

**Andrew Ngoni Chirikure
And
Solomon Gwashavanhu
And
Dimus Davis Chngunda
Versus
Kenmast Farming (Pvt) Ltd
And
Boheke Farming (Pvt) Ltd
And
Farukayi Chikomba
And
Officer-In-Charge,
Zimbabwe Republic Police Norton
And
Commissioner Of Police
And
Minister Of State For National Security,
Land Reform And Resettlement**

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE , 12, 18, 31 October, 7 and 25 November 2005

Urgent Chamber Application

Mr *Matsunge*, for the applicant
Mr *Masterson*, for 1st & 2nd respondents
Miss *Sweto*, for 3rd to 6th respondents

UCHENA J: The applicants in this case are resettled farmers who were evicted from a farm on which they had been settled by the acquiring authority. The eviction was ordered by PATEL J in HC 3216/05. The eviction was based on their offer letters being held to be invalid because they were issued prior to the coming into effect of the Constitutional Amendment Act No. 17/2005 herein after called the Constitutional Amendment Act. They have now been issued with fresh offer letters dated 26th September 2005. In paragraph 5 of his order JUSTICE PATEL had ordered as follows: -

a "In the event of any relevant change of circumstances affecting the respective rights of the parties, any such affected party shall be at liberty to approach this court with view to seeking such order or relief as may be appropriate."

In view of the new offer letters the applicants have made this urgent application. The first respondent is the former owner of the farm in question. The second respondent was the 1st respondent's lessee which was conducting farming operations on Farnley farm.

The third respondent is the chief lands officer for Mashonaland West. The fourth respondent is the officer-in-charge of Z.R.P. Norton being cited for purposes of enforcing the orders to be granted by this court. The fifth respondent is the Commissioner of Police in his capacity as Head of the Zimbabwe Republic Police. The sixth respondent is the Minister-in-charge of Lands, Land Reform and Resettlement. He is the acquiring authority.

The applicants seek the following orders: -

1. That the acquisition of Farnley farm in the District of Chegutu in terms of the acquisition order published in the Gazette on the 29th July 2005, remained unconfirmed and was overtaken by the promulgation of the Constitution of Zimbabwe Amendment No. 17 of 2005 on the 14th of September 2005.
2. By virtue of Section 16B(2) of the Constitution of Zimbabwe, the entirety of the said Farnley Farm was duly acquired by and vested in the State with effect from the 14th September 2005.
3. The State is therefore entitled with effect from the 14th September 2005, to allocate lease or otherwise dispose of the said Farnley Farm in accordance with the Agricultural Land Settlement Act [*Chapter 20:01*] or the Rural Land Act [*Chapter 20:08*] or such other law as may be applicable.
4. That the letters of offer dated 26th September 2005 from the 6th respondent to the 1st, 2nd and 3rd applicants were issued after the said Farnley Farm was acquired by the State and are accordingly of legal force and effect.
5. That at the present time the 1st, 2nd and 3rd applicant's have been lawfully granted or allocated the right to occupy subdivisions 1, 2 and 3 of the said Farnley Farm and they therefore have the right or entitlement to enter upon or occupy the said farm or any portion thereof.
6. From the date of the offer letters of 26th September 2005 the 1st and 2nd respondents became unlawful occupiers of subdivisions 1, 2 and 3 of Farnley Farm which has been allocated to the 1st, 2nd and 3rd applicants.
7. The 1st and 2nd respondents or their agents shall vacate Farnley Farm.
8. The 1st and 2nd respondents or their agents shall not in any way interfere with the farming operations of the 1st, 2nd and 3rd applicants on the property or with the activities of the applicant's officers, workers, agents and contractors on the property.
9. In the event of any inconsistencies between this order and any previous orders in this matter this order shall prevail over any such order.
10. The 1st and 2nd respondents shall pay costs of this application.

The applicants later applied to include an order that any appeal against this court's order shall not suspend the operation of this order. I must point out from the outset that such an order would be incompetent as it would have the effect of prejudging the issue of an appeal which may or may not be noted without hearing the parties on the merits of the appeal.

The applicant's draft order follows closely the order granted in HC 3216/05.

The parties first appeared before me on the 12th October 2005. The case was postponed to the 18th October for the respondents to file opposing papers. On the 18th October at 2.30 p.m. the 1st and 2nd respondents did not attend the hearing. I granted the applicant's order in default. It however turned out that Mr *Masterson* for the first and second respondents had been referred to court where I was to deliver judgment at 3.00 p.m. in an opposed case in which one party was represented by Mr *Anderson*. My clerk had mistaken Mr *Masterson* for Mr *Anderson*.

The 1st and 2nd respondents applied for rescission of the default judgment in terms of order 49 Rule 449(1) of the High Court Rules 1971. The 1st to 3rd applicant's counsel opposed the application. Counsel for the 3rd to 6th respondents did not oppose the application. Even though the application did not strictly comply with the rules I granted the application for rescission as Rule 449(1)(a) authorises the court or a judge to *mero motu* rescind or vary any judgment or order which was erroneously sought or erroneously granted in the absence of any party affected thereby. In my view this was a proper case for me to rescind the order granted on 18th October 2005 *mero motu* as the mistake was caused by my own clerk. I was also satisfied that I could exercise that power even in circumstances where the 1st and 2nd respondents had applied for rescission I refer to the case of *Banda v Pitluk* 1993(2) ZLR 60 in which that procedure was followed by ROBINSON J.

After rescinding the default judgment I ordered the parties to file their papers by stipulated dates and set down the case for hearing on 7 November 2005.

The applicants' case is based on their having been issued with new offer letters dated the 26th September 2005 after their previous offer letters dated 8th September 2005 which were issued after a valid section 8(1) acquisition order had been served on the respondents on the 29th July 2005, were held to be invalid. Their prayer is to be now allowed to go back to the farm as they now hold valid offer letters. They also seek the eviction of the 1st and 2nd respondents.

The 1st and 2nd respondents opposed the applicant's application on the following grounds: -

1. That the applicants have no *locus standi* to make this application as they are not owners of the farm and are not in possession of it.
2. That the 1st and 2nd respondents were allocated the land by the Chegutu District land committee in 2002.
3. That the Minister of Lands and Land Resettlement did not comply with section 3 of the Administrative Justice Act No. 12 of 2004 [*Chapter 10:28*] if its intention in offering the land to the applicants was to evict the 1st and 2nd respondents.
4. That there is now no law entitling the acquiring authority to evict the 1st and 2nd respondents as section 16B(3) of the Constitutional Amendment Act No. 17 of 2005 provides that laws regulating the compulsory acquisition of land in force on the appointed day shall not apply in relation to land referred to in section 2(a).

The 1st and 2nd respondents concede that the issuance of new offer letters constitutes the change of circumstances referred to in PATEL J's order entitling the applicants to come back to this court to seek such order or relief as may be appropriate. They also concede that the land now belongs to the 6th respondent but however content that the 6th respondent cannot give the applicants possession of the land without first evicting the current occupiers of the land.

The 3rd to 6th respondents do not oppose the applicant's application. The 6th respondent in his affidavit explains that he had allocated the land to the applicants prior to the coming into effect of the Constitutional Amendment Act. When his offer letters to the applicants dated 8th September 2005 were declared invalid in HC 3216/05 he rectified that situation by issuing new offer letters on the 26th September 2005. He prays that the applicant's application be granted.

The 1st and 2nd respondents also objected to being made co-respondents with the 3rd to 6th respondents whose interests are opposed to theirs. They also challenged the 6th respondent's authority to issue offer letters.

The 6th respondent's response was that he is entitled to issue offer letters in terms of section 8(2) of the Land Acquisition Act [*Chapter 20:10*] and Common Law. The 1st and 2nd respondent's counsel conceded the acquiring authority's common law right to allocate land which belongs to the state provided he complies with section 3 of the Administrative Justice Act.

Counsel for 6th respondent urged the court to concentrate on the application and ignore issues which should be properly raised by way of review. I agree with Miss Tsveto that the challenge to the 6th respondent's issuance of offer letters can only be raised by way of applying for the review of the acquiring authority's decision. I will therefore not pursue this issue.

The issues in this case are: -

1. Do the applicants have *locus standi* to apply for the eviction of the 1st and 2nd respondents?
2. What is the effect of section 16B(3) of the Constitutional Amendment Act on Sections 7, 8 and 9 of the Land Acquisition Act [*Chapter 20: 10*] and the issuance of new offer letters dated 26 September 2005.
3. Whether or not the 1st respondent was ever allocated what Mr *Masterson* called the remaining extent of Farnley Farm.
4. Whether or not there has been a misjoinder of the parties.

Locus Standi

On the issue of *locus standi* the applicants' counsel submitted that applicants were authorised by JUSTICE PATEL to come back to this court if there were changes entitling them to apply to be granted orders redefining their rights to Farnley Farm. It must be pointed out that the invitation to come back to court if there were changes does not confer legal capacity on the applicants. One's legal capacity emanates from his rights in respect of the cause of action. Its common cause that there are changed circumstances. Mr *Masterson* submitted that the fact that they are not in possession of the farm means they have no *locus standi* to evict the 1st and 2nd respondents. In my view sight must not be lost of the fact that they were in possession prior to the court's order in HC 3216/05. It is in recognition of those rights that the court granted the order authorising either party to come back if circumstances changed. I am therefore satisfied that the applicants have *locus standi* to make this application in respect of all other aspects except the eviction of the 1st and 2nd respondents which is the responsibility of the acquiring authority. In the case of *Pedzisa v Chikonyora* 1992(2) ZLR 445(s) at 452 C-E GUBBAY CJ said:

"I prefer to approach the issue of whether the respondent's personal right against council ever became a real right, by taking account of the primary duty of a lessor. It is to deliver not only *vacua possessio* but also *commodus usus* (undisturbed use) of the property let – to transfer to the lessee the detention or physical control enabling him to use and enjoy it. See *Tshandii v City Council, Johannesburg*, 1947(1) SA 494(W) at 497, *Saffiantini V Mould* 1956(4) SA 150(E) at 153 D. That duty will not of course be fulfilled if, when the property is handed over, it is occupied by some other person whether he be a trespasser or there under colour of right. In such event the court, at the request of the lessee, will grant specific performance, that is, direct the lessor to give occupation of the property to the lessee. The lessor will be compelled to comply if it is in his power to do so, but where not, he will be ordered instead to pay damages."

In the present case we are not dealing with a lease but offer letters which are akin to but do not meet the requirements of a lease. Therefore the legal principles applicable to

the lessees' occupation of the leased property are applicable subject to the provisions of the Land Acquisition Act. The offer letters were issued to the applicants inviting them to take occupation of the farm within 30 days. For that reason they have made the acquiring authority the 6th respondent. The 6th respondent does not oppose the applicants' application. That however does not cede the 6th respondent's right to evict the 1st and 2nd respondents as the applicants should have had legal capacity to evict when they filed the application and a proper cession is necessary to give the applicants *locus standi*. The applicants only have a personal right against the acquiring authority as they have not yet been given vacant possession of the farm. They are in fact presently prohibited by a court order from entering the farm. As the applicants have not taken possession of Farnley Farm under the new offer letters they cannot claim possession from anyone else except the acquiring authority. They can however apply to be allowed to go back to the farm due to changed circumstances and in terms of section 8(2) of the Land Acquisition Act. In the case of *Bodasingh's Estate v Suleman* 1960(1) SA 288 N @ 290 H referred to in the case of *Pedzisa supra* FANNIN J said:

"Furthermore, a contract of lease (without delivery of possession) as clearly appears from this last case, does no more than entitle the lessee to claim possession from the lessor (and those of his successors who had prior notice of the lease), and from no one else, (except under cession of action). It is only after he has been in possession that he can protect that possession against the whole world, and in particular against the lessor's successors. In that case, the lessee's rights can be described as real rights. (emphasis added)

Apart from not opposing the applicants' application and praying that the applicants' application be granted the acquiring authority has not ceded his right to evict to the applicants. He has also not personally applied for the 1st and 2nd respondents' eviction. It therefore seems to me that the applicants have no *locus standi* to apply for the 1st and 2nd respondents' eviction as they do not now have possession of the farm and the right to evict has not been ceded to them. They however have *locus standi* to apply to this court for an order declaring their new offer letters to be valid and other consequential orders arising from the issuance of the new offer letters. They can also apply to be allowed to go back to the farm from which they had been evicted because they did not have valid offer letters. Section 8(2) of the Land Acquisition Act allows the acquiring authority to allocate land soon after the issuance of a section 8(1) acquisition order.

Effect of section 16B(3) of the Constitutional Amendment Act

The applicant's counsel Mr *Matsunge* submitted that the applicants are entitled to occupy the land as they now have valid offer letters and the Constitutional Amendment Act does not invalidate provisions of the law which deal with the post acquisition position.

Mr *Masterson* for the 1st and 2nd respondents submitted that sections 7, 8 and 9 have in their entirety been invalidated by section 16B(3) of the Constitutional Amendment Act.

Miss *Sweto* for the 3rd to 6th respondents submitted that the provisions of sections 8(2) and 9(1)(b) of the Land Acquisition Act were not invalidated by the coming into force of the Constitutional Amendment Act.

A close examination of section 16B (3) of the Constitutional Amendment Act is necessary. The section 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 purposes 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

- (a) shall not apply to court to challenge the acquisition of the land by the State and no court shall entertain any such challenge;
- (b) may, in accordance with 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, challenge the amount of compensation payable for any improvements effected on the land before it was acquired. (emphasis added)

The meaning of section 16B (3) (a) and (b) can be ascertained from the language used and the provisions of sections 16(1) and 18(1) and (9) of the Constitution. The intention of the legislature can be ascertained from the plain meaning of the words it used and a section of a statute should be construed in conformity with the rest of the statute. In this case the sections referred to in section 16(B) (3) are critical aids in interpreting section 16B (3).

My understanding of section 16B (3) is that:-

1. Provisions of any law referred to in section 16(1) of the Constitution regulating the compulsory acquisition of land
2. Which were in force on the appointed day
3. And the provisions of section 18(1) and (9) of the Constitution
4. Shall not apply in relation to the land referred to in subsection 2(a)
5. Except for the purpose of determining any question related to the payment of compensation referred to in subsection (2) (b).
6. The meaning is further clarified by the words “that is to say, a person having any right or interest in the land –
 - (a) shall not apply to court to challenge the acquisition of the land by the State and no court shall entertain any such challenge.

Paragraph (b) then provides for the exception which allows the right holder to challenge the quantum of compensation and the courts being allowed to entertain challenges over the quantum of compensation.

The Acts and sections affected by section 16B (3) are not specified. They have to be identified by reference to their provisions. It is obvious that the Land Acquisition Act is being referred to in this case. As the sections of the Land Acquisition Act affected by section 16B(3) are not specified it would be wrong to simply say sections 7, 8 & 9 have been invalidated as suggested by Mr *Masterson*. One has to look at the provisions of those sections and be satisfied that they fall under the provisions of section 16B (3) of the Constitutional Amendment Act.

If the sections had been specifically identified then they would have been wholly invalidated.

In the case of section 16B(3) one has to look at the sections mentioned by Mr *Masterson* and determine whether or not they were wholly invalidated from the appointed day.

Section 16B (3) clearly confines itself to provisions of the law emanating from section 16(1) of the Constitution and specifically providing for the compulsory acquisition of land and interest in land. In my view it does not extend to what happens after acquisition. The provisions relating to post acquisition situations therefore remain valid, subject to how they were worded. Section 16(1) (a) – (f) of the Constitution identifies the sections and provisions of the law which were invalidated. It provides as follows: -

“16(1) Subject to section 16A no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that

(a) requires-

(i) In the case of land or any interest or right therein, that the acquisition, is reasonably necessary for the utilization of that or any other land-

A.....

B.....

C.....

(ii)

(b) Requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any interest or right therein that would be affected by such acquisition and;

(c) Subject to the provisions of subsection (2) requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property; interest or right; and

(d) Requires the acquiring authority if the acquisition is contested to apply to the High Court, or some other court before, or not later than thirty days after the acquisition for an order confirming the acquisition; and

- (e) Enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition and to appeal to the Supreme Court;
- (f) except where the property concerned is land or any interest or right therein, enables any claimant for compensation to apply to the High Court, or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court."

Section 16(1) (a) provides for the creation of a law to enable the acquiring authority to compulsorily acquire land. That is how the Land Acquisition Act can be identified as a law falling under section 16(1) of the Constitution.

Section 16(1) (b) deals with the requirement for the acquiring authority to give reasonable notice of its intention to acquire. It therefore cannot be disputed that provisions relating to the acquiring authority giving the owner or right holder reasonable notice were invalidated from the appointed day.

Section 16(1) (c) provides for payment of compensation. This too could have been affected if it had not been saved by section 16B (3) (b).

Section 16(1) (d) provides for provisions entitling the expropriatee to challenge the compulsory acquisition in the High Court or some other court. This therefore affects the provisions on which the challenges to compulsory acquisition of land were being heard by the Administrative Court, High Court and Supreme Court. Provisions for a challenge in court of the compulsory acquisition have been specifically invalidated by section 16B (3) (a) of the Constitutional Amendment Act. The owner or holder of interest in land can no longer challenge the compulsory acquisition in court and no court shall entertain such challenge.

Section 16(1)(e) provides for the law under which the expropriatee can apply to the High Court or some other court for the prompt return of his property if the court does not confirm the acquisition of the property. This resulted in section 7(5) of the Land Acquisition Act [*Chapter 20:10*] being enacted. This would therefore affect the provisions of section 7(5) of the Land Acquisition Act and any provision for an appeal to the Supreme Court.

Section 16(1) (f) enables the enactment of laws providing for the expropriatee to apply to the High Court or any other court for compensation. This needs not detain me as provisions relating to compensation have been saved by section 16B (3) (b) of the Constitutional Amendment Act.

The above analysis of the provisions of section 16(1) (a) to (f) of the Constitution exhausts the provisions of the laws which provide for compulsory acquisition of land which are affected by section 16B (3). This clearly means provisions of the Land Acquisition Act which provide for what happens after acquisition has taken place are not affected by section 16B(3). This is because they are not referred to in section 16(1) of the Constitution. They therefore remain valid and operational.

Section 18(1) of the Constitution provides that subject to the provisions of the Constitution every person is entitled to the protection of the law. That right can be enforced through the courts. This subsection is now subject to section 16B (3) of the Constitutional Amendment. The protection against compulsory acquisition of land required for agricultural resettlement purposes has therefore been removed.

Section 18(9) of the Constitution also referred to in section 16B (3) relates to the expropriatee's right to be entitled to a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority. Again this confines section 16B (3) to the provisions providing for reasonable notice before acquisition, the compulsory acquisition and the adjudication of cases of compulsory acquisition.

I am therefore satisfied that provisions of the law relating to aspects other than those on notice before acquisition, the acquisition and adjudication are not affected by section 16B(3).

Mr *Masterson* referred to section 16B (6) of the Constitutional Amendment Act as indicating that provisions relating to notice to vacate and eviction are affected by section 16B (3). He says this is because Parliament is by section 16B (6) now expected to enact laws criminalizing the unlawful possession of State land. Counsel for the applicants and 3rd to 6th respondents argued that the provisions of sections 8(2) and 9(1) (b) of the Land Acquisition Act were not affected by section 16(B) (3) of the Constitutional Amendment Act.

Section 16(B) (6) provides as follows: -

16B (6) "An Act of Parliament may make it a criminal offence for any person, without lawful authority, to possess or occupy land referred to in this section or other State land."

This being a constitutional provision simply makes a law providing for the criminalisation of unauthorised possession or occupation of State land constitutional. My understanding of section 16(B)(6) does not support Mr *Masterson's* submission that this refers to future laws still to be made by Parliament. If Parliament in enacting section 16(B) (6) had in mind future laws it would simply have provided that Parliament may enact an Act making it a criminal offence to occupy or possess State land without lawful authority.

The fact that section 16B(6) refers to "An Act of Parliament" means this applies to existing and future enactments.

I must now consider the effect of section 16B (6) on sections 8(2) and 9(1)(b) of the Land Acquisition Act. Miss *Sweto* for the 3rd to 6th respondents said section 8(2) and 9(1)(b) are still in force. She further submitted that since the 1st and 2nd respondents were served with a section 8(1) Acquisition order on 29 July 2005 they are no longer entitled to be on the farm. She further submitted that the order setting aside the applicant's offer letters of the 8th September 2005 was wrongly granted as the Constitutional Amendment

Act did not invalidate action which had been lawful taken towards the acquisition of Farnely Farm. She submitted that the 1st and 2nd respondents were only held to be in lawful possession because applicant's offer letters had been invalidated.

Mr *Masterson* on the other hand submitted that the section 8(1) order of 29 July 2005 was overtaken by the Constitutional Amendment. I understand him to mean that the order became of no force on 14th September 2005. I am inclined to avoid deciding this issue as it has already been decided by PATEL J. I will only deal with aspects which have a bearing on the case before me.

Section 8(2)(b) of the Land Acquisition Act authorises the Acquiring Authority to demarcate survey and allocate the land immediately after he has made an order in terms of section 8(1).

Section 8(2)(b) provides as follows: -

"(2) Immediately after making an order in terms of subsection: -

(1) an acquiring authority may –

(a)

(b) In relation to any agricultural land required for resettlement purposes, exercise any right of ownership, including the right to survey, demarcate and allocate the land concerned for agricultural purposes without undue interference to the living quarters of the owner or occupier of that land."

(emphasis added)

This means immediately after the acquisition order was issued on 29 July 2005 the acquiring authority was entitled to allocate the land to the applicants provided he and the persons allocated the land did not interfere with the former owners living quarters. The acquiring authority remained entitled to do so after the coming into force of the Constitutional Amendment Act. I have already found that provisions providing for situations other than the notice acquisition and adjudication over compulsory acquisition were not affected by section 16 B (3) of the Constitutional Amendment Act. The acquiring authority as owner of Farnley Farm is also entitled to exercise the owner's rights in terms of common law.

I am aware that Mr *Masterson* also submitted that the use of common law rights by the acquiring authority would have to be subject to section 3 of the Administrative Justice Act No. 12 of 2004.

Miss *Sweto* for 3rd to 6th respondents and Mr *Matsunge's* response was that this cannot be raised in opposing papers it has to be raised by way of an application for review.

I agree that the Minister's decision to allocate the farm can only be properly looked at if an application for a review is made. I will therefore confine myself to a finding that he is entitled to allocate the land in terms of section 8(2) of the Land Acquisition Act and at common law.

I now proceed to determine whether or not the 1st and 2nd respondents are entitled to remain on the farm after the expiry of 90 days from the 29th July 2005 the date when the section 8(1) Order from which the acquisition in terms of the Constitutional Amendment Act took over was issued. Mr *Masterson* submitted that they are as section 9(1)(b) was invalidated by the Constitutional Amendment Act. Mr *Matsunge* and Miss *Sweto* submitted that they are not as the constitutional amendment did not affect section 9(1)(b) of the Land Acquisition Act.

Section 9(1)(b) provides as follows:-

- "1. The following provisions shall, subject to subsection (5) of section seven and subsections (2), (3), (4) and (7) of section 8, apply to the vacation by the owner or occupier of Land acquired in terms of this Act –
- (a)
 - (b) In relation to any agricultural land required for resettlement purposes, the making of an order in terms of subsection (1) of section eight shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty five days after the date of service of the order upon the owner or occupier, and if he fails to do so, he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

Provided that:-

- (i) "The owner or occupier of that land, may remain in occupation of his living quarters on that land for a period of not more than ninety days after the date of serve of the order.
- (ii) The owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i) and if he fails to do so he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment." (emphasis added)

The provisions of section 9(1)(b) provides for a post acquisition position. They do not therefore form part of the notice acquisition and adjudication provisions which were invalidated by section 16 B(3) of the Constitutional Amendment Act. The acquisition of the 29th July 2005 was in terms of the Land Acquisition Act. It is inconceivable to expect the legislature to have intended to invalidate acquisitions which had already taken place as its clear intention was to bring land acquisition to finality. The acquisition of 29th July 2005 was merely brought to finality by the Constitutional Amendment Act. Therefore section 9(1)(b) still applies in situations where a valid section 8(1) acquisition order in terms of the Land Acquisition Act was in existence before the coming into effect of the Constitutional Amendment Act.

This means when the 1st and 2nd respondents were served with the section 8(1) acquisition order on 29 July 2005 they were served with notice to vacate Farnley Farm

within 90 days from the date of notice (the 29 July 2005). This means they should have vacated Farnley Farm by the 31st October 2005 as the 29th and 30th October fall on a Saturday and Sunday.

In my view the coming into force of the Constitutional Amendment Act and its taking over from the section 8(1) order does not interrupt the notice period.

The 1st and 2nd respondents should therefore have wound up their farming operations within 45 days of the 29th July 2005, and vacated the farm by the 90th day after service of the section 8(1) Order.

Was the Farm Ever Allocated to 1st Respondent?

Mr *Masterson's* alternative argument was that the 1st and 2nd respondents were allocated the farm in 2002 so they are by virtue of that allocation entitled to remain on the farm. An examination of the 1st and 2nd respondents' opposing papers and annexures clearly reveal that this is not true. Several letters were written to the 6th respondent by 1st and 2nd respondents pleading that they be allocated part of the farm they referred to as the remaining extend. When I drew Mr *Masterson's* attention to this during submissions he conceded that the 1st and 2nd respondents were never allocated land by the acquiring authority. They merely made arrangements to down size with Chegutu District Land Committee. The 1st and 2nd respondents even acknowledge that this arrangement was not approved by the 3rd respondent who is the Chief Lands Officer for Mashonaland West.

The 1st and 2nd respondent's position is clearly revealed by paragraph 21 of their opposing affidavit in which Mr Sheriff who deposed the opposing affidavit on their behalf said:-

21 "I had made earlier representations to the Minister about continued occupation of the downsized portion of Farnley Farm but I never received an acknowledgement or reply to any of these letters, (see Annexures II, III, IV, and V at pages 102 – 108 of the record in previous case). Such disregard of these letters was with respect unlawful, unreasonable and unfair."

Annexure II is 1st respondent's application to be allocated land addressed to the acquiring authority dated 28 August 2005. This demonstrates that the 1st and 2nd respondents were prior to HC 3216/05 and this case clearly aware that they had not been allocated any land by the acquiring authority. They therefore knew that their arrangements with the Chegutu District Land Committee was not a valid allocation and can now not claim rights under that arrangement.

Annexure III was a letter by the 1st and 2nd respondents to the Agricultural Land Settlement Board in which they sought to be allocated Farnley Farm and complained of Chirikure and Others being given offer letters and feared they could be issued with other offer letters. This again demonstrates 1st and 2nd respondents' knowledge of the fact that

they had not been allocated the remaining extent of Farnley Farm by the acquiring authority.

In annexure 4A dated 29 May 2005 another letter to the 6th respondent, the 1st and 2nd respondents' representative in paragraph 14 said: -

"While we would like to retain ownership of the downsized part of Farnley already given us, we accept that all land may be nationalised and we are prepared to surrender the title deeds in return for a long lease. I am however most concerned about the prospect of being chased off by Chirikure and his companions as this seems to be an irregular private exercise by certain officials in the Ministry of Lands."
(emphasis added)

This letter proves that the remaining extent was never allocated to the 1st respondent. It remained its property until it was acquired on 29th July 2005. It does not make sense to allege that 1st respondent was allocated its own farm before it was acquired. It seems to me all that the Chegutu District Lands Committee had agreed to do was to recommend to the acquiring authority that the 1st respondent be allowed to keep the downsized portion as his own property. They could not have allocated him a property which was not to be acquired. Infact they had no authority to allocate land. This annexure also makes it clear that the applicants were the acquiring authority's preferred settlers and still are. They already posed a threat of taking over the farm before it was acquired on 29 July 2005. The 6th respondent was informed of what 1st and 2nd respondents thought were irregularities by Ministry of Lands Officials. After being so informed he issued them with offer letters dated 8 September 2005 which were set aside by PATEL J. He again issued them with new offer letters dated 26th September 2005. This makes it clear that the 6th respondent has made up his mind that the applicants be settled on Farnley Farm. The 1st and 2nd respondents' allegations against 3rd respondent are therefore not factually correct. In annexure 4A the 1st respondent was objecting to the acquisition of the farm by the 6th respondent yet he says he was not receiving responses from the Minister. The notice of intention to acquire and the subsequent acquisition must have been a clear message to the 1st and 2nd respondents. The section 8(1) order also saved as a notice to them in terms of section 9(1) (b) of the Land Acquisition Act. If the 1st and 2nd respondents continued to operate on the land ignoring the effect of the section 8(1) order then they took a risk against the clear provisions of the law.

In annexure 4(b) dated 23rd June 2005 the 1st respondent again wrote to the Minister of Lands the 6th respondent. In the letter Mr Sheriff said: -

"I have already filed an objection to the first listing in which I suggest that Farnley be taken, if I can be allowed to continue to farm the downsized part of the property as allocated to me by the Government officials in 2002. I am prepared to accept a long lease and understand that this will be granted in return for my title deeds.

I repeat that offer and ask you (sic) please clarify where I stand for the coming season because the District Administrator Chegutu, Minister Shamu and my M.P. Deputy Minister Nguni and others all tell me I must keep on farming."

This letter again confuses being allowed to downsize and being allocated land. When one downsizes and the land is not acquired he does not lose ownership of it and it cannot be allocated to him as it remains his property. The letter further points to 1st respondent's realization that it is only the 6th respondent who allocates land hence his pleas that the 6th respondent clarifies his position for the coming season in spite of his being urged to farm on by officials and named Ministers and politicians. It would seem 1st and 2nd respondents' persistence in farming on against the clear provisions of section 9(1) (b) of the Land Acquisition Act as they were prior to the coming into effect of the Constitutional Amendment Act and as they continue to provide thereafter as I have already found above is due to their being given a sympathetic ear by other officials. However the law clearly gives the responsibility to allocate land to the 6th respondent and no one else and the letter makes it clear that the 1st and 2nd respondents were aware of this hence their plea to the 6th respondent.

In Annexure 4C which is 1st and 2nd respondent's other letter to the 6th respondent dated 23rd June 2005 in paragraph 3, 1st respondent said: -

"On 2 July 2002 we received the letter from Arex Office in Chegutu, copy attached, verifying that the Lands Committee of Chegutu had confirmed the demarcation of Farnley Farm for compliance purposes." Again this letter demonstrates that the Minister never agreed to the local arrangements and that the local arrangement was for demarcation. The letter thereafter sates some Lands Officials were scouting for land for the 1st applicant. I have already said the 6th respondent has long demonstrated his insistence on allocating Farnley Farm to the applicants.

In Annexure 4D dated 16 August 2005, 1st and 2nd respondents' further letter to 6th respondent Mr Sheriff wrote: -

"On 23rd June this year I wrote to you seeking clarification of my position on this farm which was subject to a long series of section 5 notices in the Gazette and the Press commencing 20 May this year. Since then, and in the absence of any response from your offices a court order has been issued requiring three settlers Messrs Ngoni Andrew Chirikure, Solomon Gwashavanhu and Davis Changunda to vacate the farm."

On page 2 of the letter he said: -

"But I need to know where I stand and I need to know now.

My concern is this: -

May I continue to farm on Farnley or must I get off....."

The quest to know would have been quenched if 1st and 2nd respondents had taken care to consider the legal implications of section 9(1) (b) of the Land Acquisition Act. It spells out that they had 45 days to wind up farming operations and a further 45 days to vacate the property. First and 2nd respondents made these pleas before the Constitutional Amendment Act came into force after the section 8(1) Acquisition Order which is also a notice to vacate had been served on them. They can not therefore hide behind the Constitutional Amendment as the law was then clear and I have already found it remains so today. The answer they wanted was in the law explained above and that had been triggered by their receipt of the section 8(1) order of the 29th July 2005 issued by their addressee the 6th respondent. In the Supreme court's case of *Airfield Investments v Minister of Lands, Agriculture and Rural Resettlement & Others* SC 36/04 at page 13 MALABA J A commenting on the conduct of a farmer who continued farming after being served with a section 8(1) acquisition order said: -

"Similarly the court a quo was being asked by the appellant to sanction the continued illegal farming operations and occupation of the living quarters on the land despite the clear and unambiguous language of the Act to the effect that failure to cease occupation or use of the land at the end of forty five days from the date of service of the order of acquisition and of the living quarters at the end of ninety days from the date of service of the order of acquisition constituted a criminal offence."

It is therefore clear that when 1st and 2nd respondents wrote Annexure 4D their position at law was quite clear. They had to wind up farming operations within forty five days of the 29 July 2005 and vacate the farm's living quarters within ninety days of that date.

On the facts before me as demonstrated by 1st and 2nd respondents own letters to the Minister the 6th respondent Mr *Masterson's* submission that the 1st and 2nd respondents were in lawful occupation can not be correct, unless if its confined to the time that remained to vacate Farnley farm within 90 days. That time has now lapsed and they are now illegally occupying that farm. What they had were residual rights to wind up farming operations within forty five days and vacate the farm within 90 days. As already indicated those residual rights have now been terminated by the lapse of the stipulated periods.

Mr *Masterson* had in submission sought an order that the applicants be allowed to stay on the farm pending review of the Minister's decision to issue offer letters to the applicants. That request cannot be granted because the 1st and 2nd respondents' interests in Farnley Farm were terminated on 31st October 2005. They no longer have the *locus standi* to challenge the Minister's decision to offer the land to the applicants. The 6th respondent as the new owner of Farnley Farm can offer it to anyone he pleases.

I refer to the case of *Airfields Investments (supra)* at p 15 where MALABA JA said:

“The argument advanced by Mr *Matinenga* does not help the appellant because at the time it made the application for interim relief the statutory periods marking the duration of the existence of the rights it could have claimed had long expired. The appellant was no longer a member of the class of people intended by Parliament to benefit from the provisions of s9 (1)(b) of the Act.”

In this case the intended application for review will be made by persons who no longer have any rights or interest in Farnley Farm. Infact their continued occupation of Farnley Farm is illegal. The courts can not assist them to pursue their illegal occupation of the farm.

JOINDER

On the issue of Joinder Mr *Masterson* for the 1st and 2nd respondents submitted that the 1st and 2nd respondents should not have been joined with the 3rd to 6th respondents as their interests in this matter are conflicting. He suggests that the 3rd to 6th respondents should have been made co-applicants.

The 3rd to the 5th respondents did not file opposing papers so even if there was a misjoinder it did not cause the 1st and 2nd respondents any prejudice. In the case of the 4th and 5th respondents they were ordered by PATEL J in paragraph 4 to ensure that applicants do not breach the order granted in favour of 1st and 2nd respondents against the applicants. They were therefore property joined as respondents as any order altering or confirming the previous order must be brought to their attention. There is infact no conflict of interest between the 4th and 5th respondents and the 1st and 2nd respondents.

In the case of the 6th respondent Miss *Sweto* submitted that the Minister was properly made a respondent because the offer letters issued to the applicants require them to occupy the allocated land within 30 days failing which they may loose the land. She submitted that that makes the Minister a proper respondent.

Rule 85 of the High Court rules provides as follows: -

“Subject to rule 86 two or more persons may be joined together in one action as plaintiff’s or defendants whether in convention or in reconvention where-

- (a) If separate actions were brought by or against each of them, as the case may be, some common question of law or fact would arise in all the actions and
- (b) All rights to relief in the action whether they are joint, several or alternative, are in respect of or arise out of the same transaction or series of transactions.”

In the present case the applicants can enforce their right to the allocated land by either suing the Minister to grant vacant possession or the 1st and 2nd respondents for the redefining of their rights in view of the changed circumstances. The questions of law and

facts as to whether or not the 1st and 2nd respondents can be evicted would arise in both cases.

The rights to the relief claimed arise out of the same series of transactions. The series arise from the acquisition of Farnley Farm and its allocation to the applicants by the 6th respondent. The 6th respondent has brought about conflicting interests in Farnley Farm between the applicants and 1st and 2nd respondents. It is therefore my view that the 6th respondent was properly joined as a respondent.

If I am wrong in this finding then rule 87(1) would be applicable.

It provides as follows: -

“(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of persons who are parties to the cause or matter.”

The rule clearly entitles the court to determine the cited parties rights inspite of misjoinder though in terms of rule 87(2) the court may order an improperly cited party to cease to be a party or a person who should have been joined to be joined though a person can not be ordered to be joined as a plaintiff (applicant) without his consent, signified in writing or any other manner acceptable to the court. This factor usually determines whether or not a necessary party can be joined as a co-applicant or a respondent.

As indicated earlier I am of the view that the applicants are entitled to join the 6th respondent as a co-respondent to the 1st and 2nd respondents. The fact that their interests are not in harmony is no bar to their joinder.

VALIDITY OF THE OFFER LETTERS OF 26TH SEPTEMBER 2005

Mr *Masterson* submitted that the Minister had no authority to issue offer letters as he did not comply with section 9 of the Agricultural Land Resettlement Act. Miss *Tsveto's* response was that section 9 of the Agricultural Land Settlement Act applies to leases and an offer letter is not a lease.

I agree with Miss *Sweto* that an offer letter is not a lease. This was clearly stated by ZIYAMBI JA in the case of *Airport Game Park (Pvt) Ltd and Anor v Kenny Karidza and the Minister of Lands, Agriculture and Rural Resettlement* SC 18/04 at page 9 of the cyclostyled judgment were she said: -

“Although the duration of the lease need not be specified for a lease to be constituted, the same cannot be said of the quantum of the rental and when it should be paid. In the absence of any provision setting out the rental, the letter cannot be said to constitute a lease.

Accordingly no lease having been granted, the provisions of section 9 of the Agricultural Land Resettlement Act did not apply and cannot avail the appellants as a basis on which to impugn the validity of the letter of offer.”

In view of this finding by the Supreme Court it cannot be said that the 6th respondent did not have authority to issue offer letters to the applicants. The offer letters issued to the applicants on the 26th September 2005 are therefore valid.

THE ORDER TO BE GRANTED

The applicants' draft order was styled after the orders granted under HC 3216/05. There is no need for me to deal with orders already granted under the clear understanding that if there was a change of circumstances the affected party could approach this court to seek such order or relief as may be appropriate, unless the order is relevant to the changed circumstances and correctly reflects the legal positions as discussed in this judgment.

I will therefore only grant orders sought under paragraph 4, 5, 6, 7, 8, 9 and 10 of the draft order. The orders sought will be amended to make them legally correct and to remove grammatical inaccuracies.

It is therefore ordered that: -

1. The letters of offer issued to the 1st, 2nd and 3rd applicants by the 6th respondent on 26th September 2005 are hereby declared to be valid and of legal force and effect.
2. That the 1st and 2nd respondents were served with notices to vacate Farnley Farm on 29th July 2005 when the section 8(1) acquisition order was served on them.
3. That the 1st and 2nd respondents' notice period lapsed on 31st October 2005. They are no longer entitled to possess or occupy subdivisions 1, 2 and 3 of Farnley Farm. They are therefore ordered not to interfere with the applicants' use of subdivisions 1, 2 and 3 of Farnley farm. They are only entitled to remain in the farm house pending their eviction by the acquiring authority.
4. That the 1st, 2nd and 3rd applicants are now entitled to re-enter and occupy subdivisions 1, 2 and 3 of Farnley Farm except the farm house pending the eviction of the 1st and 2nd respondents by the acquiring authority..
5. The 1st and 2nd respondents or their agents shall not in any way interfere with the 1st, 2nd and 3rd applicants' farming operations on subdivisions 1, 2 and 3 of Farnley Farm.
6. In the event of any inconsistencies between this order and any previous orders in this case, this order shall prevail over any such orders.

7. The 1st and 2nd respondents shall pay the costs of this application.

Mutezo & Partners, the applicant's legal practitioners
Coghan, Welsh & Guest, 1st and 2nd respondent's legal practitioners
Civil Division of the Attorney-General's Office, 3rd to 6th respondent's legal practitioners