REPORTABLE (18)

Judgment No. SC 31/10
Const. Application No. 81/10

(1) COMMERCIAL FARMERS UNION
(2) BATELEURS PEAK FARM HOLDINGS (PRIVATE) LIMITED
(3) CHIREDZI RANCHING COMPANY (PRIVATE) LIMITED
(4) LOUIS KAREL FICK
(5) ANDREW PAUL ROSSLYN STIDOLPH
(6) LIPGREEN FARMING (PRIVATE) LIMITED
(7) GRANDEUR RANCHING (PRIVATE) LIMITED
(8) BLUE RANGES (PRIVATE) LIMITED
(9) CHIRIGA ESTATES (PRIVATE) LIMITED
(10) BUSI COFFEE ESTATE (PRIVATE) LIMITED

v

(1) THE MINISTER OF LANDS AND RURAL RESETTLEMENT
(2) THE MINISTER OF JUSTICE
(3) THE COMMISSIONER GENERAL OF THE ZIMBABWE REPUBLIC POLICE
(4) THE AUDITOR GENERAL
(5) THE MINISTER OF FINANCE
(6) THE ATTORNEY-GENERAL
(7) THE CHAIRMAN OF THE COMPENSATION COMMITTEE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA, GARWE JA & CHEDA AJA
HARARE, SEPTEMBER 30 & NOVEMBER 26, 2010

A P de Bourbon SC, for the applicants

P Machaya, with him *N* Mutsonziwa, for the first respondent

No appearance for the second to the seventh respondents

CHIDYAUSIKU CJ: This application is made in terms of s 24(1) of the Constitution of Zimbabwe (hereinafter referred to as “the Constitution”). The applicants seek the relief set out in the draft order.

The applicants 2 to 10 (hereinafter referred to as "the individual applicant") are former owners or occupiers of land that has been acquired by the State in terms of s 16B of the Constitution. In terms of s 16B of the Constitution, former owners or occupiers of land that has been acquired must cease occupation of the acquired land within ninety days. The ninety days have since expired. Despite the expiry of the ninety days, the individual applicants have remained in occupation of the acquired land. Section 3(2) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] (hereinafter referred to as "the Act") explicitly provides that a former owner or occupant who does not cease to occupy acquired land on the expiry of the period prescribed shall be guilty of an offence.

The applicants allege that their constitutional rights, as guaranteed in *Chapter III* of the Constitution, have been violated in a number of respects. They have detailed the respects in which their rights have been violated in para 16 of the founding affidavit, which reads as follows:

"16. The object of this application is generally to seek and secure the protection by the Courts of the applicants in terms of section 24 of the Constitution. The individual applicants and the CFU acting on behalf of its general membership complain that:

a) they are being improperly treated because of their race in contravention of section 23 of the Constitution;

b) they are being denied protection of the law and equality before the law under section 18 of the Constitution; and that

c) they are being unfairly tried on charges of contravening section 3 of the Gazetted Lands (Consequential Provisions) Act; and that

d) the racial imbalance sought to be addressed in the land reform programme has been achieved rendering any further evictions of white farmers unlawful; and that

e) the Ministers, Ministry officials, and magistrates, public prosecutors, court officials, police and military (all being public officials) mentioned in the body of the application and affidavits have breached their duties in terms of section 18(1a) of the Constitution to uphold the rule of law and to act in accordance with the law."

On the basis of the alleged violations of their rights set out above, the Applicants seek the relief set out in para 20 of the founding affidavit as read with the draft order. Paragraph 20 of the founding affidavit reads as follows:

"20. The applicants seek the protection of the law as provided for in subsection (1) and (1a) of section 18 of the Constitution by placing a moratorium on:

20.1 the occupation by holders of offer letters for agricultural land which is still or already occupied by third persons particularly those white farmers who may have been in occupation at the time of enactment of the gazetted Land (Consequential Provisions) Act [*Chapter 20:28*].

20.2 the institution and pursuit of prosecutions against such people under section 3(3)(a) of the (a)foresaid Act.

20.3 the seizure of farm equipment and material by the holder of offer letters and the acquisition of such property in the name of the first respondent.

20.4 the institution and pursuit of proceedings in the Administrative Court in applications by the Minister of Lands for confirmation of the acquisition of movable items so acquired.

The applicants pray that the moratorium remains operative pending an application by the respondents to show cause why they contend the racial imbalance as envisaged in the Land Reform Programme has not been addressed."

The draft order reads:

"1. That is be and is hereby declared that:

(a) The prosecutions and criminal proceedings in respect of the applicants referred to in PART VIII of this application for allegedly contravening section 3(2) as read with section 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] are invalid and of no force and effect in that they are in conflict with sections 16A, 18(1), 18(1a). 18(9) and 23 of the Constitution of Zimbabwe; and

(b) The purported attempts of whatsoever nature or kind by the first respondent to acquire farm equipment and material of the applicants referred to in PART VIII of this application are invalid and of no force and effect in that they are in conflict with section 18(1), 18(1a), 18(9) and 23 of the Constitution.

2. That a moratorium be and is hereby ordered in respect of any attempt or intention by any of the respondents:

i) to evict any white farmer from any farm referred to in PART III and of any member of the first applicant presently in occupation of their properties who have not been evicted by order of a competent court having final effect and who were conducting farming operations as at the date of the filing of this application; and

ii) to acquire any farm equipment or material of any of the applicants referred to in PART VIII of this application.

3. The moratorium referred to in paragraph 2 above shall remain in force until:

a) the respondents show good cause why, by application to this Court, that the alleged racial imbalance in redistribution of land for resettlement as referred to in the programmes of land reform produced by the first respondent has not been redressed; and

b) the first respondent has complied with its programme of land reform.

4. The respondents shall pay the costs of this application jointly and severally the one paying the other to be absolved."

Mr *Machaya*, the Deputy Attorney-General, represented the first respondent. He initially raised a number of preliminary objections to the application and filed a written application for the preliminary points raised to be determined

before consideration of the merits of this case. The preliminary points raised by the Deputy Attorney-General may be summarised as follows –

1. The allegations that the criminal prosecutions of the applicants in terms of s 3(3) of the *Gazetted Lands Act* [*Chapter 20:28*] are unlawful by reason of the fact that they contravene s 18(1) of the Constitution is devoid of merit as that issue has been decided in the matter of *Tom Beattie and Ano v Ignatius Mugova and Ano* Supreme Court appeal no 32/09. The Court order issued in that case reads in relevant part:

> "IT IS DECLARED THAT:
>
> (1) ...
>
> (2) ...
>
> (3) Sections 3(2) and 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:08*] are consistent with section 18(1) of the Constitution of Zimbabwe. Consequently the prosecution of the applicants under section 277(3), as read with section 277(5), of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] and sections 3(2) and 3(3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:08*] is lawful.
>
> (4) The Workshop held at Chegutu on 6 February 2009 and its deliberations did not violate the applicants' rights protected in terms of section 18(2) of the Constitution of Zimbabwe.
>
> (5) ...."

The reasons for that judgment are yet to be given. However, the order explicitly declares s 3(2) and s 3(3) of the Act as Constitutional and the prosecution of formers owners and occupiers is lawful;

2. The issue of the alleged unfair trials in contravention of s 18(1a) of the Constitution and s 18(9) of the Constitution in court proceedings following a workshop held at Chegutu was similarly determined in the case of *Tom Beattie and Ano supra*;

3. The issue of discrimination against the applicants in contravention of s 23 of the Constitution is not justiciable in terms of s 16B(3) of the Constitution;

4. The issue of whether or not enough land for resettlement has been acquired is a policy issue and not a legal issue and therefore not justiciable;

5. The alleged contraventions of ss 18(1), 18(9), 18(1a) and 23 of the Constitution in respect of the acquisition of equipment are too vague for this court to make a determination; and

6. No case has been made out for granting of the moratorium sought.

In my view, there is substance in all the above preliminary points taken by the Deputy Attorney-General. However, at the commencement of the hearing in this Court, the Deputy Attorney-General advised the Court that he did not wish to persist with his written application that the preliminary issues be determined before the merits of the case. He indicated that his new stance is that the preliminary issues he raised be considered as part of his submissions on the merits.

I will deal with the applicants' complaints, as set out in para 16 of the founding affidavit, *seriatim*.

(a) Are the applicants being treated in a discriminatory manner in contravention of s 23 of the Constitution?

The applicants allege that the discrimination against them is in the following three respects –

(i) They allege that it is only land belonging to white commercial farmers that has been compulsorily acquired;

(ii) It is only white commercial farmers who are being prosecuted in terms of s 3 of the Act; and

(iii) White commercial farmers are not being allocated land in terms of the Land Reform Programme.

It is common cause that the land *in casu*, which the individual applicants occupy, was acquired by the State in terms od ss 16A and 16B of the Constitution. Sections 16A and 16B of the Constitution, in relevant part, provide as follows:

"16A Agricultural land acquired for resettlement

(1) In regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform, the following factors shall be regarded as of ultimate and overriding importance –

(a) under colonial domination the people of Zimbabwe were unjustifiable dispossessed of their land and other resources without compensation;

(b) the people consequently took up arms in order to regain their land and political sovereignty, and this ultimately resulted in the Independence of Zimbabwe in 1980;

(c) the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land;

and accordingly –

(i) the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement, through an adequate fund established for the purpose; and

(ii) if the former colonial power fails to pay compensation through such a fund, the Government of Zimbabwe has no obligation to pay compensation for agricultural land compulsorily acquired for resettlement.

(2) In view of the overriding considerations set out in subsection (1), where agricultural land is acquired compulsorily for the resettlement of people in accordance with a programme of land reform, the following factors shall be taken into account in the assessment of any compensation that may be payable –

(a) – (g) ... .

16B Agricultural land acquired for resettlement

(1) In this section –

'acquiring authority' means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purpose of this section;

'appointed day' means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

(2) Notwithstanding anything contained in this Chapter –

(a) all agricultural land –

(i) that was identified on or before the 8th July, 2005, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after the 8th July, 2005, but before the appointed day, in the *Gazette* or *Gazette Extraordinary* under section 5(1) of the Land Acquisition Act [*Chapter 20:10*], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the *Gazette* or *Gazette Extraordinary* for whatever purpose, including, but not limited to –

A. settlement for agricultural or other purposes; or

B. the purpose of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the day it is identified in the manner specified in that paragraph; and

(b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

(3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land –

(a) shall not apply to a 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.

(4) …

(5) …

(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.

(7) This section apples without prejudice to the obligation of the former colonial power to pay compensation for land referred to in this section that was acquired for resettlement purposes."

In terms of s 16B of the Constitution, the individual applicants have been stripped of all the rights to the land they previously owned or occupied. Section 16B of the Constitution vests all the rights of previous owners and occupiers in the State. *In casu*, the only link the individual applicants have to the land is their continued occupation of the acquired land, which continued occupation has been rendered a criminal offence by an Act of Parliament authorised by s 16B(6) of the Constitution.

Section 16B of the Constitution contains a *non abstante* clause. Consequently s 16B prevails over all other sections of the Declaration of Rights provisions of the Constitution. All other sections in the Declaration of Rights or *Chapter III* of the Constitution are subject to s 16B of the Constitution. In other words, any rights conferred on anyone in terms of the Declaration of Rights or *Chapter III* of the Constitution can be derogated in terms of s 16B of the Constitution. Such derogation would not constitute a violation of the Constitution. In terms of s 16B of the Constitution, a litigant cannot successfully contend that the acquisition of

his or her land is unlawful because it violates a right conferred on the litigant in terms of the Declaration of Rights, contained in *Chapter III* of the Constitution. It follows that a litigant whose land was acquired in terms of s 16B of the Constitution cannot seek to set aside the acquisition of that land on the basis that such acquisition violated the rights conferred on the litigant by a provision contained in the Declaration of Rights or *Chapter III* of the Constitution, such as ss 18 ad 23 of the Constitution.

Apart from the *non abstante* clause, s 16B(3) of the Constitution ousts the jurisdiction of the courts to enquire into the legality or otherwise of the acquisition of land in terms of s 16B(2)(a) of the Constitution. In the case of *Mike Campbell (Pvt) Ltd and Ors v Minister of National Security Responsible for Land, Land Reform and Resettlement and Ano* SC 49/07 MALABA JA (as he then was), who delivered the unanimous judgment of this court, had this to say at pp 36-38 of the cyclostyled judgment:

> "By the clear and unambiguous language of s 16B(3) of the Constitution the Legislature, in the proper exercise of its powers, has ousted the jurisdiction of courts of law from any of the cases in which a challenge to the acquisition of agricultural land secured in terms of s 16B(2)(a) of the Constitution could have been sought. The right to protection of the aw for the enforcement of the right to fair compensation in case of breach by the acquiring authority of the obligation to pay compensation has not been taken away. The ouster provision is limited in effect to providing protection from judicial process to the acquisition of agricultural land identified in a notice published in the *Gazette* in terms of s 16B(2)(a). An acquisition of the land referred to in s 16B(2)(a) would be a lawful acquisition. By a fundamental law the Legislature has unquestionably said that such an acquisition shall not be challenged in any court of law. There cannot be any clearer language by which the jurisdiction of the courts is excluded.
>
> The right to protection of law under s 18(1) of the Constitution, which includes the right of access to a court of justice, is intended to be an effective remedy at the disposal of an individual against an unlawful exercise of the legislature, executive or judicial power of the State. The right is not meant to protect the individual against the lawful exercise of power under the Constitution. Once the state of facts required to be in existence by

s 16B(2)(a) of the Constitution does exist, the owner of the agricultural land identified in the notice published in the *Gazette* has no right not to have the land acquired. The conduct and circumstances of the owner of the agricultural land identified for compulsory acquisition would be irrelevant to the question whether or not the expropriation of his or her property in the land in question is required for any of the public purposes specified in s 16B(2)(a) of the Constitution. In the circumstances there is no question of prejudice to the rights of the individual since is personal conduct or circumstances are irrelevant to the juristic facts on which the lawful acquisition depends. No purpose would be served in giving the expropriated owner the right to protection of the law under s 18(1) and (9) of the Constitution when an attempt at the exercise of the right would amount to no more than its abuse."

In the face of the clear language of s 16B(3) of the Constitution, a litigant can only approach the courts for a review and for a remedy relating to compensation. In this regard, the learned JUDGE OF APPEAL in the same judgment had this to say at p 38 of the cyclostyled judgment:

"Section 16B(3) of the Constitution has not however taken away for the future the right of access to the remedy of judicial review in a case where the expropriation is, on the face of the record, not in terms of s 16B(2)(a). This is because the principle behind s 16B(3) and s 16B(2)(a) is that the acquisition must be on the authority of the law. The question whether an expropriation is in terms of s 16B(2)(a) of the Constitution and therefore an acquisition within the meaning of that law is a jurisdictional question to be determined by the exercise of judicial power. The duty of a court of law is to uphold the Constitution and the law of the land. If the purported acquisition is, on the face of the record, not in accordance with the terms of s 16B(2)(a) of the Constitution a court is under a duty to uphold the Constitution and declare it null and void. By no device can the Legislature withdraw from the determination by a court of justice the question whether the state of facts on the existence of which it provided that the acquisition of agricultural land must depend existed in a particular case as required by the provisions of s 1B(2)(a) of the Constitution."

Mr *de Bourbon* cited the decision of the SADC Tribunal in *Mike Campbell (Pvt) Ltd and Ors v The Republic of Zimbabwe* SADC (T) case 2/2007, which he submitted was in stark contrast to this Court's decision in the *Mike Campbell* case *supra*. It is not clear why this judgment was cited. Mr *de Bourbon* in his

submission made the point that his clients reserve the right to benefit from the decision of the SADC Tribunal.

For the avoidance of doubt, I wish to make the following observations regarding the status and the relationship between this Court and the SADC Tribunal.

The legal system of Zimbabwe consists of the following courts in their order of ranking. At the base are the small claims courts, established in terms of the Small Claims Act [*Chapter 7:12*], and the local courts, established in terms of the Customary Law and Local Courts Act [*Chapter 7:05*]. Above these are the magistrates courts, established in terms of the Magistrates Court Act [*Chapter 7:10*]. Above the magistrates courts are the labour courts and the administrative courts, established in terms of the Labour Act [*Chapter 28:01*] and the Administrative Court Act [*Chapter 7:01*] respectively. Above the labour courts and the administrative courts is the High Court, established in terms of the High Court Act [*Chapter 7:06*]. At the apex of the legal system of Zimbabwe courts is the Supreme Court of Zimbabwe, established in terms of the Supreme Court Act [*Chapter 7:13*].

Section 26 of the Supreme Court Act provides as follows:

"**26 Finality of decisions of Supreme Court**

(1) There shall be no appeal from any judgment or order of the Supreme Court.

(2) The Supreme Court shall not be bound by any of its own judgments, rulings or opinions nor by those of any of its predecessors."

The decisions of the Supreme Court are final. No appeal lies from the Supreme Court to any other Court. No appeal lies to the SADC Tribunal from the Supreme Court. The decision of the SADC Tribunal are at best persuasive but certainly not binding.

The SADC Tribunal has not been domesticated by any municipal law and therefore enjoys no legal status in Zimbabwe. I believe the same obtains in all SADC States, that is, that there is no right of appeal from the South African Constitutional Court, the Namibian Supreme Court, the Lesotho Supreme Court, the Swaziland Supreme Court, the Zambian Supreme Court and the Supreme Courts of other SADC countries to the SADC Tribunal.

I now turn to deal with the complaint that the Attorney-General is being discriminatory, in that only white commercial farmers are being prosecuted for contravening s 3 of the Act. The applicants contend that because of this discrimination the Attorney-General should be interdicted from prosecuting the individual applicants.

Section 3 of the Act provides a former owner or occupier of land acquired in terms of s 16B of the Constitution who does not cease to occupy or use the acquired land "shall be guilty of an offence". Section 16B(6) of the Constitution authorises Parliament to enact s 3 of the Act. The race of an accused is not an essential element of the offence. The essential elements of contravening s 3 of the Act are – (1) proof that the land has been acquired in terms of s 16B of the Constitution; (2) the former owner or occupier has not ceased to use or occupy the

acquired land; and (3) the former owner or occupier has no lawful authority to continue to occupy the land. Once these essential elements have been established, prosecution is inevitable.

There is no suggestion on the papers that in deciding to prosecute the Attorney-General has taken into account anything other than the essential elements set out above. The applicants do not allege that there are black commercial farmers who, as former owners or occupiers, are contravening s 3 of the Act but have not been prosecuted. If this were the contention, there might be merit in the complaint. The individual applicants, as a group of white commercial farmers, have taken a deliberate and conscious decision to act in defiance of the law by continuing to occupy acquired land without authority. They cannot be heard to complain that only white commercial farmers are being prosecuted. What is the Attorney-General supposed to do if it is only white commercial farmers who are breaking the law? It is an abuse of court process for the applicants to approach this Court seeking an interdict against the Attorney-General in these circumstances.

In any event, s 76 of the Constitution provides for the independence of the Attorney-General. It provides in subs 76(7) that the Attorney-General shall not be subject to the direction or control of any person or authority in the exercise of his prosecutorial authority.

In my view, the solution to this problem is in the hands of the individual applicants and like-minded commercial farmers. All they have to do is obey the law by vacating the acquired land. Once they vacate the acquired land

within the prescribed period no prosecution can arise. If they have any legal claim to the acquired land or arising from the acquired land they can launch legal proceedings after vacating the acquired land as is required by law.

I therefore find that the applicants' complaint as set out in para 16(a) of the founding affidavit has no substance.

I now turn to deal with the complaints set out in paras 16 (b) and (c) of the founding affidavit. The complaints set out in paras 16 (b) and (c) are very similar and linked to each other. It is convenient to deal with them together.

(b) Are the individual applicants being denied protection of the law and equality before the law under section 18 of the Constitution?: and

(c) Are the individual applicants being unfairly tried on charges of contravening section 3 of the Gazetted Lands (Consequential Provisions) Act?

The complaints contained in these two subparagraphs are similar to the complaint raised in subpara (a) of para 16 of the founding affidavit, which I have already dealt with. Much of what I have stated in regard to subpara (a) of para 16 above applies with equal force to the complaints in subparas (b) and (c) of para 16.

The land previously owned by the individual applicants was acquired by the State in terms of s 16B of the Constitution. Section 16B has an overriding effect on other sections of *Chapter III* of the Constitution.

The effect of s 16B of the Constitution is that it renders agricultural land occupied under Bilateral Investment Protection Agreements (BIPAs) liable to compulsory acquisition if the acquiring authority considers that it is required for resettlement purposes or any other purpose as prescribed under s 16B(2)(a)(iii) of the Constitution.

It is, therefore, not open to the applicants to argue that such an acquisition of land in terms of s 16B is invalid by reason of a violation of a right guaranteed in the Declaration of Rights in the Constitution.

As regards the complaint that the individual applicants are being unfairly or illegally prosecuted for contravening s 3 of the Act, the answer is to be found in the case of *Tom Beattie Farms (Pvt) Ltd and Ano v Ignatius Mugova and Ano* Civil Application No. SC 32/09 in which this Court issued the order cited above. There is nothing in Mr *de Bourbon's* submissions that persuades this Court to revisit the order issued in *Tom Beattie* case *supra*. This Court has determined that s 3 of the Act is constitutional. It is not open to the applicants to contend that prosecutions in terms of s 3 of the Act are unconstitutional.

I have already sufficiently dealt with the complaint of discrimination in the prosecution of the individual applicants.

The complaints of the individual applicants are set out in paras 16 (b) and (c) have no substance.

(d) Has the racial imbalance sought to be addressed in the land reform programme been achieved, rendering any further evictions of white farmers unlawful?

The issue of whether land should be acquired for the land reform programme, how much land should be acquired for that purpose, from where it should be acquired, and to whom the acquired land should be allocated are matters for the Executive. They are policy issues that are not justiciable. What is justiciable is whether the acquisition itself and the allocation of the land has been done in accordance with the law.

(e) Have Ministers, Ministry officials, magistrates, public prosecutors, court officials, the police and the military (all being public officials) mentioned in the body of the application and affidavits breached their duties in terms of section 18(1a) of the Constitution to uphold the rule of law and to act in accordance with the law?

This complaint, as elaborated in the submissions, boils down to three complaints, namely –

(a) That the Minister has been issuing offer letters to individuals in respect of land which he acquired in terms of s 16B of the Constitution. He is doing this despite the land being still occupied by the former owners.;

(b) That the holders of the offer letters have sought through self-help to evict the former owners from the acquired land. This has led to conflict between the holders of the offer letters and previous owners.; and

(c) that Ministry officials, magistrates, public prosecutors, court officials, the police and the military have not assisted the former owners in the conflict described in para (b), despite the duty imposed on them by s 18(1a) of the Constitution. The applicants contend that the conflict between the holders of the offer letters and the former owners is so widespread and the failure by public officials to assist them in this conflict is so prevalent that the rule of law has been eroded to the extent that the individual applicants are entitled to a moratorium of the land reform programme and other relief sought in the draft order.

The complaint in para (a) raises the issues of whether the Minister can lawfully issue offer letters to individuals and whether he can lawfully issue offer letters to individuals before the acquired land is vacated. It also raises the issue of the respective rights of the holder of the offer letters and the former owners of the acquired land.

Dealing firstly with the issue of whether the Minister has the legal authority to issue an offer letter to an individual. Section 2 of the Act, in relevant part, provides as follows:

"**2 Interpretation**

(1) In this Act -

'lawful authority' means –

(a) an offer letter; or

(b) a permit; or

(c) a settlement lease;

> and 'lawfully authorises' shall be construed accordingly;
>
> 'offer letter' means a letter issued by the acquiring authority to any person that offers to allocate to that person any Gazetted land, or a portion of Gazetted land, described in that letter;
>
> 'permit', when used as a noun, means a permit issued by the State, which entitles any person to occupy and use resettlement land; …".

The Legislature is enacting the above provision clearly intended to confer on the acquiring authority the power to issue to individuals offer letters which would entitle the individuals to occupy and use the land described in those offer letters. The draftsman could have used better language to convey the legislative intent, but there can be no doubt that s 2 of the Act confers on the acquiring authority the power to allocate land using the medium of an offer letter. This provision is not in any way inconsistent with ss 16A and 16B of the Constitution. If anything, it fits in well with the overall scheme envisaged in ss 16A and 16B of the Constitution, which is that the acquiring authority acquires land and reallocates the land so acquired. The acquisition of land and its redistribution lies at the heart of the land reform programme. I have no doubt that the Minister as the acquiring authority can redistribute land he has acquired in terms of s 16B of the Constitution by means of the following documents –(a) an offer letter; (b) a permit; and (c) a land settlement lease. The Minister is entitled to issue a land settlement lease in terms of s 8 of the Land Settlement Act [*Cap. 20:01*]. However, if the Minister allocates land by way of a land settlement lease in terms of s 8 of the Land Settlement Act he is enjoined to comply with the other provisions of that Act, such as s 9 which requires him to consult the Land Settlement Board which obviously has to be in existence. I do not accept the contention by the applicants that the Minister can only allocate acquired

land by way of a land settlement lease which he presently cannot do because there is no Land Settlement Board in existence.

The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of a land settlement lease. It is entirely up to the Minister to choose which method to use. I am not persuaded by the argument that because the offer letter is not specifically provided for in the Constitution it cannot be used as a means of allocating land to individuals.

I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual.

Having concluded that the Minister has the legal power or authority to issue an offer letter, a permit or a land settlement lease, it follows that the holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease.

On the other hand, s 3 of the Act criminalises the continued occupation of acquired land by the owners or occupiers of land acquired in terms of s 16B of the Constitution beyond the prescribed period. The Act is very explicit that failure to vacate the acquired land by the previous owner after the prescribed period is a criminal offence. It is quite clear from the language of s 3 of the Act that the individual applicants as former owners or occupiers of the acquired land have no legal

right of any description in respect of the acquired land once the prescribed period has expired.

It as also argued that previous owners and occupiers of acquired land have the right to remain in occupation until they have been tried and convicted and an order for eviction issued in terms of s 3(5) of the Act, which provides as follows:

> "**3 Occupation of Gazetted land without lawful authority**
>
> (5) A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates."

Section 3(5) of the Act does not confer on the individual applicants the right to remain in occupation until conviction. Section 3(5) of the Act simply directs the presiding magistrate in criminal proceedings for a contravention of s 3 of the Act to issue an eviction order. It gives the magistrate jurisdiction or power, which he or she would not otherwise have, to issue an eviction order. Generally speaking, magistrates in criminal proceedings have no jurisdiction to issue an eviction order against an accused person upon conviction. Section 3(5) of the Act confers on the criminal court jurisdiction to issue an eviction order and directs the presiding magistrate to exercise the power. Thus a proper reading of s 3(5) of the Act simply confers certain jurisdiction on the presiding magistrate. It does not in any way confer on the individual applicants as previous owners or occupiers of acquired land the right to continue in occupation after the expiry of the prescribed periods. It therefore follows that the conflict between the individual applicants and former owners or occupiers of acquired land on the one hand and the holders of offer letters on the

other hand is a conflict between legally entitled occupants, that is, the holders of offer letters, and the illegal occupants, the former owners and occupiers.

An offer letter issued in terms of the Act is a clear expression by the acquiring authority of the decision as to who should possess or occupy its land and exercise the rights of possession or occupation on it.

The holders of the offer letters, permits or land settlement leases have the right of occupation and should be assisted by the courts, the police and other public officials to assert their rights. The individual applicants as former owners or occupiers of the acquired land lost all rights to the acquired land by operation of the law. The lost rights have been acquired by the holders of the offer letters, permits or land settlement leases. Given this legal position, it is the holders of offer letters, permits and land settlement leases and not the former owners or occupiers who should be assisted by public officials in the assertion of their rights.

This leads me to the issue of whether Ministry officials, magistrates, public prosecutors, court officials, the police and the military have a duty in terms of s 188(1a) of the Constitution to assist, as alleged, the individual applicants as former owners or occupiers of the acquired land.

Section 18(1a) of the Constitution provides as follows:

> "**Provisions to secure protection of law**
>
> (1a) Every public officer has a duty towards every person in Zimbabwe to exercise his or her functions as a public officer in accordance with the law and to observe and uphold the rule of law."

As I have already stated, the individual applicants' continued occupation of the acquired land is illegal in terms of s 3 of the Act. Their continued occupation of the acquired land constitutes a criminal offence. I do not accept that s 18(1)(a) of the Constitution imposes an obligation on a public official to assist persons in the commission of a crime indeed, assisting a criminal or a person in doing that which Parliament has decreed constitutes a criminal offence is in itself a crime, of aiding or abetting the commission of a criminal offence.

By seeking to prevent the institution and prosecution of criminal proceedings in cases in which they are acting unlawfully, the individual applicants are clearly frustrating the observance of the rule of law by the relevant public officials in the discharge of their duty in terms of s 18(1a) of the Constitution. A moratorium on the implementation of a national programme such as the land reform programme cannot be granted to protect unlawful conduct regardless of the race or colour of the perpetrators. It is unfortunate that the individual applicants seem to think that the duty to observe the rule of law falls on others and not on them because they belong to a particular race. The obligation on the State is to arrest, prosecute and punish those who commit criminal offences on the farms regardless of their race or colour, but it does not need a moratorium on the implementation of the land reform programme for it to carry out its constitutional mandate to uphold the rule of law.

I have no doubt in my mind that s 18(1a) of the Constitution does not impose a duty on the Ministry officials, magistrates, public prosecutors, court

officials, the police and the military to assist former owners of acquired land in breaking the law by remaining in unlawful occupation of acquired land.

Be that as it may, one of the allegations made against a Government official, a magistrate, is a cause for concern. The applicants allege that a magistrate presided over a criminal trial of a former owner of gazetted land offered to him by the Minister in terms of an offer letter. The magistrate is alleged to have convicted the former owner and ordered eviction, obviously to enable the magistrate to take occupation. Unfortunately the magistrate was not party to these proceedings and therefore cannot respond to these allegations. If these allegations are true, the conduct of the magistrate is totally unacceptable and I hope disciplinary action was taken. If not, it should be taken. If the allegations are true, the proceedings were certainly irregular and should be set aside for review. The individual applicant concerned should take he matter for review.

It was submitted that some of the individual applicants and other former owners or occupiers of acquired land have court orders issued by the Magistrates Courts and the High Court authorising their occupation of acquired land after the prescribed period. If such orders were issued, they would have the effect of authorising the doing of something that Parliament has decreed should not be done. This Court, or any other court for that matter, has no jurisdiction to authorise the doing of that which Parliament has decreed would constitute a criminal offence. Put differently, a court of law cannot authorise an individual to commit a criminal offence.

It was submitted that the orders were issued in spoliation proceedings. Spoliation proceedings cannot confer jurisdiction where none exists. A court of law has no jurisdiction to authorise the commission of a criminal offence. In any event, spoliation is a criminal law remedy which cannot override the will of Parliament. A common law remedy cannot render nugatory an Act of Parliament.

Apart from this, there is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity and Ors* SC 111/04. Indeed, if this point has been raised as a preliminary point, the probabilities are that this application would have been dismissed on that point alone. A former owner who is occupation of acquired land in open defiance of the law cannot approach the courts for assistance.

I am satisfied that this complaint is without substance.

As regards the relief relating to the seizure of farm equipment, this Court has jurisdiction to adjudicate. The Acquisition of Farm Equipment or Material Act [*Cap 18:23*] has made provision for the manner in which the acquiring authority can acquire, either by agreement or compulsorily, any farm equipment or material not currently being used for agricultural purposes for the utilisation of that farm equipment or material on any agricultural land. Such acquisition is subject to confirmation by the Administrative Court where the owner or holder of the farm equipment or material contests such acquisition. Payments for such farm equipment or material must be made within reasonable time or where the farm equipment or

material is compulsorily acquired within the time frame provided for in the Acquisition of Farm Equipment or Material Act.

The acquisition of farm equipment or material outside the provisions of the Acquisition of Farm Equipment or Material Act would be unlawful. The owner of such farm equipment or material would have the right to approach the courts for protection. The Acquisition of Farm Equipment or Material Act does not authorise the holder of an offer letter, permit or land lease to take it upon himself or herself to seize such equipment without reference to the acquiring authority.

I, however, agree with the submission of the Deputy Attorney-General that the claims relating to the acquisition of equipment as set out in this application are too vague for this Court to make a determination.

In conclusion, I would summarise the legal position as follows -

(1) Former owners and/or occupiers whose land has been acquired by the acquiring authority in terms of s 16B(2)(a) of the Constitution cannot challenge the legality of such acquisition in a court of law. The jurisdiction of the courts has been ousted by s 16B(3)(a) of the Constitution. See also the *Mike Campbell* case *supra*.

(2) The Gazetted Lands (Consequential Provisions) Act [*Cap. 20:28*], and in particular s 3 of that Act, is constitutional. See *Tom Beattie's* case *supra.* Accordingly, all Zimbabweans have a duty to comply with the

law as provided for in that Act and prosecutions for contravening the Act are constitutional and therefore lawful.

(3) Every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon the expiry of the prescribed period (ninety days after the acquisition). See subs 3(2) (a) and (b) of the Act and s 16B of the Constitution. By operation of law, former owners or occupiers of acquired land lose all rights to the acquired land upon the expiration of the prescribed period.

(4) A former owner or occupier of acquired land who without lawful authority continues occupation of acquired land after the prescribed period commits a criminal offence. Of the former owner or occupier continues in occupation in open defiance of the law, no court of law has the jurisdiction to authorise the continued use or possession of the acquired land.

(5) Litigants who are acting outside the law, that is, in contravention of s 3 of the Act, cannot approach the courts for relief until they have complied with the law. See *Associated newspapers of Zimbabwe (Private) Limited v The Minister of State for Information and Publicity and Ors* case *supra*.

(6) A permit, an offer letter and a land settlement lease are valid legal documents when issued by the acquiring authority in terms of s 2 of the Act and s 8 of the Land Settlement Act. The holder of such

permit, offer letter or land settlement lease has the legal right to occupy and use the land allocated to him or her in terms of the permit, offer letter or land settlement lease.

(7) The Minister may issue land settlement leases in terms of s 8 of the Land Settlement Act [*Cap. 20:01*]. In doing so he is required to comply with the other provisions of that Act.

(8) While s 3(5) of the Act confers on a criminal court the power to issue an eviction order against a convicted person, it does not take away the Minister's right or the right of the holder of an offer letter, permit or land settlement lease to commence eviction proceedings against a former owner or occupier who refuses to vacate the acquired land. The holder of an offer letter, permit or land settlement lease has a clear right, derived from an Act of Parliament, to take occupation of acquired land allocated to him or her in terms of the offer letter, permit or land settlement lease. No doubt the Legislature conferred on the holder of an offer letter, permit or land settlement lease the *locus standi*, independent of the Minister, to sue for the eviction of any illegal occupier of land allocated to him or her in terms of the offer letter, permit or land settlement lease.

(9) The holders of offer letters, permits or land settlement leases are not entitled as a matter of law to self-help. They should seek to enforce their right to occupation through the courts. Where therefore the holder of an offer letter, permit or land settlement lease has resorted to self-help and the former owner or occupier has resisted, both parties

are acting outside the law. If either party resorts to violence, the police should intervene to restore law and order.

Turning to the issue of costs. It has become the practice of this Court not to award costs in the case of genuine applications to this Court for the enforcement of rights guaranteed under the Constitution. However, this application does not fall into that category. It is an application by the individual applicants who are acting in open defiance of the law. It is devoid of any merit and is an abuse of court process. For this reason, this Court will register its disapproval by awarding costs against the applicants in this case.

Accordingly, the appeal is dismissed with costs awarded against the applicants jointly and severally, the one paying the others to be absolved.

MALABA DCJ: I agree

ZIYAMBI JA: I agree

GARWE JA: I agree

CHEDA AJA: I agree

Kevin Arnott: Legal Practitioner, applicants' legal practitioner

Civil Division of the Attorney-General's Office, first respondent's legal practitioners