GWENZI MHONDORO
versus
THE MINISTER OF LANDS, AGRICULTURE WATER AND RURAL RESETTLEMENT
and
THE ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 8 June 2021 & 12 September 2022

Opposed application – *Declaratur*

F Murisi, for the applicant
C Siqoza, for the 1st and 2nd respondents

MUSITHU J:

BACKGROUND

The application before the court is one for a *declaratur* initiated under s 85 (1) of the Constitution of Zimbabwe. The applicant challenges the constitutional validity of the Land Commission (Gazetted Land) (Disposal In Lieu of Compensation) Regulations, 2020 (S.I. 62 of 2020) (hereinafter referred to as the regulations). The regulations were promulgated by the first respondent on 13 March 2020 in terms of s 21 as read with s 17 of the Land Commission Act[1] (the Act). The applicant argues that the regulations violate his right to agricultural land, his right to property, his right to administrative justice and the right to be heard. The applicant also argues that the regulations are inconsistent with s 295 of the Constitution and are also *ultra vires* s 21 as read with s 17 of the Act. To that end the applicant seeks the following relief by way of *declaratur*:

> "IT IS DECLARED THAT:
> 1. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation) Regulations, 2020 (SI 62 of 2020) is declared to be inconsistent with Section 72 (2)(3) and (4) of the Constitution of Zimbabwe as read with sections 289 (b) and (f) and section 292 of the Constitution and therefore invalid in terms of the Section 2 of the Constitution of Zimbabwe.
> 2. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation) Regulations, 2020 (SI 62 of 2020) is declared to be inconsistent with section 71 (2) and (3) of the Constitution of Zimbabwe and therefore invalid in terms of Section 2 of the Constitution of Zimbabwe.

[1] [*Chapter 20:29*]

3. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation) Regulations, 2020 (SI 62 of 2020) is declared to be inconsistent with section 68 (1) of the 2013 Constitution of Zimbabwe and therefore invalid in terms of the Section 2 of the Constitution of Zimbabwe.
4. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation) Regulations, 2020 (SI 62 of 2020) is declared to be inconsistent with Section (2) of the Constitution of Zimbabwe and therefore invalid in terms of the Section 2 of the Constitution of Zimbabwe.
5. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation), Regulations, 2020 (SI 62 of 2020) is declared to be inconsistent with Section 295 of the Constitution of Zimbabwe and therefore a violation of the right to the protection of the law and the Supremacy of the Constitution and thus invalid in terms of the Section 2 of the Constitution of Zimbabwe.
6. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation) Regulations, 2020 (SI 62 of 2020) is ultra vires Section 21 as read with section 17 of the Land Commission Act [Chapter 20:29] and therefore invalid."

The application was opposed by both respondents. In his notice of opposition, the second respondent argued that he was improperly cited since he had no interest in the proceedings, save to act as counsel for the Government of Zimbabwe. He requested to be excused from the proceedings. At the hearing, Mr *Murisi* for the applicant conceded that the second respondent had been improperly cited. The second respondent was consequently excused from taking part in the proceedings. Any reference to the respondent herein shall mean the first respondent.

FACTUAL BACKGROUND

The applicant is a beneficiary of the land reform programme. On 13 October 2005, he was allocated a farm by the then Minister of State for National Security, Lands, Land Reform and Resettlement. The farm is described in the offer letter as subdivision 6 of Sholliver in Zvimba District of Mashonaland West province measuring approximately 79.125 hectares in extent (hereinafter referred to as the farm). That offer was made in terms of the Agricultural Land Settlement Act.[2]

The farm was previously owned by a company called Broxifield Enterprises Private Limited (the company), but it had since been acquired by the State. The company is owned by indigenous persons, meaning that the former owners of the farm are persons that qualify to reclaim title to their land under s 4 of the regulations. That feat would be achieved through an application to the respondent. The applicant feared that in the event of the company making such application, he and others in a similar position would be seriously prejudiced by the surrender of the land to previous owners.

[2] [*Chapter 20:01*]

The applicant averred that the land reform programme was initiated as a means of addressing past colonial injustices, which explained why the Government of Zimbabwe had no obligation to pay compensation for the land repossessed from the former settlers. The land issue was a matter of national interest, and any law that affected the rights of indigenous people over the land issue was of public interest. Indigenous companies or individuals affected by the land reform programme had recourse in the form of compensation from the Government.

According to the applicant, ss 3 and 4 of the regulations seek to dispose of the land to persons who, before the agricultural land owned by them was compulsorily acquired under the Land Reform and Resettlement programme, were the owners of such land under a deed of grant or title deed. It also applied to those people who had completed the purchase of their farms from the State in terms of a lease with an option to purchase.

Applicant's Case

The applicant's contention is that the regulations seek to reverse the land reform programme in that the persons who qualify under ss 3 and 4 thereof are entitled to claim back their land upon an application to the respondent. If such application were to succeed, then it would result in the eviction of the current lawful occupiers from their farms without any recourse.

The applicant further contends that the regulations violate s 95 of the Constitution since that section only entitles persons stated in ss 3 and 4 of the regulations to seek compensation from the State, and not the right to regain title to their former land. The applicant further avers that s 72 (3) of the Constitution vests ownership of all agricultural land in the State. The regulations had the effect of reversing that constitutional position by vesting ownership in the persons specified in s 4 of the regulations.

The applicant also contended that the regulations violated s 71(3) of the Constitution. He argued that once a person was allocated land under the land reform programme, that land constituted property which entitled the occupier to property rights under s 71 of the Constitution. The regulations unlawfully deprived such occupiers of their rights and interest to such land without a proper law of general application in breach of s 71(3) of the Constitution. The law of general application required the acquiring authority to give reasonable notice of any intention to acquire property to any person whose rights or interests would be affected by the acquisition and payment of fair compensation before acquiring or within a reasonable time after acquiring. The regulations were therefore inconsistent with s 292 of the Constitution, and consequently invalid to the extent of the inconsistency.

The applicant also averred that the regulations took away his rights to administrative justice and to be heard in terms of ss 68 and 69 of the Constitution. He averred so in light of the fact that there was no indication of what would happen to all persons adversely affected by the operationalization of that law. Chances were that those people in his position would be evicted and left without any recourse.

The applicant also submitted that the respondent acted in terms of s 21 as read with s 17 of the Land Commission Act in making the regulations, yet the Land Commission Act did not give the respondent the power to make such regulations. The respondent therefore acted *ultra vires* the said law. The regulations themselves were also *ultra vires* the same law.

The applicant averred that it was his desire to seek the protection of the public interest and achieve real and substantial justice on behalf of the marginalised members of society in the same position as him. Many people would be adversely affected by the illegality if the regulations were allowed to stand. The regulations were clearly against the wellbeing of the beneficiaries of the land reform and the public interest. In terms of s 44 of the Constitution, the State was obliged to protect every fundamental human right and freedom regardless of one's social and economic standing.

The applicant further averred that the regulations amounted to a public wrong as they violated rights under Chapter 4 of the Constitution. The public had an interest in having that wrong corrected by the courts. The applicant was seeking a vindication of the rule of law and the supremacy of the Constitution.

Respondent's Case

The opposing affidavit was deposed to by the Permanent Secretary in the respondent's ministry. He stated that the fast track land reform programme introduced around 2000, was intended to correct land imbalances caused by the colonial regime, through the compulsory acquisition of agricultural land and its redistribution to landless Zimbabweans. The exercise was never intended to dispossess indigenous black Zimbabweans of their land. In order to surmount the challenges caused by continuous resistance and myriad court challenges, the Government acquired all agricultural land and vested it in the State through Constitutional Amendment No. 17. That amendment also contained a list of all the farms that were gazetted and acquired by the State.

Because of the fast track nature of the programme, two sets of farms that were not intended for acquisition were also included in the list of the farms gazetted and acquired by the State. These were the farms owned by indigenous Zimbabweans and those protected under the

Bilateral Investment Protection and Promotion Agreements (BIPPA). Owners of the first category of farms were facing three major challenges, that is: they could no longer exercise proprietary rights over land they purchased legitimately; they could not access lines of credit from banks as they could not utilise the farms as collateral; the farms could not be sold or transferred as they were acquired agricultural land.

Before the coming into effect of Constitutional Amendment No.17, the Ministry of Lands would simply delist the farms that had been erroneously acquired or gazetted. However after the coming into force of the Constitutional Amendment, the delisting route was no longer feasible. This is because the amendment included all previously gazetted farms including those that had been delisted. It meant that all the farms that the Government had not intended to acquire were included in the process.

Several ways of rectifying this anomaly were mooted. One approach was for the affected farmers to approach the courts for the delisting of their farms, with the Ministry of Lands supporting such a request. That approach had its own challenges. The upliftment of the endorsement of the title deed did not restore ownership to the affected farmer. This was because the land remained acquired in terms of the Constitutional Amendment and s 72(4) of the new Constitution. Further, delisting through the courts was considered to be tantamount to an amendment of the Constitution through the courts. It was in view of these legal impediments that delisting was considered not to be a competent route for the restoration of proprietary rights. That explained the birth of the regulations.

According to the respondent, s 295 of the Constitution provided for the compensation of indigenous Zimbabweans whose agricultural land was acquired as well as those persons whose land was protected under BIPPA at the time of acquisition. Of the 440 indigenous farms acquired, 90 were allocated to new beneficiaries, while the remaining 350 were never reallocated with the owners still retaining possession. With respect to those protected by BIPPA, a total of 281 farms were acquired with a combined hectarage of 1 124 512 hectares. Government had an obligation to pay compensation for improvements in respect of the acquired farms.

According to the respondent, s 293 of the Constitution provides for the alienation of land by the State including for value, transfer of ownership and lease of agricultural land. That provision allows the State to sell land and even issue title deeds for the land sold. In order to restore the proprietary rights of individuals who were erroneously affected by the acquisition

of the farms falling under the said categories, there was need to issue title deeds to those affected persons. It was therefore wrong to allege that the regulations violated the Constitution.

The respondent denied that the regulations violated the Constitution, insisting the applicant had adopted a narrow interpretation of the law. The applicant had also failed to demonstrate in what way the impugned law would adversely affect his rights since legal safeguards were already in place.

The Submissions

In his oral submissions, Mr *Murisi* argued that the respondent aborted the delisting approach of returning land that had been erroneously acquired or gazetted because it was tantamount to amending the Constitution through the backdoor. That position had not changed since the regulations had the same effect of amending the Constitution. Alienation of land could not be achieved through a Statutory Instrument. All persons affected had adequate protection under s 295 of the Constitution. Counsel further submitted that the respondent's decision was final, thus denying interested persons the enjoyment of their rights under ss 68 and 69 of the Constitution. He also argued that s 21 of the Act was limiting in its scope and did not cover matters that the respondent sought to regulate through the regulations.

In response, Ms *Siqoza* for the respondent submitted that s 17 of the Act provided for alienation of land, and it was in terms of that law that the respondent had acted. She further submitted that the regulations were concerned with matters of procedure and had nothing to do with alienation of land. Counsel further submitted that the alleged violation of the right to a fair hearing was rather far-fetched. The right to be heard did not exist where the owner of property decided what to do with their property.

In any event, there was a process to be followed in the event that the respondent decided to withdraw an offer letter. The holder of the offer letter would be notified in writing before the actual withdrawal was done. At least that common law position safeguarded such holders of offer letters and they could not be ambushed so to speak. The principles of natural justice required the respondent to follow due process failing which the aggrieved party could approach the court for appropriate relief. For that reason, the applicant had no reason to worry about the intentions of the law.

Analysis

The much maligned regulations were made in terms of s 21 as read with s 17 of the Land Commission Act. It is instructive to analyse these two sections at the outset. Section 21 states as follows:

> **"21 Regulations under Part IV**
> (1) The Minister shall have power to make such regulations as he or she may deem expedient to give force or effect to this Part or for its better administration.
> (2) The appropriate Minister may make regulations in terms of subsection (1) providing for—
> (*a*) limiting the number of pieces of land that any person may own or hold for farming or other purposes;
> (*b*) limiting the size of any piece of land that may be owned by any person for farming or other purposes and, in so doing, the Minister may fix the size of any such piece of land according to the Natural Region in which such land is located or according to such other criteria as he or she considers appropriate;
> (*c*) restricting the right of—
> (i) individuals who are not indigenous citizens of Zimbabwe to own, lease or otherwise occupy State land in Zimbabwe;
> (ii) individuals who are not residents or citizens of Zimbabwe, or companies or bodies corporate whose activities are controlled by individuals who are not resident in Zimbabwe, to own, lease or otherwise occupy land in Zimbabwe."

Section 17 of the same Act deals with the lease or other forms of alienation of State Land. It states as follows:

> "**17 Lease or other alienation of State Land**
> (1) The Minister may, after consultation with the Commission and with the approval of the President, lease, sell or otherwise dispose of State land for such purposes and subject to such conditions as he or she may determine.
> (2) Land may be leased or alienated to a single individual, a single corporate body, a single household or to two or more persons jointly."

Having set out the components of the law in terms of which the regulations were made, I will in turn proceed to determine whether the regulations suffer from the legal infirmities as alleged herein.

Whether the regulations are ultra vires s 21 as read with s 17 of the Act and s 293 of the Constitution.

The critical issue is whether the respondent's powers to make regulations is limited to the matters stated in terms of s 21 (2) of the Act as argued for the applicant, or it is unlimited as submitted on behalf of the respondent. The applicant's contention was that the Act does not give the respondent powers to make regulations that provide for the giving back of title to land to former land owners under any circumstances. It was submitted on behalf of the respondent that a clear reading of s 21 showed that the respondent had powers to make regulations for any matter contained in Part IV of the Act including those matters listed in s 21 (2).

It is clear from a reading of s 21(1) that the respondent is endowed with powers to make regulations to deal with matters specified in Part IV of the Act. Indeed the heading to s 21 refers to *"Regulations under Part IV"*. Part IV of the Act deals with *"Powers of minister in relation to State land generally"*. Section 17 of the Act falls under Part IV of the same Act. Section

21 of the Act does not envisage the making of regulations whose scope is limited to the regulation of matters stated in s 21 (2), as argued on behalf of the Applicant. Rather, its scope is wide and inclusive of all the matters that are covered under Part IV of the Act.

Having made the above finding, a further critical issue that arises for consideration is whether the respondent can in the exercise of his powers under s 21 of the Act, make regulations whose effect is to provide for the lease or other form of alienation of State land. Section 3 of the regulations states that the object of the regulations is to provide for the disposal of land to persons referred to in s 4, who are, in terms of s 295 of the Constitution, entitled to compensation for acquisition of previously compulsorily acquired agricultural land. In other words, while the persons referred to in s 4 of the regulations are entitled to compensation for their land that was compulsorily acquired, the regulations seek to provide further relief to indigenous Zimbabweans who wish to reclaim title to their land that was compulsorily acquired.

What is clear from a reading of the regulations is that they provide a detailed procedure of the steps that have to be followed by the s 4 beneficiaries, in the process of reclaiming their land back.

It is common cause that the regulations were made in terms of s 21 of the Act as read with s 17 thereof. In her oral submissions, Ms *Siqoza* submitted that the regulations were simply concerned with procedure and they had nothing to do with alienation of land. According to her, the alienation of land was done in terms of s 17 of the Act. That submission contradicted the submissions made in para 14 of the respondent's heads of argument, where it was stated:

> "14. It is respectfully submitted that the 1st Respondent has power to make regulations with regards to the alienation of agricultural land and SI 62 of 2020 is therefore not ultra vires section 21 as read with section 17 of the Act." (Underlining for emphasis).[3]

In determining the lawfulness of the respondent's conduct, one needs to start by looking at the Constitutional basis of the respondent's actions. It was submitted on behalf of the respondent that the State holds ownership rights over agricultural land and that includes the right to alienate and lease agricultural land. According to the respondent, s 17 of the regulations must be read in harmony with ss 289, 293 and 295 of the Constitution. I agree. Section 289 deals with the principles guiding policy on agricultural land. Section 293 deals with the alienation of agricultural land by the State, while s 295 is concerned with compensation for acquisition of previously acquired agricultural land.

[3] Page 84 of the record of proceedings

Sections 289, 293 and 295 of the Constitution provide a framework that must guide the alienation of agricultural land by the State. Section 293 is specific to the alienation agricultural land by the State. It reads as follows:

> **"293 Alienation of agricultural land by State**
> (1) The State may alienate for value any agricultural land vested in it, whether through the transfer of ownership to any other person or through the grant of a lease or other right of occupation or use, but any such alienation must be in accordance with the principles specified in section 289.
> (2) The State may not alienate more than one piece of agricultural land to the same person and his or her dependants.
> (3) An Act of Parliament must prescribe procedures for the alienation and allocation of agricultural land by the State, and any such law must be consistent with the principles specified in section 289." (Underlining for emphasis).

The key issue that warrants interrogation is whether the respondent can make regulations that provide for the alienation or disposal of agricultural land outside the parameters set out by s 293 of the Constitution. In other words, could it have been the intention of the Legislature that the respondent could make regulations providing for the lease or other alienation of State land in terms of s 17 of the Act, while at the same time requiring that procedures for the alienation and allocation of agricultural land by the State be spelt out in an Act of Parliament, in line with s 293 of the Constitution. I do not believe that was the intention of the Legislature to provide two parallel structures to regulate the alienation of agricultural land for purposes of recompensing indigenous land owners whose land was compulsorily acquired. After all, agricultural land is vested in the State.

Further, one cannot divorce matters of procedure and alienation as suggested by counsel for the respondent. Indeed counsel for the respondent had difficulties in trying to reconcile the procedure she claimed was set out in the regulations, and the alienation process she claimed was set out in s 17 of the Act. Alienation of land does not occur in a vacuum. It must be carried out through a well-defined procedure to avoid chaos. It is clear from a reading of s 293 (3) that the procedure for alienation and allocation of agricultural land by the State must be prescribed through an Act of Parliament and not through regulations.

Counsel for the respondent did not suggest to the court that there is a separate process through which the respondent may alienate agricultural land other than through s 17 of the Act, as read in consonant with sections 293 and 289 of the Constitution. If according to respondent's counsel, the alienation of land for purposes of s 17 of the Act is entrenched in s 293 of the Constitution, then it follows that s 17 must be read in accord with s 293 of the Constitution.[4]

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[4] See *Democratic Assembly for Restoration and Empowerment & 3 Ors* v *Saunyama & 3 Ors* CCZ/19 at page 11 of the cyclostyled judgment, where MAKARAU JCC writing for the Constitutional Court bench held as follows:

The two sections substantively deal with the same matters. Any interpretation that results in a discord between s 17 of the Act and s 293 of the Constitution would render s 17 of the Act unconstitutional. It follows that while s 21 of the Regulations permit the respondent to make regulations encompassing matters covered in Part IV of the Act, such regulations cannot extend to matters concerned with the alienation of agricultural land by the State.

Having determined that the procedure for alienation and allocation of agricultural land by the State must be prescribed through an Act of Parliament and not through regulations, it follows that the regulations are unconstitutional as they are inconsistent with s 293 as read with s 289 of the Constitution. Further, the regulations are *ultra vires* s 21 as read with s 17 of the Act as they seek to regulate matters which must be regulated through an Act of Parliament. The respondent does not enjoy the powers to make regulations that concern the alienation of agricultural land by the State. In short, the regulations have no legal foundation and must fall on that basis. It is pointless for this court to then interrogate the other perceived constitutional violations once the court determines that the regulations are bereft of any legal foundation.

In coming to this conclusion I am cognizant of the provisions of s 175 of the Constitution as read with s 31 of the Constitutional Court Rules[5], as regards the further progression of this matter in connection with the confirmation of the order of the constitutional invalidity of the said regulations.

COSTS

Neither party addressed the court on the issue of costs. This is a case of public interest, and courts are slow to make an order of costs in public interest litigation. It is therefore befitting that each party shall bear its own costs.

> "The correct approach of presuming constitutionality is to avoid interpreting the Constitution in a restricted manner in order to accommodate the challenged legislation. Instead, after properly interpreting the Constitution, the court then examines the challenged legislation to establish whether it fits into the framework of the Constitution.
> This approach gives the Constitution its rightful place, one of primacy over the challenged legislation. The Constitution is properly interpreted first to get its true meaning. Only thereafter is the challenged legislation held against the properly constructed provision of the Constitution to test its validity. In other words, one does not stretch the Constitution to cover the challenged legislation but instead, one assesses the challenged law, and tries to fit it like a jigsaw puzzle piece into the big picture which is the Constitution. If it does not fit, it must be thrown away. (See Zimbabwe Township Development (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983(2) ZLR 376 (S). (Underlining for emphasis).

[5] Statutory Instrument 61 of 2016

DISPOSITION

Resultantly it is ordered that:

1. The application for a *declaratur* succeeds.
2. The Land Commission (Gazetted Land) (Disposal in lieu of Compensation) Regulations, 2020 (SI 62 of 2020) are *ultra vires* section 21 as read with section 17 of the Land Commission Act [*Chapter 20:29*], and s 293 of the Constitution and consequently invalid.
3. Each party shall bear its own costs.

Murisi and Associates Legal Practitioners, legal practitioners for the applicant
Civil Division of the Attorney General's Office, legal practitioners for the first and second respondents