REPORTABLE (70)
Judgement No. S.C. 132/2000
Const. Application No. 262/2000

COMMERCIAL FARMERS' UNION v
(1) THE MINISTER OF LANDS, AGRICULTURE AND RESETTLEMENT
(2) THE MINISTER OF LOCAL GOVERNMENT, PUBLIC WORKS AND NATIONAL HOUSING
(3) THE MINISTER OF RURAL RESOURCES AND WATER DEVELOPMENT
(4) THE MINISTER OF HOME AFFAIRS
(5) THE COMMISSIONER OF POLICE
(6) THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, NOVEMBER 6, 7 & DECEMBER 21, 2000

AP de Bourbon SC, with him *JB Colegrave* and *P Mherere*, for the applicant
B Patel, with him *C Machaka* and *F Chatukuta*, for the respondents

THE FULL COURT:

I INTRODUCTION

This is an application to the Court sitting in its capacity as a constitutional court. The applicant ("the CFU") is an incorporated voluntary association which represents the interests of commercial farmers operating within Zimbabwe. The respondents are the four government ministers most closely involved with agricultural land reform, the Commissioner of Police, and the President of Zimbabwe in his official capacity as such. The first three ministers together comprise the "Land Task Force" appointed by the President to co-ordinate and oversee the land acquisition and land resettlement exercise. The Minister of Home Affairs is cited together with the Commissioner of Police as the two most senior persons responsible for the Zimbabwe Republic Police ("the ZRP"). The President is cited because one of the issues raised is the constitutional validity of the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*] and the regulations there under contained in SI 148A of 2000. He is also the "acquiring authority" as defined in the Land Acquisition Act, and has made significant pronouncements on the issues before the Court.

II LEGISLATIVE BACKGROUND

In order to understand the issues relating to legislation it is necessary briefly to describe the various enactments which are relevant.

1. THE PRESIDENTIAL POWERS (TEMPORARY MEASURES) ACT [*CHAPTER 10:20*] was enacted in 1986. Its head note reads:

"An Act to empower the President to make regulations dealing with situations that have arisen or are likely to arise and that require to be dealt with as a matter of urgency; and to provide for matters connected therewith or incidental thereto."

2. One such regulation was the PRESIDENTIAL POWERS (TEMPORARY MEASURES) (LAND ACQUISITION) REGULATIONS, 2000, which made fundamental alterations to the Land Acquisition Act [*Chapter 20:10*] in line with the amendments made to the Constitution of Zimbabwe by the Constitution of Zimbabwe Amendment Act, No. 5 of 2000 which came into effect on 19 April 2000.

3. THE LAND ACQUISITION ACT [*CHAPTER 20:10*] was introduced as Act No. 3 of 1992. It was intended to provide a mechanism, or rather, a better mechanism by which the State could set about acquiring land from the large-scale commercial white farmers and redistributing it to peasant farmers.

4. THE CONSTITUTION OF ZIMBABWE AMENDMENT ACT (NO. 16) was introduced, as indicated earlier, in order to overcome one of the problems which had bedeviled the implementation of the land acquisition programme, namely lack of funds. It introduced s 16A into the Constitution. The essence of the section was contained in two statements at the end of subs (1), as follows:

(1) 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

(2) 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."

5. Finally, and in order to circumvent any problem which might arise if a legal attack on the Presidential Powers Act and Regulations were successful, the President and Parliament enacted an amendment to the Land Acquisition Act, which was ACT NO. 15/2000. It came into effect on 7 November 2000, which was the second and final day of argument in this Court. The effect of the amendment was to incorporate into the main Act the provisions of the Presidential Powers Regulations. The amendments were backdated to the date (23 May 2000) on which the regulations were introduced. One or two significant changes were made.

It seems to the Court that this stratagem has been successful, to the extent at least that it is no longer necessary or relevant to the decision in this case to consider the constitutionality of the Presidential Powers (Temporary Measures) Act or of the regulations.

III THE RELIEF SOUGHT BY THE APPLICANT

The applicant seeks the following declaratory orders:

"It is declared that:

2. The respondents shall bear the costs of the application including the costs of three counsel.

The applicant finally seeks an order that:

"The respondents be and are hereby interdicted and restrained from taking any further steps in the acquisition of land for resettlement until all the terms of the consent order issued by the High Court on 17 March 2000 in Case No. HC 3544/2000 have been obeyed and fulfilled."

IV COMMENTARY ON THE RELIEF SOUGHT

1. For the reasons set out earlier, namely the enactment and backdating of the Land Acquisition Amendment Act No. 15/2000, the first declaration sought is no longer relevant. We are concerned now with the Land Acquisition Act as amended by Act 15/2000, and no longer with the Presidential Powers Regulations.

2. For the same reasons, the second declaration sought is irrelevant. The Presidential Powers (Temporary Measures) Act has no bearing on the case.

3. The third declaration sought, concerning the provisions relating to compensation, must be regarded as if it relates to the compensation provisions in the amending Act No. 15/2000. In fact it is unnecessary to deal with this aspect, as will appear later.

4. The fourth declaration sought, as to the unconstitutional manner in which the land acquisition exercise has been carried out, has been essentially conceded by the first to fifth respondents, inclusive, in the consent order made in *Commercial Farmers' Union* v *Minister of Lands, Agriculture and Rural Resettlement & Ors* Case No. SC 314/2000, albeit in the slightly different context of sections 16 and 17 of the Constitution, whereas this declaration is sought in relation to section 18 of the Constitution. The sixth respondent , the President of Zimbabwe, was not involved in Case No. 314/2000, but since the President's involvement in the present case is now for the reasons indicated earlier, somewhat nominal, the fact that he was not involved in the consent order is of little if any significance. This will be dealt with under the heading "Protection of the Law".

5. The fifth declaration relates to the protection afforded under section 23 of the Constitution, and will be dealt with under the heading "Discrimination".

6. The sixth declaration sought relates to the protection afforded by section 21 of the Constitution and will be dealt with under the heading "Rights of Assembly and Association".

7. The seventh declaration sought relates to the provisions of sections 16 and 16A of the Constitution, and more specifically to the provision in section 16A(1) which sets out what may be done "in regard to the compulsory acquisition of agricultural land for the resettlement of people in accordance with a programme of land reform." It will be dealt with under the heading "A programme of land reform?"

8. The eight order sought is the setting aside as invalid of all notices and orders under sections 5, 8 and 9 of the Land Acquisition Act published, made, served or in any way enforced since 23 May 2000. This will be dealt with under the heading "Validity of Notices and Orders – Reasonable Notice" in terms of section 16(1)(b) of the Constitution.

9. The ninth order sought is an interdict against further land acquisition until the terms of the consent order made by MR JUSTICE GARWE in *Commercial Farmers' Union v Commissioner of Police & Ors* Case No. HC 3544/2000 have been obeyed and fulfilled. This will be dealt with under the heading "Interdict".

10. Finally we will deal with the questions of costs.

V CONSIDERATION OF THE MERITS OF THE APPLICATION

We proceed therefore to deal with the merits under the following headings:

1. The historical background.
2. The affidavits.
3. Protection of the law.
4. Discrimination.
5. Rights of assembly and association.
6. A programme of land reform?
7. Validity of notices and orders – reasonable notice.
8. Interdict.
9. Costs.

1. THE HISTORICAL BACKGROUND

In so contentious an issue as land it is probably impossible to set out impartially the story of land rights in Zimbabwe. Suffice it to say that over one hundred years ago white settlers moved into what is now Zimbabwe bringing with them a concept of land ownership which was quite foreign to the local people. Over the years they laid claim to extensive areas of agricultural land, moving the local people off as they did so. During the civil war of independence in the 1970's a great deal of stress was laid on the land question, and it was an issue at the Lancaster House Conference at which the Constitution of Zimbabwe was agreed. That Constitution made provision for land acquisition on a willing buyer-willing seller basis. Certain undertakings were given by the British Government to assist in a programme of land reform. There is a dispute as to whether and to what extent those promises were fulfilled.

For ten years the constitutional provisions as to land acquisition were immutable. From 1990 various amendments were made to section 16 of the Constitution (Protection from deprivation of property) with the object of making it easier for Government to acquire land. The Land Acquisition Act was introduced in 1992, and amended on 7 November 2000. The introduction of section 16A to the Constitution on 19 April 2000 constituted an assertion that:

(a) under colonial domination the people of Zimbabwe were unjustifiably 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."

A certain amount of land reform took place between 1980 and 1983, the effectiveness of which is a matter of some debate. 2.7 million hectares of commercial farming land were purchased for resettlement in that period. Then, in about 1992-1993, a further 900 000 hectares were acquired. The resettlement exercise was largely unsuccessful because of lack of finance for the provision of infrastructure. According to Mr Hasluck, the CFU Director, "the co-operative system failed, much of the acquired land began to be underutilized, and Government began to parcel out land to senior officials and servants of the State and the governing party."

On 28 November 1997, against a background of growing economic hardship and political pressure for land reform, "a list of 1471 commercial farms was published in the Gazette as preliminary notice of Government's intention to acquire such properties on a compulsory basis for resettlement purposes. Contrary to the practice in the early 1990's where properties for resettlement were usually identified and targeted for resettlement by Agritex officials in the Ministry of Lands and Agriculture, the properties listed in November 1997 were identified by the Governors of the various provinces with the help and participation of members of the ruling ZANU (PF) party" (per Hasluck).

Most farmers lodged objections, as provided for in the legislation. 512 farms were later withdrawn from the list.

In September 1998 an International Donor Conference was held to raise financial and other support for the country's resettlement objectives. A policy framework document was produces by Government - the Land Reform and Resettlement Programme, Phase II; the conference issued a joint communiqué setting out the way forward; it was proposed to acquire initially a limited number of properties to test a variety of alternative resettlement models; a number of committees were to be established; and a chairman was appointed. After a short time, however, all further progress came to a stop.

Instead, in November 1998 Government issued some 800 orders in terms of section 8 of the Land Acquisition Act, acquiring the properties remaining from the 1997 list although the objection proceedings had not been completed. This necessitated confirmation proceedings in the Administrative Court in terms of section 7(1)(b) of the Act. The Government was unable to comply with the procedures and the exercise came to a halt in February 1999 with the ruling in *Minister of Lands and Agriculture v Fick* LA370/99. It must be recorded that the courts were blamed for these events although they came about as a result of Government's failure to comply with its own legislation.

To date 2 345 properties have been listed for acquisition, covering more than 5 million hectares.

In February 2000 a referendum was held on a proposed new Constitution for Zimbabwe. The defeat of that proposal was followed "within a matter of days by the beginning of a series of land invasions. Although these began as a supposedly peaceful demonstration they quickly gathered such momentum that it became obvious that the exercise was actually being driven by or had been taken over by Government" (Hasluck).

The story of these demonstrations/invasions is set out in graphic detail in the CFU's papers, more particularly in Mr Hasluck's affidavits. Murders (in the early stages), serious assaults, trespass, arson, stock-theft, poaching and malicious injury to property became rife throughout the commercial farming areas. The reaction of the police was either nil or negligible, with isolated exceptions. War veterans, landless peasant farmers and unemployed youths moved onto farms, ferried in some cases in Government vehicles, encouraged by party politicians. Some were aggressive, forcing the farmers to flee, burning down workers' houses, forbidding the reaping or planting of crops. Others cut fences and cut down trees to make temporary shelters. Others again were more passive, simply making temporary shelters for themselves and leaving when the subsidy they were given ran out. The situation throughout the commercial farming areas remained, and remains, tense and volatile. The harassment continues and in many cases has intensified.

Meanwhile endeavours were made to resolve the matter in the courts. MR JUSTICE GARWE made the order referred to above on Friday 17 March 2000. In that matter the CFU was the applicant. The respondents were Governor Border Gezi, war veterans' chairman Hunzvi, the Zimbabwe National Liberation War Veterans Association and the Commissioner of Police. The order was detailed and specific.

In brief summary the order declared (by consent of all the parties) that the occupation of farms since 16 February 2000 by persons claiming a right to do so in pursuit of a right to demonstrate, was unlawful. All such persons were ordered to vacate within twenty-four hours. The Commissioner of Police was specifically ordered to direct his officers and members to enforce the law.

Despite the consent, the Commissioner applied, within a few days to amend parts of the order. His application was heard by CHINHENGO J on 10 April 2000. In a

judgement handed down on 13 April 2000 *sub nom. Commissioner of Police v Commercial Farmers' Union*, reported in 2000 (9) BCLR 956 (Z), the learned judge dismissed the application. There was talk of an appeal but nothing eventuated.

The order of the court was not obeyed. In some areas the situation eased. Politicians urged further "demonstrations" and the police pleaded insufficiency of manpower and what might be termed "superior orders".

Finally on the legal front - although actually this took place after the hearing of this application on 6 and 7 November 2000 - mention must be made of a further order by consent, this time made by this Court on 10 November 2000. In Case No. SC 314/2000 the CFU was again the applicant. The respondents were the same four Ministers as in the present case, the Commissioners of Police and the eight Provincial Governors. The order again declared that the entry of uninvited persons on commercial farming properties was unlawful. It required the respondents, and those under their control, not to give sanction to the entry upon or continued occupation of farms by persons involved in resettlement until all legal requirements for such settlement had been fulfilled.

It appears there has been some compliance with this order, but also some open defiance of it. The fact that it was an order by consent seems simply to have been brushed aside.

2. THE AFFIDAVITS

The affidavits by Mr Hasluck are detailed, well documented and supported where necessary by affidavits from colleagues and members of the farming community. They set out a chilling picture of pervasive lawlessness largely, though not entirely, unchecked by the police. The lawlessness has been encouraged and supported by ruling party politicians. Farmers and farm workers have been unable to defend themselves, or to call on those whose duty it is to protect them. This brief summary does scant justice to the story of some nine months of harassment on their own properties by invaders who pay no regard, not only to "the little law of trespass" as it has been described, but also to the law governing resettlement under the Land Acquisition Act, and to the criminal law generally.

The only respondent to file an affidavit has been the Commissioner of Police, who has filed two. The first respondent has been content to rely on affidavits from a public servant, the Acting Permanent Secretary in the Ministry of Lands, Agriculture and Resettlement, Dr Vincent Hungwe. The other respondents have said nothing.

By and large the respondents' affidavits have added little by way of information. They consist largely of denials or statements that "I am not aware of ...". Reference will be made to them where necessary in the detailed sections that follow.

3. PROTECTION OF THE LAW

As indicated earlier, the applicant seeks to rely on section 18 of the Constitution which commences –

"Subject to the provisions of this Constitution, every person is entitled to the protection of the law".

There can be no doubt or dispute about the fact that the farmers and farm workers on the occupied farms have been denied the protection of the law. It is unnecessary to spell out the details. The Rule of Law in the commercial farming areas has been overthrown.

This unlawfulness has been admitted by all the relevant State representatives, first before GARWE J in the High Court in March, and then before this Court on 10 November 2000.

There is no difficulty therefore in issuing a declaratory order that commercial farmers - and primarily white commercial farmers - have been, consistently since February 2000, denied the protection of the law. Indeed the same can be said about farm workers. The question is - what relief should the Court grant in consequence of this declaration? We will consider this later in the judgement.

4. DISCRIMINATION

The applicant complains of discrimination on three grounds. First, that the unlawful campaign is directed specifically at white farmers, thus discriminating against such persons on the ground of colour (or race, or place of origin). Second, that the land acquisition exercise involves discrimination on the ground of political opinions. This is so because it has been frequently stated that only ZANU (PF) supporters will be allowed to participate in the resettlement exercise. This probability is supported by the fact that ZANU (PF) party officials are prominent among the committees organising the invasions of farm land. Third, discrimination is alleged against farm workers of Malawian, Mozambican or other foreign origin. This is not denied.

Section 23 of the Constitution clearly forbids the treatment of any person in a discriminatory manner on the grounds of *inter alia*, race, place of origin, colour or political opinions.

We are not entirely convinced that the expropriation of white farmers, if it is done lawfully and fair compensation is paid, can be said to be discriminatory. But there can be no doubt that it is unfair discrimination to target farmers who are believed to be supporters of an opposition party, and to award the spoils of expropriation primarily to ruling party adherents. If ZANU (PF) party branches or cells or official are involved in the selection of settlers and the allocation of plots, the exercise degenerates from being an historical righting of wrongs into pure discrimination. It is equally wrong to discriminate against workers of foreign origin who are lawful permanent residents of Zimbabwe.

Accordingly, we find that the exercise as it is being implemented does involve discrimination on the grounds of place of origin and political opinions, contrary to the provisions of section 23 of the Constitution. Again, we propose to consider what relief should be granted at the end of this judgement.

4. RIGHTS OF ASSEMBLY AND ASSOCIATION

The contention is that the forced attendance of farmers and farm workers at meetings organised by the local ZANU (PF) branch is contrary to the right of freedom of association

guaranteed by section 21 of the Constitution. The allegations are not denied. The contention is quite clearly right.

It is further contended that as a result of the illegal invasions, farmers and farm workers are being forced to associate with the invaders against their will. This contention is also correct.

6. A PROGRAMME OF LAND REFORM?

There is no dispute whatever that a programme of land reform is necessary and indeed essential for the future peace and prosperity in Zimbabwe.

In section 16A(1) of the Constitution, under the heading "Agricultural land acquired for resettlement", it is stated that:

(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 – ...

(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 -
...". (emphasis added).

It is clear therefore that it is a prior requisite for the compulsory acquisition of agricultural land for resettlement, that there must be a programme of land reform.

A programme is defined in the Oxford English Dictionary as "a definite plan or scheme of any intended proceedings; an outline or abstract of something to be done (whether in writing or not)". In a matter of national importance such as this, one would certainly expect the programme to be in writing. Inevitably one must expect it to be in conformity with the law.

It will be evident from the historical portion of this judgement that the "Inception Phase Framework Plan, 1999 to 2000" ("the Plan"), described as "An Implementation Plan of the Land Reform and Re-settlement Programme - Phase 2", was based on the results of the Donor Conference in 1998. The Plan envisaged that 40% of the cost of the programme would be met by Government, 40% by donors, and 20% by the beneficiaries themselves - see Chapter 7, para 7.3 of the Plan. The collapse of the donor funding and the financial difficulties facing the Government have meant that this Plan became incapable of implementation.

In place of this plan there came what was called the "Fast Track Plan". Dr Hungwe says at the beginning of his opposing affidavit:

"After the Donor Conference no significant progress was made with respect to implementation of the resettlement programme. The expected donor support for the Inception Phase Framework Plan did not materialise. Government then proceeded to

implement its resettlement models within the said Plan using the limited resources at its disposal. This involved the compulsory acquisition of the 804 properties which were gazetted on the 2nd of June 2000. It also market the beginning of the implementation of the Fast Track Programme. The UN Mission was expected to assist this programme, but this was not to be."

(It is remarkable that the reduction in funding was followed by a huge increase in acquisitions).

Dr Hungwe then goes on to define the Fast Track Plan (or Programme) as follows:

"The Fast Track Plan is Government's intention to speed up land redistribution which is otherwise causing legitimate frustration among people. It is being implemented as part of the existing Government approaches articulated in the Inception Phase Framework Plan as opposed to a separate 'stand alone' programme. Annexure M is merely a draft which is being revised. A final document will be released when it is ready."

So the Fast Track Plan is simply and "intention".

In his answering affidavit Mr Hasluck takes issue with these contentions. It would make this judgement too bulky to quote all the relevant passages in his answering affidavit. We cite the most important extracts as follows:

"the implication that he (Dr Hungwe) seeks to get this Honourable Court to accept is that the Fast Track Plan carries with it all the planning, all the support services, all the manpower and facilities and all the finance that Government itself has acknowledged in that document (the Inception Phase Framework Plan) to be essential elements of a resettlement programme.

It is respectfully submitted, however, that this is just not so and that the Fast Track Plan is so lacking in these many essential features as to doom the plan to failure not only *in the long run but also in the short term.*"

Mr Hasluck proceeds to highlight the inadequacies of the Fast Track Plan. The original plan had been to focus on the poor and those with a farming aptitude, including women; it was to be affordable, cost effective and consistent with economic and financial constraints. Yet when, in April 2000, mention began to be made of a Fast Track Plan:

"it was clearly just an idea arising from the fact that Government found itself in the predicament of not being able to keep proper control of the land invasions without disenchanting the very people who were to spearhead the ruling party's election campaign."

Far from being restricted because of the lack of funds:

"at the end of July the Fast Track Plan was extended to cover 5 million hectares of land. ... the programme is to cover some 3 0 40 farms. ... To date 2 345 properties have been listed covering in excess of 5 million hectares. ...

The selection process for settlers was not that envisaged in the IPFP. Instead it is largely determined by the Governor (in each province) and the party, with priority being given to war veterans and their followers who have occupied the commercial farms. In fact this has been a self-selection process by illegal occupants ... it is largely unprovided for in the budget and certainly has not been part of a consultative proves through the NCEF (National Consultative Economic Forum)."

There is really no answer to this analysis. Save perhaps for those farms whose owners have agreed to the takeover of their properties, the settling of people on farms has been entirely haphazard and unlawful. It has not been done in terms of a programme of land reform or in terms of the Act. A network of Organisations, operating with complete disregard for the law, has been allowed to take over from Government. War veterans, villagers and unemployed towns people have simply moved onto farms. They have been supported, encouraged, transported and financed by party officials, public servants, the CIO and the Army. It has undoubtedly been an outpouring of reaction to years of frustration and economic hardship. Who is to blame for that frustration and economic hardship is another matter, and not one for the courts to determine.

The Government has adopted an approach to this problem which has not been helpful in finding a solution. Before the Courts it has admitted that what is happening is unlawful. In the High Court before GARWE J, in the Supreme Court in Case No. SC 314/2000, it has agreed that the settlement of persons on farms is illegal because the requirements of the Land Acquisition Act have not been complied with. Yet outside the courtroom a variety of excuses for non-compliance with the very orders to which they have consented is put forward.

One argument is that they did not really consent. Consent was approved at "to low a level". This is frankly ridiculous. No disciplinary action appears to have been taken against the unknown culprits. If the error was made in March before GARWE J, how was it possible that it was made again in November in the Supreme Court? On so fundamentally important a matter this excuse is untenable.

Another argument is that this is a political and not a legal question. Thus in the application before CHINHENGO J the Attorney-General submitted that the decision when and where to enforce court orders was:

"not one for the Courts, because it was a political affair failing outside the powers of the Courts ...".

The Rule of Law, he said:

"must be looked at from a political point of view".

And the Commissioner of Police himself said:

"The problem is better solved politically. The solution to the land issue lies in the political domain and not (in) the courts."

Of course, it is fundamentally true that the land issue is a political question. It is equally true that the political method of resolving that question is by enacting laws. The Government has done so. It has enacted, and amended, the Land Acquisition Act. It has then failed to obey its own law. That is the point at which, with respect, the Attorney-General and the Commissioner have gone astray. The Courts are doing no more than to insist that the State complies with the law. The procedures under the Land Acquisition Act have been flouted. The Act was not made by the Courts. It was made by the State.

We must conclude, in the circumstances, that there is no programme of land reform. This makes it unnecessary to deal with the issue of compensation which was argued before us.

7. **VALIDITY OF NOTICES AND ORDERS: REASONABLE NOTICE**

Section 16(1)(b) of the Constitution "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 other interest or right therein that would be affected by such acquisition". (Emphasis added).

Prior to the amendments effected by the Presidential Powers (Temporary Measures) (Land Acquisition) Regulations 2000, now validated by s 24 of the Land Acquisition Amendment Action 15/2000, the Land Acquisition Act allowed the period of notice to be given to affected parties of an intention to acquire land, to be not less than thirty days after the date of the publication of the preliminary notice in the *Gazette* (see s 8(1)), and a maximum period of one year (see s 5(4)(a)).

The position before 23 May 2000 was, therefore, that the acquiring authority could identify rural land for resettlement and other purposes by means of the designation procedure without infringing s 16(1) of the Constitution. See *Davies and Ors v Minister of Lands, Agriculture and Water Development* 1996 (1) ZLR 681 (S); 1996 (9) BCLR 1209 (ZS). Once it had been decided that such land, whether designated or not, was to be acquired, a preliminary notice was published in the Gazette in terms of s 5(1) of the Land Acquisition Act. Not less than thirty days but not more than one year thereafter, the acquiring authority could acquire all or any of the land affected by order made in terms of s 8(1).

Under the amendment to s 5(4) of the Act a preliminary notice remains in force until the acquiring authority either withdraws the notice in terms of s 7 or acquires the land in terms of s 8. The outer time limit of the preliminary notice has been removed. Thus, at any time after the expiry of thirty days the acquiring authority may acquire the land made subject to the preliminary notice; and until it does so by order the preliminary notice remains in force unless withdrawn by the acquiring authority. Even the ten year maximum period under which rural land could be designated in terms of s 12(1)(c) no longer applies since Part IV of the Act (sections 12 to 15), which dealt with designation, has been repealed.

Moreover, consequent upon the publication of the preliminary notice, s 5(2) operates to prohibit, save for the permission in writing of the acquiring authority, any subdivision or disposal of the land or the construction of permanent improvements thereon. And under the new s 29B of the Act compensation payable for improvements or the land, as the case may be, is to be assessed as at the date of the publication of the preliminary notice and not when the acquiring authority acquires the land by order issued pursuant to s 8(1) of the Act.

Against the legislative background it was argued on behalf of the applicant that the indeterminate duration of a preliminary notice, from the standpoint of the owner of the land and the holder of any other registered real right in that land offends the requirement of "reasonable notice" afforded to such persons by s 16(1)(b) of the Constitution. This is because the acquiring authority is given no deadline by which to make up his mind whether to acquire or not to acquire the land or to withdraw the preliminary notice. He may keep the party or parties affected y the publication of the preliminary notice "in limbo" as it were, with the consequent freezing of the rights specified in s 5(2) together with the prospect of being prohibited from undertaking any activity on such land as may be specified by the acquiring authority in terms of s 5(3) of the Act.

The respondents seek to meet the argument with the submission that the giving of "notice" in its ordinary connotation imparts the concept of making known or announcing a given thing or event before it occurs or eventuates. In the present context the constitutional mandate of reasonable notice of the intention to acquire attaches to the sufficiency of such notice as a warning of the intended acquisition. In other words s 16(1)(b) of the Constitution is concerned with the minimum period of a notice; the fact that a preliminary notice may subsist for a potentially indefinite period does not detract from the adequacy of that notice of the intention to acquire.

We do not agree that the minimum period of the notice is to be looked to in the assessment of its reasonableness. What s 16(1)(b) is aimed at achieving is the giving, to the party to be affected, of sufficient warning of the date by which the acquiring authority is to make up its mind to acquire the property, interest or right. It is the outer limit that is the crucial factor, for it is that date that brings about certainty. It transforms the intention to acquire into reality. It provides the definition which an open-ended period of notice fails to do. It informs the affected party of the ultimate date when acquisition of the property, interest or right either will or will not pass to the acquiring authority. It is akin to the grant of an option to purchase, that has to be exercised by a certain date, thereby altering the status of the grantor to seller and that of grantee to purchaser. Its object is to require the grantee to decide whether to purchase or not and, thus, to free the grantor to retain the property for himself or to dispose of it on the open market.

The alternative submission advanced by counsel for the respondents was that if the amendment to s 5(4) was contrary to s 16(1)(b) of the Constitution, the provision was to be regarded as not having been amended at all since the purported amendment was null and void ab initio. This is clearly correct. But does it follow that the preliminary notices which were published in the Gazette and served after 23 May 2000 should be treated as valid notices subject to the maximum duration of one year in terms of the unamended provision?

Section 5(1) of the Act in its amended form does not require the preliminary notice of compulsory acquisition to inform the owner, or occupier or any other person having an interest or right in the land, of the period during which it remains in force. All that the notice must direct the attention to are the matters referred to in subsection (1)(a)(i), (ii), and (iii) of s 5. It is for the party affected to ascertain the duration of the notice by having regard to s 5(4) of the Act. There is no obligation on the part of the acquiring authority to indicate in the preliminary notice when it is deemed to lapse. The same situation applies to a notice served in terms of s 5(3) of the Act prohibiting any specified activity on the land.

It necessarily follows, in our view, that the invalidity of the open ended notice leaves unscathed the preliminary notices of acquisition which were published in the Gazette subsequent to 23 May 2000. However, they must all be deemed to be subject to the one year maximum duration provision.

8. **INTERDICT**

The CFU claims that the only appropriate relief, in the light of the wholesale unlawfulness of the way in which the land acquisition policy has been carried out, is an interdict. It asks the Court to impose a ban which would prohibit the Government from taking any further steps in the acquisition of land for resettlement until all the terms of the consent order issued by GARWE J on 17 March 2000 have been obeyed and fulfilled.

It seems to us that this remedy should be suspended for a time to enable a solution to be reached. We consider that a distinction must be drawn between what has been done unlawfully in the past, on the one hand, and what has been done lawfully in the past and may be done lawfully in the future, on the other.

It is overwhelmingly obvious that the farm invasions are, have been, and continue to be, unlawful. Each Provincial Governor, each Minister in charge of a relevant Ministry, even the Commissioner of Police, as admitted to. They could do nothing else. Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. Laws made by Parliament have been flouted by the Government. The activities of the past nine months must be condemned.

But that does not mean that we can ignore the imperative of land reform. We cannot punish what is wrong by stopping what is right.

The reality is that the Government is unwilling to carry out a sustainable programme of land reform in terms o fits own law. The first thing to be done is to return to lawfulness.
A huge problem has been created. Thousands of people have been permitted and encouraged to invade properties unlawfully. They have not right to be there. That situation will not be easy to resolve, but it must be resolved. Either their presence must be legalised, or they must be removed.

We have already indicated that notices and orders, and in particular preliminary notices of acquisition which were published in the *Gazette* subsequent to 23 May 2000, remain valid, but subject to the one year expiry limitation. We believe that this leaves the way clear for Government to proceed lawfully. All the indications are that the Government has overreached itself in the number of farms listed, both from the point of view of the financial

resources available and of the administrative capacity not only to handle the acquisition exercise, but also to cope with the very large burden that will be thrown upon the Administrative Court. In this regard, too, the Government will need to formulate a plan, because we do not accept that a plan exists.

9. COSTS

We find that the applicant is entitled to its costs.

Accordingly the Court makes the following orders:

1. It is declared that the rule of law has been persistently violated in the commercial farming areas of Zimbabwe since February 2000, and it is imperative that the situation be rectified forthwith.

2. It is declared that persons in the commercial farming areas have been denied the protection of the law, in contravention of s 18 of the Constitution; have suffered discrimination on the grounds of political opinions and place of origin in contravention of Section 23 of the Constitution; and have had their rights of assembly and association infringed in contravention of section 21 of the Constitution.

3. It is declared that there is not in existence at the present time a programme of land reform as that phrase is used in section 16A of the Constitution.

4. It is declared that the purported amendment of section 5(4) of the Land Acquisition Act [*Chapter 20:10*] by section 3(b) of Act 15/2000 is null and void as being in conflict with the requirement of reasonable notice in section 16(1)(b) of the Constitution.

5. Accordingly it is ordered –

   A. That the respondents comply immediately with the order of this Court, made by consent of the parties thereto, on 10 November 2000 in Case No. SC 314/2000, and with the order of the High Court (GARWE J) made on 17 March 2000.

   B. That an interdict prohibiting the first, second and third respondents from taking any further steps in the acquisition of land for resettlement is hereby granted, but its operation is postponed until 1 July 2001, to enable the first, second and third respondents to produce a workable programme of land reform, and to enable the fourth and fifth respondents to satisfy this Court that the rule of law has been restored in the commercial farming areas of Zimbabwe.

6. Costs, including the costs of three counsel, are awarded to the applicant.