1. PETER HINGESTON

versus

BILLIARD MUSAKWA N.O.

and

MALVERN MUSARURWA N.O.

and

ATTORNEY GENERAL OF ZIMBABWE

1. O.W. THWAITES (PVT) LTD

and

HEATHER GUILD

versus

BILLIARD MUSAKWA N.O.

and

MALVERN MUSARURWA N.O.

and

ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 15 November 2010

Mr *N. Phiri*, for the applicants

Mr *T.R*. *Zvekare,* for the respondents

CHIWESHE JP: The applicants in the above matters sought on an urgent basis similar relief by way of provisional orders. Although I heard each application separately and on different dates, the cause of action in each of the applications is substantially the same and the draft orders filed of each record are identical, word for word. Each of the draft provisional orders reads as follows:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable court why a final order should not be made in the following terms:-

1. That the respondents be interdicted from proceeding with the trial of the applicants pending finalisation of the Supreme Court application in Case No………………
2. That the respondents be ordered to pay the costs of this application on the higher scale of attorney and client.

INTERIM RELEIF GRANTED

That pending finalisation of this application:-

1. The respondents be and are hereby interdicted from proceeding with the trial of the applicants.”

Incidentally the applicants in both cases were represented by the same firm of legal practitioners whilst on the other hand the respondents were represented by the same law officer from the Attorney General’s Office.

I dismissed both applications with costs and indicated that my reasons for doing so would follow. These are they.

The applicants in each case and in separate trials appeared before the first respondent, a magistrate, charged with contravening s 3 of the Gazetted Lands (Consequential Provisions) Act [*Cap 20:28*], that is to say, occupation of gazetted land without lawful authority. The second respondent, in each case, was the prosecuting law officer.

Initially both trials could not proceed as the applicants had filed separate applications with the Supreme Court, sitting as a Constitutional Court, in terms of s 24(1) of the Constitution of Zimbabwe. The relief sought in the Supreme Court was a “declaratur” in favour of each applicant to the following effect:-

“IT IS ORDERED:

1. That the first respondent’s decision declining to refer to this court in terms of s 24 (2) of the constitutional questions raised by the applicant in his criminal prosecution pending at Mutare under CRB 1916/09 is a breach of the applicant’s right to the protection of the law guaranteed under s 18 (1) of the Constitution of Zimbabwe.

Consequently this court will proceed to hear and determine the questions raised as

if they had been referred.

1. That the purported acquisition of the land held by the first applicant (description of the property), in terms of s 16 B (2) (1) (a) of the Constitution is null and void.
2. Consequently the prosecution of the applicant for violation of s 3 (2) as read with 3 (3) of the Gazetted Lands (Consequential Provisions) Act [*Cap 9:23*] is a breach of the applicant’s rights under s 13 (1) and 18 (1) of the Constitution and is hereby stayed and set aside.

ALTERNATIVELY TO THE EXTENT THAT IT WILL BE NECESSARY -

1. That the State has, in its application of s 16 B of the Constitution, discriminated against the applicants on the grounds of race and ancestry.
2. Consequently, the applicants’ prosecution founded under s 16 B and finding expression in s 3 (2) as read with 3 (3) of the Gazetted Lands (Consequential Provisions) Act is a breach of the applicants’ rights under sections 18 (1), 23 (1) and 13 (1) of the Constitution and is hereby stayed and set aside.

ALTERNATIVELY TO THE EXTENT THAT IT IS NECESSARY -

1. That the applicant’s prosecution before a determination has been made in their application for land recognised in the GPA and by necessary implication the Constitution, is a breach of the applicants’ rights under sections 13 (1) and 18 (1) of the Constitution.
2. Consequently, the said prosecution is hereby stayed and set aside.”

After a number of postponements of the criminal trial in the Magistrates Court, during which time the second respondent was awaiting instructions from the third respondent as to how the State should respond to an application made by the applicants wherein it was sought to stay the proceedings pending the outcome of the constitutional application, the second respondent made an application to have the criminal trial proceed in spite of the pending Supreme Court application. The Magistrate granted that application and directed that the trial proceed in spite of the pending Supreme Court application. Riled by that ruling the applicants approached this Honourable Court on an urgent basis by way of the present application.

In support of this application it was argued on behalf of the applicants that the constitutionality of the charges preferred against them in the court *a quo* was being challenged in the Supreme Court in the constitutional applications. Accordingly if the trial in the court *a quo* were to proceed the applications before the Supreme Court would be rendered academic. Since the constitutional issues raised were important not only to the litigants but also to the public at large, it would be prudent to stay the present criminal trial until the Supreme Court determination was at hand. It was argued that such a course of action would pose no prejudice to the State and that on the whole there was much to be gained in waiting for the Supreme Court to enunciate its position.

The respondents opposed the application on the grounds that the issues referred to the Supreme Court were frivolous and vexatious. In terms of s 24 (2) of the constitution the magistrate may decline to refer a matter to the Constitutional Court if he is of the view that the application to that court is frivolous or vexatious. That discretion vests with the trial court. In this case therefore the magistrate in dismissing the application for referral acted within his powers, argued the respondents. It was also argued that stay of the prosecution in the court *a quo* in the present circumstances would prejudice the State and the beneficiaries of the land reform programme. The State needs to create vacant possession of gazetted land so that beneficiaries may rightfully take occupation. The present application, contended the respondents, was to all intents and purposes a gimmick to delay the just and equitable redistribution of land, a process meant to address the racial imbalances created during the colonial era. The courts, argue the respondents, should not be seen to be assisting the applicants in the perpetuation of colonial injustice and in any event the balance of convenience favours the State and the beneficiaries of the land reform programme.

The respondents contend that there is no basis upon which the validity of s 16 B of the Constitution can be questioned *vis a vis* the provisions of the Declaration of Rights. They also contend that the question of racial discrimination does not arise as the land reform programme, which the section facilitates, is meant to correct the racial imbalances of the past in the ownership and use of land. They argue that it is impossible to address this imbalance without embarking on what they referred to as “positive discrimination” or affirmative action in favour of the dispossessed. The reference by the applicants to the Global Political Agreement is, according to the respondents, irrelevant to the issues at hand. It has no bearing whatsoever on the land laws of the country.

In response the applicants persisted with the application and brought in another dimension, namely, that a refusal to refer on the basis of frivolity is in itself a violation of section 18 of the Constitution if the presiding officer has not applied his mind objectively to the application before him. In support of this submission the applicants cited the following cases: *Martin vs Bill 1993* (1) ZLR at 153 and *Morgan Tsvangirayi v Robert Mugabe* SC 84/2005.

Mr *Zvekare*, for the respondents, argued that in any event as observed by the trial magistrate, the Supreme Court has already pronounced itself on the constitutional issues raised by the applicants and discussed them in their entirety in a unanimous decision in the case of *Mike Campbell (Private) Limited and Anor vs The Minister of National Security* *responsible for Land, Land Reform and Resettlement and the Attorney – General* SC 49/07, Constitutional Application No 124/06.

I agree with Mr *Zvekare*. In the Campbell case *supra* the Supreme Court dealt with an application raising substantially the same constitutional issues. In that case the applicants sought an order in the following terms:

“1. That the Constitution of Zimbabwe Amendment (No 17) Act 2005 that introduced

s 16 B into the Constitution of Zimbabwe, in its effect and implementation with

particular regard to the Provisions of s 16 B (3) (a) thereof, constitutes an abrogation of the applicant’s fundamental rights to protection of the law (the rule of law) and to due process (the right to a hearing). To that end the section violates the essential features as core values of the Constitution in so far as the Constitution’s provisions as to security and protection of fundamental rights as contemplated for under s 11 as further read with s 16 (1), 16 A, s 18 (1), s 18 (9) and s 23 of the Constitution are concerned. To that end the ‘Amendment’ is inconsistent with the essential features of the Constitution as to the right to due process and protection afforded every person in Zimbabwe and accordingly the ‘Amendment’ is consistent with the essential features of the Constitution as to the right to due process and protection afforded every person in Zimbabwe and accordingly the ‘Amendment’ is null and void.

1. That it be and is hereby declared that the applicant’s right to protection from deprivation of property and to the obligation on the State, through the acquiring authority to pay “fair compensation” for the acquisition (of property) before or within a reasonable time after acquiring the ‘property, interest or right’ as provided for under s 16 (1) (c) of the Constitution of Zimbabwe has been violated. Accordingly to the extent of such declared violation, the acquisition of the applicant’s property is declared null and void and of no force or effect.

Alternatively :

That it be and is hereby declared that the applicants’ right to the payment of ‘fair compensation’ for improvements on the property and as provided for under s 16 (1) ( c ) of the constitution of Zimbabwe as further read with sections 29 B and 29 C of the Land Acquisition Act [*Cap 20:10*] has been violated.

Accordingly the State through the acquiring authority is forthwith and in any event not later than 30 days of the date of this order directed to attended to complying with the provisions of s 29 of the Act subject to the applicants’ right and entitlement to challenge such compensation as my be fixed by the Compensation Committee and subject to the applicants’ further rights at law.

1. That the first respondent pays the cost of this application.”

The Supreme Court affirmed the validity and efficacy of Amendment No. 19 to the Constitution which introduced s 16 B into the Constitution. In this regard the Supreme Court noted that s 11 of the Constitution provides that the entitlement to fundamental rights specified in Chapter III is subject to the provisions of the Constitution. One such provision to which that entitlement to and, protection of such, is subject to is s 52 (1) of the Constitution which section empowers the legislature to amend, add or repeal any of the provisions of the Constitution. In enacting Amendment No. 19, the Legislature had complied with the mandatory procedures provided under s 52 (1) of the Constitution and accordingly acted within its constitutional powers. This point is made very clear at p 24 of the cyclostyled judgment, in the second paragraph wherein it is stated:

“The language used (in section 52 (1) of the constitution) is that which gives the legislature full power to amend, add to or repeal any of the provisions of the Constitution. Nothing can be more mischievous than an attempt to cut back power given by the Constitution in so wide language. The use of the word “any” shows that all the provisions of the Constitution, including those relating to fundamental rights, share one common feature of being liable to alteration or repeal.” (My own brackets).

Thus Amendment No. 19, in terms of that judgment, constitutes a proper and valid amendment to the Constitution. It cannot be held to be null and void as contended by the applicants. Section 16 B of the Constitution derives its legitimacy from the amendment. Further, section 16 B of the Constitution is a complete and self-contained code on the acquisition of privately owned agricultural land by the State for public purposes. Its provisions relate exclusively to the acquisition of agricultural land. By the use of the *non abstante* clause, “notwithstanding anything contained in this Chapter”, at the beginning of subsection (2), the Legislature gave the provisions of s 16 B overriding effect in respect of the regulation of matters relating to the acquisition of all agricultural land identified by the acquiring authority in terms of s 16 B (2) (a).” (See p 7 of the cyclostyled judgment, second paragraph).

It follows from the above that the acquisition of the applicants’ properties in terms of s 16 B of the Constitution must be deemed lawful and that the subsequent prosecution of the applicants in terms of s 3 (2) as read with s (3) of the Gazetted Lands (Consequential Provisions|) Act [*Cap 8:23*] is not a breach of the applicants’ rights under s 13 (I) or 18 (1) or any other provision of the Declaration of Rights. The allegation that “the State has, in its application of s 16 B of the Constitution, discriminated against the applicants on the grounds of race and ancestry”, thereby breaching applicants’ rights under sections 18 (1) 23 (1) and 13 (1) of the Constitution was dismissed out of hand by the Supreme Court in the Campbell case *supra*. At page 16 and 17 of the cyclostyled judgment the Supreme Court held as follows:

“It must be stated at this stage that the law as embodied in the provisions of s 16 B (2) (a) (c ) of the Constitution and the acquisitions of the pieces of agricultural land which resulted from its operations had no reference at all to the race or colour of the owners of the pieces of land acquired. There was no question of violation of s 23 to be considered in this case. No more shall be said on the alleged violation of s 23 of the Constitution.”

This conclusion is in line with the factors set out in the preamble to s 16 A of the Constitution.

“These factors are that under colonial domination the people of Zimbabwe were unjustifiably dispossessed of their land and other resources without compensation and that consequently the people took up arms in order to regain their land and political sovereignty resulting in the independence of Zimbabwe in 1980. It declares that the people of Zimbabwe must be enabled to reassert their rights and regain ownership of their land. The section declares further that the former colonial power has an obligation to pay compensation for agricultural land compulsorily acquired for resettlement purposes…………” (pages 8 and 9 of the cyclostyled judgment in the Campbell case *supra*).

As for the reference to the Global Political Agreement (GPA) I do not see its relevance to the present application. The applicants seem to suggest that where a former owner has applied for an offer letter or other lawful authority to occupy land he is not obliged to vacate gazetted land until his application has been determined by the acquiring authority. I am unable to agree with the applicants in this regard. A former owner or occupier is obliged to vacate the gazetted land upon the expiry of the statutory days unless he or she has been authorised by means of an offer letter, a lease agreement or permit issued by the appropriate authority to so remain in occupation. In the absence of such authority he or she remains liable for prosecution.

I am satisfied that in view of the stance taken by the Supreme Court with regards the legal effect of Amendment 19 to the Constitution and the provisions of s 16 B with regards land acquisition, the application for referral to the Constitutional Court was properly dismissed in the court *a quo* on the grounds that such application was frivolous and vexatious. I would accordingly uphold the magistrate’s decision.

It was for these reasons that I dismissed both applications with costs.

*Mugadza, Mazengero & Dhliwayo*, applicants’ legal practitioners

*Civil Division of the Attorney General’s Office*, respondents’ legal practitioners