FOLY CORNISHE (PRIVATE) LIMITED
versus
MINISTER OF LANDS AND RURAL RESETTLEMENT
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 2 & 10 October 2018

Opposed application

Ms *L Banda*, for the applicant
Ms *T S Musangwa*, for the 1st respondent

MATHONSI J: This is an application for the review of the decision of the first respondent to compulsorily acquire what is in essence a suburban residential stand and to issue a preliminary notice in terms of s 5 (1) (a) of the Land Acquisition Act [*Chapter 20:10*] to the applicant, announcing the intention to do so for "Urban Development". The decision to compulsorily acquire the developed piece of land, being stand 2558 Glen Lorne Township Harare, itself a well-developed urban suburb in the City of Harare which was established in terms of the Southern Rhodesia Government Notice No. 263 of 1959, was made by the former Minister of Lands and Rural Settlement, D.T. Mombeshora, who signed the preliminary notice dated 18 December 2014.

I take judicial notice that there is now a new Minister superintending that Ministry who, if at all he was made aware of this application and the serious allegations impropriety and crass corruption attributed to those claiming to have influence over the office of the former Minister, is unlikely to have opposed this application or even permitted the matter to come this far. I say so because extremely serious allegations of the capture of the office of the then Minister of Lands and Rural Settlement by the basest of land barons and its manipulation to compulsorily acquire privately owned suburban residential land ostensibly for "Urban Development" in order to coerce the land owner into an agreement surrendering large tracts of land under duress to land barons as "protection fee" against expropriation of their land, have been made very loudly in this application, complete with an example of a similar case where the same *modus operandi* was successfully implemented, but have not been refuted in any meaningful way.

Yet the activities of these ruthless and indeed shameless land sharks appear to have been behind the compulsory acquisition of the land leading to the issuance of a preliminary notice by the Minister which is the subject of this review application. Perhaps it is not without reason that although the Minister was cited as the first respondent in his official capacity, the opposing affidavit was signed by the acting permanent secretary and other than the impugned preliminary notice itself, there is not a single other document in the record placed before me running into 350 pages which is ascribed to or was signed by any of the Ministers who have held the portfolio of Lands and Rural Resettlement. But then, it is the exercise of ministerial discretion as the acquiring authority, to compulsorily acquire the land in dispute which is under scrutiny in these proceedings. The direct and undiluted input of the Minister would have been invaluable to the court indeed.

The applicant, an incorporation registered in Zimbabwe, holds title to stand 2558 GlenLorne Township in the District of Salisbury measuring 18, 2024 hectares (the property) by Deed of Transfer number 6050/2006. Prior to that, the property comprised of 4 developed but vacant stands being stands 57,59, 60 and 61 which were consolidated by Certificate of Consolidated Title Reg No 6049/2006 dated 25 August 2006 in favour of GreyLichen (Pvt) Limited, the applicant's predecessor in title. The property has previously been the subject of protracted litigation between the applicant and an individual known as Shingirayi Tapomwa who had masterminded its transfer from the applicant to the deceased estate of his late father Misheck Tapomwa by Deed of Transfer number 8361/2008. In *Foly Cornishe (Pvt) Ltd & Anor* v *Tapomwa NO & Ors* SC 26-14 (unreported), the Supreme Court found that the transfer had been a nullity having been procured through some impropriety on the part of Shingirayi Tapomwa and his father's estate. The court reversed the transfer and reinstated the applicant's title.

Although the court judgment was delivered on 18 March 2014 the applicant has been battling to evict Tapomwa since then and the papers indicate that he has also subdivided and sold 9 stands at the property despite the definitive determination of the parties' rights to the property by the Supreme Court. In fact Tapomwa vowed in an affidavit that he deposed to on 31 July 2014 in opposition to an application for eviction in HC 5855/14 to motivate the acquisition of the property. He said:

> "9. In fact the estate (of the late Misheck Tapomwa) will institute proper proceedings against the applicant for an order (confirming) the acquisition of the property."

Tapomwa did not elaborate on how a private individual could possibly influence the acquisition of privately owned property. Be that as it may, and against that background, the first respondent issued a preliminary notice for the compulsory acquisition of the property in terms of s 5 (1) (a) of the Land Acquisition Act [*Chapter 20:10*]. It is dated 18 December 2014 and reads in relevant part:

> "Re: Stand 2558 GlenLorne Township situate in the District of Salisbury measuring 18, 2024 hectares.
>
> Notice is hereby given, in terms of paragraph (a) of subsection (1) of section 5 of the Land Acquisition Act [*Chapter 20:10*], that the President intends to acquire compulsorily the land described in the Schedule for Urban Development. A plan of the land is available for inspection at the following offices of the Ministry of Lands and Rural Resettlement between 8am and 4pm from Monday to Friday (other than on public holiday) on or before 26th January 2015.-----
>
> If you wish to object to the proposed compulsory acquisition, you may lodge the objection in writing with the Minister of Lands and Rural Resettlement Private Bag 7779, Causeway, Harare on or before 26th of January 2015.------A preliminary notice to compulsorily acquire the land described above will appear in the Zimbabwean Government Gazette on 19th of December 2014. The same notice will appear in the Herald on the 19th December 2014 in terms of the Land Acquisition Act."
> (The underlining is mine)

It is common cause that the notice was published in the government gazette of 19 December 2014. The first respondent has produced a single newspaper cutting which is not the official proof of publication as would be generated by the Herald newspaper and does not show from which newspaper it comes. It does not have a date except for a handwritten endorsement in blue ink "Herald 19/12/14." Clearly this is not sufficient to prove publication in the Herald on 19 December 2014 and the applicant has disputed it. In addition, as I have said, it is only one publication and not 2 as stated in the s 5 notice.

Apart from that, the applicant has stated that it was only served with the preliminary notice on 29 January 2015 pursuant of s 5 (1) (b) (i) of the Act meaning that it was served on the applicant 3 days after the time during which the applicant was required to object to the notice. Although the applicant did lodge a letter of objection dated 20 February 2015 chronicling the basis of its objection, it has taken issue with the preliminary notice and insists that it is invalid by reason of failure to comply with the peremptory provisions of the Land Acquisition Act. The applicant has also challenged the validity of the notice published in the Schedule of the government gazette on the ground that it cited a wrong Deed of Transfer as the one in terms of which the property is held. The cited Deed of transfer is 8361/2008, a deed which was cancelled by the Supreme Court by virtue of which the Estate Late Misheck

Tapomwa held the property. The applicant holds the property by Deed of Transfer number 6050/2006.

The applicant has also made reference to an email written to a representative of the applicant on 17 February 2015 by a legal practitioner acting on behalf of an individual who was trying to coerce the applicant into entering into an agreement with him signing away a large portion of its land in consideration of the reversal of the acquisition of the property and specifically mentions that the acquisition "notices would be served out of time so that you cannot act in any way." The legal practitioner suggested on behalf of her client that the applicant should sign the agreement with her land baron client who would then approach the first respondent to facilitate a reversal of the acquisition. This, according to the applicant explains why it was served with the notice 3 days after the expiry of the *dies inducae,* to facilitate a scam to expropriate its property for the benefit of corrupt individuals and nothing near the purpose alleged in the notice.

As if that did not raise enough complications, the applicant complains that upon objecting to the preliminary notice, the first respondent shifted ground and gave a different reason for the acquisition of the property, namely that it was required, not for "Urban Development" as stated in the s 5 notice, but for the construction of houses for senior government officials. That is contained in a letter written by one E. Sumowah for the Secretary for Lands and Rural Resettlement on 24 March 2015. The letter reads in pertinent part:

> "RE: OBJECTION TO COMPULSORY ACQUISITION OF POLY CORNISHE (PVT) LTD: STAND 2558 GLENLORNE TOWNSHIP SALISBURY MEASURING 18 2024 HECTARES.
>
> Your objection to compulsory acquisition of the above cited property refers. The acquiring authority responds as follows:
>
> The purpose of the compulsory acquisition of this property is so that there is construction of a stock of houses for senior government officials to compliment the stock national housing in Gunhill i.e. the Gunhill Villas. These villas house senior government officials including permanent secretaries, principal directors and judges. Your client states that he has always had long term plans to develop the property in question and attaches a 2001 letter to a client to that effect. To date nothing has taken place by way of development on this stand. It has therefore been identified as suitable for this national project of housing for executives ….. We are not aware of a plot to reverse the acquisition of this property. Firstly, the Minister of Lands and Rural Resettlement (the acquiring authority) only acquires land for urban development upon request from the Ministry of Local Government, Public Works and National Housing. It would be absolutely impossible for the Ministry of Lands officers or officials to thereafter reverse the acquisition without the express instruction and authority of the Ministry of Local Government, Public Works and National Housing to do so. Secondly the Ministry of Lands and Rural Resettlement has no jurisdiction over urban land. It only acquires urban land for urban development on behalf of the Ministry of Local Government, Public Works and National

> Housing and at its request. If your client is aware of any reversal of land done by the Ministry of Lands and Rural Resettlement in an improper manner kindly provide the details and the matter will be investigated to its logical conclusion. In light of this, it is submitted that you have not proferred any real reason as to why the compulsory acquisition should not proceed. The purpose for the acquisition outweighs any reasons you have cited in your objection."

That conclusion was made even though the detailed letter of objection contained evidence of the nefarious deals complained of, the details of which are in a series of e-mails written by a legal practitioner representing a named land baron. Also attached to the letter of objection was a draft agreement prepared by these people complete with the name and address of the individual involved, which they wanted the applicant's representative to sign. In addition, those documents included examples of a similar scam successfully undertaken by that cartel with another land owner using the same method. It is therefore difficult to comprehend what other information the first respondent, or is it the Secretary for Lands, needed in order to commission an investigation into the serious allegations of corruption. The first respondent appeared to have had this fixation at acquiring the property notwithstanding the unearthing of the scam. It is also worrisome that the first respondent did not see the need to adequately rebut the allegations.

As I have said the applicant has now taken the decision of the first respondent to acquire the property and to issue the s 5 notice on review on a number of grounds chief among which being that it was instigated by certain individuals in a corrupt way in order to benefit themselves from the property belonging to the applicant. In addition, there were procedural irregularities in the issuance of the preliminary notice which rendered it and the entire process a legal nullity given that even the provisions of the Land Acquisition Act were not complied with. Apart from that, the decision itself is unlawful by reason that the acquisition could only be for a purpose set out in s 71 (3) (b) of the Constitution but the purposes stated by the first respondent are *ultra vires* the constitution and therefore a nullity.

The first respondent has opposed the application by an affidavit deposed to by Elizabeth Sumowah who stated that she was doing so in her capacity as the Acting Permanent Secretary in the Ministry of Lands and Rural Resettlement by virtue of which position she is authorised to depose to the affidavit on behalf of the Minister. The *locus standi injudicio* of Elizabeth Sumowah to make the opposing affidavit has been challenged by the applicant. I shall return to that later but for now let me state that the first respondent's position is that he is entitled to acquire urban land in terms of the Land Acquisition Act which Act accords with s 71 (3) (a) of the Constitution. Appearing to depart from the purpose specified in the preliminary notice, the

first respondent contends that the property is required for a public purpose beneficial to the community at large in that it is required for the construction of pool houses for senior government officials, an exercise which is in the public interest.

It is stated further that the first respondent, in his capacity as the acquiring authority commenced the process of acquiring the property following a "request" from the Ministry of Local Government Public Works and National Housing which is mandated to provide government pool houses. In that regard it is further contended by the first respondent that the construction of pool houses for the stated purposes is a public need as "it will not benefit individuals in their private capacities," thereby bringing it under the ambit of s 71 (3) (a) of the Constitution.

Regarding the s 5 preliminary notice the first respondent asserted that it was published in the gazette on 19 December 2014, the same day it was published in the Herald. I have already said that there is no valid proof of any publication in the Herald, let alone 2 publications. The first respondent concedes that the s 5 notice was served out of time but denies that it was done deliberately it having been as "a result of an administrative delay", whatever that means. It is further contended that the applicant was later granted more time to file an objection. For that reason, failure to serve the notice timeously is of no moment and no prejudice was suffered as a result.

The first respondent also conceded that he cited a wrong Deed of Transfer in the notice but maintained that "this error is not fatal to the notice" considering that s 5 (1) (a) (i) does not require any citation of the Deed of Transfer holding the property. Nothing should turn on the incorrect citation. The first respondent took the view that he does not have to respond to the allegations of impropriety raised by the applicant at this stage. He will only do so in an application for confirmation of the acquisition in term of s 7 to the Administrative Court. In his founding affidavit in support of that application he will give details of the purpose of the acquisition and the applicant will have an opportunity to respond. It is lost to the first respondent that what is being impugned is the very decision to issue a s 5 notice which decision is reviewable, it being an administrative one.

The first respondent's opposing affidavit, brief as it is considering the voluminous objections contained in the application being opposed, is remarkable not by what it says but by what it does not say. It is completely silent on the corruption charges central to the whole dispute. The notion that what is not denied in affidavits is taken as admitted is the cornerstone

of our civil practice and procedure. In the words of McNally JA in *Fawcett Security OPS (Pvt) Ltd* v *Director of Customs & Excise & Ors* 1993 (2) ZLR 121 (5) at 127F:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted. Therefore Customs have in effect conceded that they were asked by Fawcetts whether all was well, and they advised that it was."

See also *Minister of Lands & Agriculture* v *Commercial Farmers Unions* S-111-01.

Before I consider the merits of the matter it is important to record that this matter ended up at the High Court as the court with both inherent jurisdiction over all civil and criminal matters in Zimbabwe as well as review jurisdiction by virtue of s 26 of the High Court Act [*Chapter 7:06*]. In terms of s 7 (3a) of the Land Acquisition Act [*Chapter 20:10*] it is the Administrative Court which has jurisdiction at the first instance to hear and determine any application to review the proceedings and decisions of the acquiring authority using the same grounds of review specified in s 27 of the High Court Act. Ordinarily therefore this matter should have been heard and determined by that court. Indeed the applicant did file the application in that court but, by judgment delivered on 12 February 2017, MANDEYA J declined jurisdiction holding that the relief sought had declaratory connotations which could only be dealt with by the High Court, the Administrative Court being a creature of statute could not entertain the application. It was then brought to this court as a review application in terms of Order 33 of this court's rules.

Ms *Banda* for the applicant took a point *in limine* that there is no valid opposition to the application given that the deponent of the opposing affidavit, not being the first respondent, could not depose to an affidavit on his behalf merely by virtue of being the Acting Permanent Secretary. She has not exhibited any authority given to her by the first respondent to stand on his behalf. Ms *Musangwa* for the first respondent defended the opposing affidavit on the basis of r 227 (4) (a) which allows "a person who can swear positively to the facts or averments" to depose to an affidavit in support of an application or in opposition thereof. She submitted that as the Acting Secretary for Lands, Sumowah is the accounting officer for the Ministry and is privy to the facts of the matter. She can swear positively to the facts.

I do not intend to be detained unduly by such legal niceties. What is clear is that it cannot be said that there is no opposition to the application because, although the deponent does not state that she is aware of and can swear positively to the facts, the correspondence which preceded the filing of this application shows that she was indeed dealing with the matter. She should be taken to be aware of the facts. In saying that I am mindful that what is sought to be impugned and is therefore the subject of the present inquiry on review is the subjective

mental state of the acquiring authority in making a decision to compulsory acquire the property. His application of his mind in arriving at the decision is what is being investigated to see whether he applied executive discretion lawfully and in a proper manner. His election not to give evidence in that regard is certainly not helpful to his case and the secondary affidavit of Sumowah should be viewed in that context. It tends to weaken the first respondent's case. I am only prepared to go that far and no further.

Consideration of the validity of the preliminary notice itself involves an examination of the procedure for acquisition set out is the relevant Act. The preliminary notice was issued in terms of s 5. It provides in pertinent part:

> "5. Preliminary notice of Compulsory acquisition
> (1) Where an acquiring authority intends to acquire any land otherwise than by agreement, he shall –
> (a) publish once in the Gazette and once a week for two Consecutive weeks, commencing with the day on which the notice in the gazette is published in a newspaper circulating in the area in which the land to be acquired is situated and in such other manner as the acquiring authority thinks will best bring the notice to the attention of the owner, a preliminary notice-
> (i) describing the nature and extent of the land which he intends to acquire and stating that a plan or map of such land is available for inspection at a specified place and at specified times; and
> (ii) setting out the purpose for which the land is to be acquired; and
> (iii) calling upon the owner or occupier or any other person having an interest or right in the land who:
> A. wishes to contest the acquisition of the land, to lodge a written objection with the acquiring authority within thirty days from the date of publication of the notice in the Gazette; or
> B……
> (b) serve on the owner of the land to be acquired and the holder of any registered real right in that land whose whereabouts are ascertainable after diligent inquiry at the Deeds Registry and, if necessary, in the appropriate companies register, notice in writing providing for the matters referred to in sub paragraphs (i), (ii) and (iii) of paragraph (a);
> Provided that in respect of specially gazetted land the publication of a preliminary notice in the gazette and once a week for two consecutive weeks (commencing on the day on which the notice in the Gazette is published) in a newspaper circulating in the area in which the land to be acquired is situated, shall be deemed to constitute service of notice in writing on the owner of the land to be acquired and the holder of any registered real right in that land."
> (The underlining is mine)

In terms of s 2 of the Act, the interpretation section, specially gazetted land means agricultural land referred to in s 16 B (1) (a) (i) (ii) or (iii) of the previous constitution of this country. Clearly therefore the property forming the subject of this dispute is not specially gazetted land. What it means is that in respect of the property in question only the peremptory provisions of s 5 (1) apply and not the *proviso.* They are of peremptory application by virtue

of the use of the word "shall" in subsection (1). The publication of a notice once in the gazette, once in 2 consecutive weeks in a newspaper circulating in the area, the description of the nature and extent of the land, the setting out of the purposes for which the land is to be acquired, and indeed the service of a written notice on the owner are all pre-requisites of a valid notice of compulsory acquisition. They cannot be derogated from and there can be no valid notice falling short of those requirements. Here we have a case where the purpose of acquisition has changed from that given in the notice.

In a line of cases which Ms *Banda* diligently cited in her heads of argument, the Supreme Court has settled the point that a failure to comply with the peremptory direction of a statute leads to invalidity. In any event, it is trite that when interpreting statutes, the courts are primarily guided by the wording and context of the statutes. The view that a defective compliance with the peremptory provisions of the rules or statute is one that has been expressed by the courts for quite a long time to be settled by now. KORSAH JA stated in *Jensen* v *Acavalos 1993* (1) ZLR 216(S) that the use of the word "shall" means that compliance with such provision is peremptory. The court went on, citing a passage in the judgment of KLOPPER J P in *Hattingh* v *Pienaar* 1977 (2) SA 182 (O) at 183, to remark that a fatally defective compliance with a provision cannot be condoned it being a nullity. Every proceeding which is founded on that is also bad and incurably bad as famously expressed by LORD DENNING in *McFoy* v *United Africa Co Ltd* [1961] 3 All ER 1169 (PC) at 1172I.

That reasoning was followed by CHIDYAUSIKU CJ who appeared to qualify it though in *Moyo & Ors* v *Zvoma N O &Anor* 2011 (1) ZLR 345 (S) at 364 D – F. He said:

> "It is quite clear from the above authorities that failure to comply with peremptory language of a statute can lead to a nullity. Equally, there are decisions of this court wherein it has been held that non-compliance with peremptory statutory provisions does not necessarily lead to a nullity. See *Sterling Products International Ltd* v Z*ulu* 1988 (2) ZLR 293 (S) and the cases referred to therein. The above authorities can be reconciled on the basis that the use of peremptory language is one of a number of indicators of the legislative intent where such intent is not explicitly stated. This obviously is a departure from the principle of strict exaction of compliance with the wording of the stature that I referred to earlier. In my view, the use of peremptory language, such as the words 'shall' or 'must' in a statute is no longer conclusive evidence of the intention of Parliament but remains cogent evidence of such intention."

Whatever the case, the fact that in the present case the law-maker used the word "shall" in s 5 (1) points to an intention that there must be compliance with the procedure set out therein. Where there has been no compliance or partial compliance an invalidity occurs. It is not disputed that the notice was only published in the gazette. There is no cogent evidence of publication in the Herald which is a newspaper circulating where the property is located. In

addition, service on the applicant was only effected 3 days after the notice given had expired. The level of tardiness displayed by the first respondent in respect of such an important process only points to an invalidity. To my mind it matters not that out of further tardiness the applicant seized the opportunity to submit its objection albeit out of time. That cannot cure the failure to comply with the legislative directive.

I say there was further tardiness over and above the defective s 5 notice which even incorrectly cited the Deed of Transfer involved in that the applicant's objection was served upon the first respondent on 24 February 2015. It is amazing that the first respondent is still speaking of filing a s 7 application for confirmation of the acquisition disregarding completely the peremptory provisions of s 7 (1) of the Act. It provides:

> "7. Application for authorizing or confirming order where acquisitions is contested
> (1) Where an objection to a proposed acquisition has been lodged in terms of subparagraph A of subparagraph (iii) of paragraph (a) of subsection (1) of section five, the acquiring authority shall-
> (a) before any acquisition takes place; or
> (b) not later than thirty days after the coming into force of an order in terms of section eight;
> apply to the Administrative Court for an order authorizing or confirming the acquisition as the case may be."

This application was only filed in this court on 16 March 2017. The Administrative Court had declined jurisdiction a month earlier. Ms *Banda* submitted that on the date of the hearing of this matter it had been 3 years 9 months and 14 days since the preliminary notice was issued and later objected to. The first respondent did not apply for confirmation within 30 days underscoring the cavalier approach that has been employed throughout. In my view the preliminary notice is susceptible to be set aside on the foregoing grounds alone. This is because it is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no force or effect. See *Muchini* v *Adams & Ors* 2013 (1) ZLR 67 (S) at 72 B- C.

However these are not the only problems afflicting the proposed acquisition. It has been submitted on behalf of the applicant that the decision to acquire the property is grossly irrational for a number of reasons including that, according to the notice, the property was acquired for "urban development". In response to the objection the first respondent changed the reason to something else, the need to construct houses. Ms *Musangwa* was constrained to suggest that the construction of houses qualifies for urban development. When that could not stick, she swung round and tried to suggest that construction of houses is in the public interest

even though the proposed houses will benefit, not the community, but a few elites in their individual capacities.

I propose to deal with all the other problems besetting this acquisition under irrationality given that the circumstances seem to suggest that there are underlying reasons for the acquisition than have been given. A closer look at the circumstances exposes the unreasonableness of the activity. It is common cause that the property is developed and is in an urban township where subdivided stands have been on sale for some time. Urban development, first and foremost involves the act of converting rural land into urban one. The process involves what in the construction industry is referred to as "servicing stands", which includes the laying of water and sewer reticulation pipes and road network. It is not disputed that the property is made up of serviced stands and is urbanized.

The reason for the acquisition given in the preliminary notice is therefore irrational. It was perhaps upon a realization of that fact that the first respondent gave another reason, the construction of government houses. Those are the factors which give credence to the allegations of corruption which have been set out, it being impossible to explain the decision in any other way. As a court of law this court is obligated to examine those claims in greater detail given that this country has declared a "zero tolerance" to corruption. This court can therefore ill-afford to turn a blind eye to allegations of corruption as it has to play a central role in the fight against corruption.

It is the steady outflow of national resources owing to corruption which undoubtedly has an effect on the long term future of the country. The corrosive damage caused by corruption ultimately holds up development, impoverishes the nation and invariably results in the breakdown of societal values. Therefore a culture of "zero tolerance" to corruption which has been declared by the leadership of the country must permeate our legal system. We have a case in which a legal practitioner of this court not only had no qualms representing a corrupt person and propagating his nefarious scheme, but was prepared to openly document the evil. The undisputed evidence placed before me shockingly suggests that illegality had in fact become a way of life. On 17 February 2015, a legal practitioner of this court wrote the following email to the applicant's representative:

> "Subject Re: Stand 2588 LAND ACQUISITION---
> For now I can only (reveal that it's a political scam that involved Tapomwa (because) he had sold 9 stands already at the plot. He then approached one Minister to have the land acquired so that he could in the long run get a share. The Minister was told that you had pledged the land to him but you are now changing sides. They approached the Minister of Lands. It was agreed that notices would be served out of time so that you cannot act in any way. The land

was then offered to someone else who is not Tapomwa but in confidential agreement with Tapomwa. The 2 Ministers would receive land after it has been converted to local governance and the permit is resuscitated. They want to act expeditiously and put in an advert in terms of s 8 of the Land Acquisition Act. My client is afraid if he approaches the Minister before paper work is signed, the Minister might ask for another meeting the following day and that he produce the agreement of sale. We therefore need to move with high speed. The moment you sign your agreements, take the back seat and watch as the land comes back. However to make our case strong our client requires copies of the following

(a) Court order in this case
(b) CR14 and CR6
(c) Permit to subdivide the land (granted in favour of Tapomwa)
These he will use to convince the Minister, failing which the President."

One would find it hard to believe that the foregoing is a document penned by a lawyer who is an officer of this court and is sworn to uphold the laws of the country as well as justice and fairness. The contents were stated openly and on behalf of a named individual as if what was being discussed was lawful. It was not. Much earlier on 4 February 2015, when the activities to coerce the applicant to sign an agreement commenced, the same legal practitioner had written to the applicant's representative as follows:

"I hope this finds you well despite all the trauma of the acquisition. As you requested telephonically, I lay hereunder my client's proposal for your consideration.

1. My client proposes that he works towards the reversal of the land acquisition as he once did with the land belonging to Clouds end Stud (Pvt) Ltd, a company wholly owned by …. which was gazetted in 2010.
The way he will do it is through the following:
(a) We draft an agreement between yourselves and him in terms of which we stipulate how you will work in the event of the reversal of the land acquisition. My client is proposing that once the land acquisition is reversed, the property will have to be subdivided and the stands be sold. He proposes that 10% of the stands would go towards endowment to council, 10% would go towards development of the land. This means that you will not fork out any money towards the development of the land. You will then get 40% of the stands and he gets 40% as well. As soon as there is a permit to subdivide and survey diagram, the exact stand numbers each party is going to benefit will be stipulated and each party will sell its own stands for its own benefit whilst the development will be catered for by the 10% reserved for that.

(b) Land acquisition in Zimbabwe is only against whites so we will draft an agreement between yourselves and him selling to him the shares in the company Folly Cornishe--- This agreement which will be dated back to last year he will go with to the Minister of Lands, T Mombeshora and advise that the land the Minister gazetted belongs to him. There is no law allowing land acquisition of black owned farms, so the reversal is definite."

A draft agreement between the applicant and the lawyer's client complete with his name, national identity number and address was also forwarded to the applicant's representative with instructions for her to sign it. She was also favoured with copies of sample

agreements signed between that individual and another land owner in the process of reversing a similar compulsory acquisition in August 2013.

It is not the admissibility of this evidence or the truthfulness of the allegations which is the subject of this case but the fact that all this information, including the affidavit of Tapomwa vowing to procure the compulsory acquisition of the property, was submitted to the first respondent attached to the letter of objection. He was specifically requested to investigate the veracity of the story as the applicant genuinely believed that the first respondent's office was being used to further illegal activities of land barons preying on innocent white land owners. It is disappointing that the papers placed before me do not show any effort to investigate the claims. More importantly they have not been meaningfully rebutted raising the presumption of truthfulness.

In terms of s 27 of the High Court Act [*Chapter 7:07*], corruption is one of the grounds upon which a decision or proceedings may be reviewed. The first respondent had no choice whatsoever but to investigate the land barons mentioned in the objection. If indeed he investigated them, surely he would have shared his findings with the court. He did not. Instead he has doggedly defended the acquisition without even attempting to address the irregularities raised. I am unable to dismiss the allegations merely on the bare denial of the first respondent. Given that most of the statements made by the land baron on the trajectory of the acquisition, including the late service of the notice upon the applicant, and the proven fact that Tapomwa had indeed sold 9 stands at the property, I conclude that there is substance in the allegations. I find that indeed the acquisition was actuated by acts of corruption by those who appear to have captured the office of the first respondent.

Ms *Musangwa* sought to justify the acquisition on the ground of public interest. She submitted that the second purpose of the acquisition, namely the construction of villas for senior government executives, satisfies the requirement of public interest set out in s 71 (3) (b) of the Constitution. The section outlaws the compulsory deprivation of property except where certain conditions are met. It provides:

> "Subject to this section and to s 72, no person may be compulsorily deprived of their property except where the following are satisfied—
> (a) –
> (b) the deprivation is necessary for any of the following reasons—
> (i) in the interest of defence, public safety, public order, public morality, public health or town and country planning; or
> (ii) in order to develop or use that or any other property for a purpose beneficial to the community."

No matter how much one stretches the meaning of community it cannot possibly be defined to include government executives who do not even cherish residence in GlenLorne suburb. I agree with Ms *Banda* for the applicant that s 71 must be read with s 297 (1) (c) (ii) of the constitution which reposes the power to make recommendations to the government on the acquisition of private land for public purposes in the Land Commission. Although at the time the first respondent acted there was no Land Commission, it is now in place. The first respondent has not said that the Land Commission has been roped in.

Whichever way one look at this matter, the proposed acquisition cannot stand as it is fraught with irregularities and has not been satisfactorily justified. I find it unnecessary to consider the submissions made on behalf of the applicant regarding the first respondent's lack of jurisdiction to acquire land at the instance of the Minister of Local Government. Suffice to say though that the property is urban land. There are provisions in the Urban Councils Act [*Chapter 29:15*] entitling that Minister to acquire land through the local authority under whose jurisdiction the land is located. I am satisfied that the applicant has made a case for the relief sought.

In the result, it is ordered that:

1. The preliminary notice of compulsory acquisition of stand 2558 GlenLorne Township measuring 18.2024 hectares held by the applicant by Deed of Transfer number 6050/2006 dated 25 August 2006 issued by the first respondent be and is hereby declared unlawful, null and void and of no force or effect.
2. The decision to acquire the said stand and the preliminary notice issued by the first respondent are hereby set aside.
3. The second respondent shall forthwith cancel any endorsements on Deed of Transfer number 6050/2006 made in pursuance of any directive issued by the first respondent under s 18 of the Deeds Registries Act [*Chapter 20:05*].
4. It is declared that pursuant to s 71 (3) b) (i) and (ii) of the Constitution of Zimbabwe 2013, the said land cannot be compulsorily acquired for purposes of urban development or the construction of residential houses for government officials.
5. The 1st respondent shall bear the costs of suit.

Linda Banda, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners