

BONNYVIEW ESTATES PRIVATE LIMITED  
versus  
ZIMBABWE PLATINUM MINES PRIVATE LIMITED  
and  
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE  
CHIGUMBA J  
HARARE, 13, 15 September 2016, 21 June 2017

### **Opposed Application**

*Mr. C Venturas*, for the applicant  
*Mr. J. Manikai*, for the respondent

CHIGUMBA J: This a court application in which the relief sought is the following declaratory order;-

1. Applicant is entitled to all benefits deriving from the occupation by the respondent of that section of Bulfield Farm which is the subject of Notarial Deed of Servitude 11-7-95.
2. Respondent shall pay applicant's costs.

The application was filed of record on 24 May 2016. *Mr. Colin Cloete* deposed to the founding affidavit in which he averred that;-

Applicant is a company which is duly registered in accordance with the laws of this country. It acquired a commercial farm in Chegutu in a district known as Bulfield in 1955, which measures 1223.1078 hectares. Tobacco, seed maize, wheat, soya beans are grown there, and cattle ranching practiced on a commercial scale. The farm produced USD\$700 000-00 a year when it was at its most productive.

The purpose of this application is to compel the respondent to honor its lease agreement with the applicant. Respondent is trying to resile from the lease agreement on the basis that this farm has been acquired by the Government of Zimbabwe. Applicant assisted various mining

companies which came to the area prospecting for platinum in the 1980s and 1990s. It provided the prospectors with tractors to pull their water carts, it provided borehole water and moved its cattle herds to give way to the explorations. In 1995, BHP discovered a large platinum deposit in the area and subsequently secured the rights to mine this underground resource. Its Chief Executive officer (CEO), *Mr Gordon Taylor*, approached the applicant and subsequently signed a lease agreement to lease part of Bulfield farm to develop 'the south portal, a smelter and mine offices'.

By 1995, BHP had completed the first phase of the development and approached the applicant for more land on which to develop a 'slimes dam'. They required a servitude over 788 hectares out of the total 1223 hectares held by the applicant. Applicant agreed to grant the servitude in exchange for four million dollars. On 30 July 2001, the Notarial Deed of Servitude was registered. On 30 March 2001 applicant entered in to a formal lease agreement with Hartley Platinum Mines Private Limited which was valid from 1 February 2001 to 31 December 2010. The rent was the Zimbabwean dollar equivalent of six thousand United States dollars per month. In 2001 BHP and Hartlet Platinum Mines sold these rights to the first respondent. Applicant agreed to take a 35% reduction in rental. In 1997 1<sup>st</sup> respondent agreed to let applicant graze some of its cattle on the leased portion. Some of the cattle died due to the toxic emissions of first respondent's mining activities.

In 2000 Bulfield farm was listed for compulsory acquisition on 1 September. On 15 October 2004 a section 8 notice was issued. The farm was subsequently delisted by a government gazette after applicant raised objections to its compulsory acquisition. In 2005, 1<sup>st</sup> respondent's Managing Director was approached by the applicant who sought an increase in rentals which were being eroded by inflation. Applicant was paid eighty nine thousand United States dollars, the total value of the rentals due till the expiry of the lease period, 31 December 2010.

In 2005 the Constitution of Zimbabwe was amended by s16 A and 16B. Efforts to renew the lease did not yield any positive results. Respondent is adamantly refusing to pay any rental, which is unlawful. 1<sup>st</sup> respondent has no right to remain on this land in the absence of a valid lease agreement or payment of rentals. The respondent filed opposing papers on the 20<sup>th</sup>

December 2011. The Chief Finance Officer *Mr. Patrick Maseva-Shayawabaya*, deposed to the opposing affidavit in which he averred that;-respondent undertakes its mining and processing operations in terms of a special mining lease number 1 (special mining lease-the SML) which was originally issued to it by the Minister of Mines as Hartley Platinum Mines Private Limited in terms of the *Mines and Minerals Act*. The Notarial Deed of Servitude was signed between the applicant and BHP Minerals Zimbabwe Private Limited in 1995. Applicant was paid four million United States dollars in full and final settlement. Applicant was paid a lump sum settlement WHL regards to the lease agreement in 2005. Applicant is not entitled to renew the lease agreement because the farm was compulsorily acquired and never delisted as alleged.

The respondent's case is that it has the right, in terms of the SML and the Mines and Minerals Act to carry out mining operations within the agreement area. Even if the land had not been acquired by the Government, the applicant would retain only the right to graze its livestock in terms of s179 of the Mines and Minerals Act, or alternatively, to compensation in terms of s188 of the same act. These payments would be made upon application to the Mining Commissioner. The Notarial Deed of Servitude granted the respondent a servitude over the area in perpetuity, and all payments made under it were in full and final settlement of all and any claims for compensation by the applicant, its heirs successors or assigns. In terms of a 2005 amendment to the Constitution of Zimbabwe, all agricultural land that is identified for acquisition and gazetted by the state is considered to have been acquired and to vest in the State from the date of being gazette. Respondent is not obliged to pay rent to the applicant for land which has vested in the State. The respondent averred that it follows that if the applicant does not own the land in question, it has no *locus standi in judicio* to bring these proceedings

The following facts are common cause in this matter;-

1. The respondent assumed all rights and obligations of Hartley Platinum Mines and BHP.
2. On 24 August 1994 the respondent was granted authority to conduct mining operations by the Government of Zimbabwe through a special mining lease (SML).
3. The land covered by the SML measures 788 hectares, and it was encumbered by a Notarial Deed of Servitude and a lease agreement.

4. The Notarial Deed of Servitude was executed on 13 July 1995 and the applicant was paid four million dollars.
5. The lease was valid for a period between 1 February 2001 and 31 December 2010, and it expired by effluxion of time. Despite being renewable after 31 December 2010, the parties failed to reach agreement to renew the lease.
6. Full compensation and rentals were paid in full for the lease period.

The issues which arise for determination in this matter are as follows;-

1. Whether the applicant has *locus standi in judicio* to bring these proceedings against the respondent.
2. Whether the land in issue was acquired by the State in terms of the Land Acquisition Act, and the effect of Amendment number 17 of 2005 on the rights and obligations of the parties.
3. Whether acquisition alienated any and all ownership rights in the land from the applicant.
4. Whether the respondent is obliged to pay rental to the applicant.
5. Whether applicant has been paid in full and final settlement of all the respondent's obligations.

At the hearing of the matter, the court expressed the opinion that the question of *locus standi in judicio* should be disposed of first, before delving in to the merits. The parties agreed to file heads of argument on this preliminary point only, and that the court could make its ruling on that point, which might obviate the need to deal with the merits. After not receiving anything from either party, the parties were called to chambers for a case management conference, and it was agreed that the applicant would file heads on this preliminary point by 31 March 2017, and the respondent by 7 April 2017. The applicant did not file any heads of argument as agreed, by the stipulated date, or to date. The first respondent then filed its heads of argument, purely on this preliminary point, on 12 April 2017, without having received any heads of argument from the applicant.

It was submitted on behalf of the 1<sup>st</sup> respondent that an application stands or falls on the basis of the averments made in the founding affidavit. See *Jackson v Rothmans of Pall Mall*

*(Zimbabwe) Private Limited*<sup>1</sup>. No new facts or evidence may be established by any subsequent affidavits or pleadings such as answering affidavits or heads of argument from the bar. The applicant in its founding affidavit par 17 p6 stated under oath that the farm had been acquired by the Government of Zimbabwe. It attached proof of the acquisition , a s5(1) preliminary notice, and a section 8 acquisition order rp29-30, and rp31-32, annexures D-E. In par 18 of the founding affidavit applicant states that the farm was subsequently delisted by a government notice (se par 24, p73 answering affidavit).

It is trite that the effect of a formal admission is;-

“...A formal admission made in pleadings cannot be ignored by the court before whom it is made. Unless withdrawn, it prevents the leading if any further evidence to prove or disprove the admitted facts. It becomes conclusive of the issue or fact admitted. Thus where liability in full...is admitted, no evidence is permissible to prove or disprove the defendant’s admitted liability. The importance of the admission is that it is thus seen as limiting or curtailing the procedures before the court in that where it is not withdrawn, it is binding on the court and in its face, the court cannot allow any party to lead or call for evidence to prove the facts that have been admitted”. See *The Civil Evidence Act [cap 8:01]*, *DD Transport Private Limited v Abbott*<sup>2</sup>, *Mining Industry Pension Fund v Dab Marketing Private Limited*<sup>3</sup>.

The court accepts that the applicant has failed to establish on these papers which it filed of record, that the farm was subsequently ‘delisted’, and should be deemed to not have been compulsorily acquired. Applicant did not withdraw its formal admission that the farm was gazetted and acquired by the State. No title deeds were attached to the papers filed of record. No title deeds may be made part of the record from the bar. The respondent was entitled to meet the case which had been made against it in the founding affidavit. See *Austerlands Private Limited v Trade & Investment Bank Ltd & Ors*<sup>4</sup>, *Keavney & Anor V Msabaeka Bus Services Private Limited*<sup>5</sup>, where the Supreme Court stated that;-

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<sup>1</sup> 1993 (2) ZLR 156 (SC) @ 161D

<sup>2</sup> 1998 (2) ZLR 92 (SC) @97G-98B

<sup>3</sup> SC 25-12 @ 8-9

<sup>4</sup> SC 92-2005 @ 8

<sup>5</sup> 1996 (1) ZLR 605

“A pleader cannot be allowed to direct the attention of the other party to one issue, and then at the trial attempt to canvass another. The purpose of pleadings is to define the issues, and to enable the other party to know the case that he has to meet”.

The court accepts that, s5(7) of the *Land Acquisition Act* requires the acquiring authority to withdraw the preliminary notice of acquisition by publishing a notice of its withdrawal in the Government gazette. See *Naval Phase Farming Private Limited & Ors v Minister of Lands & Rural Resettlement & Ors*<sup>6</sup>. The court accepts that, the acquiring authority is at liberty to revoke any proposed acquisition in terms of s 10A of the Land Acquisition Act. No evidence of the gazetting of the delisting of the farm, or of the revocation of the acquisition of the farm, was attached to the applicant’s papers.

It is trite that, in terms of the Land Acquisition Act, a farm is acquired on the date when the s 8 (1) (b) (iii) acquisition order is published in a government gazette, not on the date when the title deeds are endorsed. Endorsement of the title deeds is notice to the whole worlds of the fact of acquisition. It is not a required step in the process of acquisition(my emphasis). Endorsement of the title deeds is a result of acquisition. If title deeds are merely endorsed without the publication of a section 8 notice in a government gazette there can be no compulsory acquisition to speak of. On 14 September 2005, the appointed date, all farms listed as gazette vested in the government of Zimbabwe in terms of the Constitution of Zimbabwe Amendment No17 Act of 2005.

We accept that Bulfield farm was compulsorily acquired by the State on 15 October 2004 when the acquisition order was gazetted. It was acquired further, in the event that the acquisition process in 2004 had not been completed, by merely being listed in terms of s 16 B (2) (a) (1) of the former Constitution. Blufield farm was identified for acquisition, before 8 July 2005. It was itemized in Schedule 7 of the former Constitution. It was acquired and vested in the State from 14 September 2005. See *Campbell Private Limited & Anor v the Minister of National Security*

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<sup>6</sup> HH 768-2015 @ 16 (one of my own judgments)

*Responsible for Land, land Reforms and Resettlement & Anor*<sup>7</sup>, *Route Toute BV & Ors v Minister of National Security Responsible for land Reform & Resettlement*.<sup>8</sup>

We find that the effect of the acquisition of Bulfield farm in terms of the former Constitution in 2005 was the alienation of all and any of the applicant's rights in the farm save the right to claim compensation from the State for any improvements on the farm. The rights and interest in the land now vest in the State free of any encumbrances. We find that the applicant, not being the holder of any rights and interest in the land, does not have a direct or a substantial interest, *locus standi in judicio*, which would entitle him to bring an application of this nature, or to be eligible, at law, for the relief that it is seeking. See *Naval Phase Farming Supra* at p16, *Chisvo & Anor v Peter & Ors* <sup>9</sup>.

In the result, the preliminary point raised by the first respondent has merit. It follows that the applicant is not entitled to the substantive relief that it is seeking, because it is no longer a legitimate holder of title or interest in Bulfield Farm. For these reasons, the application is dismissed with costs.

*Messrs Mbidzo, Venturas & Samkange*, applicant's legal practitioners  
*Messrs Dube, Manikai & Hwacha*, respondent's legal practitioners

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<sup>7</sup> SC 49-2007 @ 13-20

<sup>8</sup> HH 128-2009 @ 5

<sup>9</sup> HH 23-2006

