resettlement* HH364-10".

In this regard the applicant has failed to demonstrate that he is entitled to the declaratory relief sought. See *Chevhu Housing Cooperative and Others v Crest Breeders and Others* SC19/21.

SMITH J, in the *Econet (Pvt) Ltd v Telecel Zimbabwe (Pvt)* Ltd 1998 (1) ZLR (H), with reference to a declaratory relief, stated that, " it confirms the right of applicants, it does not confer rights".

DISPOSITION

The final analysis I am inclined to agree with the submission made by the respondents. No right has been exhibited as still in existence by the applicant. Applicant's rights were prescribed by operation of the law and are non-existent, they await restoration through due process of law and

by a competent body. It is also crucial to note, that the prerogative to grant or deny lies with Minister, as clearly outlined in S. I 62/2020.

Applicants still have a remedy before the Administrative Court which they are free to pursue. Guided by the *Econet* case above. This court's hands are fettered. It cannot confer the right sought by the applicants for the reasons accentuated herein. This court can only come in as Statutorily provided for as a court for review or appeal after a decision has been made by the fourth respondent at the instance of the aggrieved party. I am not convinced that applicant has made a case for the declaration of rights, rights he does not have in the first place.

As regards costs, whilst taking cognizant of the fact that an award of costs is within the discretion of the court, I am guided by the general principles and guidelines. These dictate that firstly, the successful party is entitled to costs. Secondly, that an award of costs at the legal practitioner and client scale is a drastic measure, one which should be sparingly resorted to and only in exceptional circumstances, where to the satisfaction of the court there has been an abuse the process of the court or for any other good reason. See, *Mudzimu v Municipality of Chinhoyi & Anor* 1986 1 ZLR 12 (HC) at 18C, *P. v C.* 1978 ZLR 80 at 88A.and*Gwinyayi v Nyaguwa* 1982 (1) ZLR 136 at 138F. In this case, I am not persuaded that a punitive order of costs is not justified as prayed by the respondent.

Accordingly it is ordered that;

The application is dismissed with costs.

Thompson Stevenson & Associates, Applicant's Legal Practitioners.
Civil Division of the Attorney General's office, for the first and second Respondents' Legal Practitioners
Sawyer and Mkushi, Legal practitioners, for the third, fourth and fifth Respondents' Legal Practitioners