

NICHOLAS HATIDANE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 24 March 2015

Concession in terms of section 35 of the High Court Act, [Chapter 7:06]

S.M Chikotora, for the appellant
E Makoto, for the respondent

HUNGWE J: The appellant was convicted of fraud as defined in s 136 of the Criminal Law (Codification & Reform) Act, [Chapter 9:23]. He was sentenced to 4 years imprisonment of which one year was suspended for 5 years on conditions of good behaviour, two years on condition he made appropriate restitution to the buyer of a piece of land which he had sold and the balance on condition that he performs community service. The state filed a notice in terms of s 35 of the High Court Act conceding the appeal. We allowed the appeal on the date of hearing. In our view that concession is well founded. We say so for the following reasons, which reasons merely add to what the appellant had been saying from the outset of his arrest and which reasons were also given by the state.

In brief the facts upon which the appellant was convicted were as follows. The appellant held title to land privately before the land reform program. He intended to sell a portion of it to offset certain of his debts. He therefore applied for the appropriate authority to subdivide and further authority to sell. The subdivision of his land was properly approved. The appropriate authority granted him a certificate of no present interest. He instructed an estate agency to handle the sale. They advertised it and drew the necessary papers to facilitate the sale. Unfortunately, his creditors sought and obtained a writ of execution against the undivided farm. They proceeded to auction it by way of public auction. The appellant protested appropriately the error committed by the various people involved in the sale by auction but the error appears not to have been rectified such that when the buyer of the

subdivision sought to exercise his right to occupy the plot, he met certain difficulties. This led to a report for fraud against the appellant for which he was convicted as aforesaid.

The evidence shows that the appellant created Lot 2 of subdivision E of Binder from the Remainder of subdivision E of Binder Farm. This subdivision measuring 14, 6809 ha was subject of the sale. The subdivision was approved by the Surveyor-General. Yet the public sale to the bidders in the auction did not make the distinction intended by the subdivision. This created, wrongfully though, the impression that the appellant had sold something he did not possess or own. This was the gist of the charge. But the whole investigation also showed that the error was committed in several other offices without the connivance of the appellant nor did he intend to defraud the purchasers. Had he intended to defraud anyone the appellant would not have sought approval of the subdivision with the District Council as well as the Surveyor-General. It was an error he could hardly have anticipated. He could not have foreseen that the Sherriff's Office would unprocedurally and unlawfully ignored the approved plans which clearly set aside the portion sold to the complainants as separate from the rest of the farm. The evidence was there that the estate agents may have carelessly described the farm in an effort to get a sale. The estate agents were not called. They would have clarified this issue beyond doubt.

At the hearing the appellant filed a significant piece of evidence which placed the matter beyond doubt. He filed a notice of intention to withdraw a land offer wherein the responsible authority categorically acknowledges the fact of subdivision of the property. In terms of that letter, the complainant's rights were recognised as was the subdivision.

In any event we were satisfied that the state had not proved an intention to defraud hence our decision to allow the appeal and confirm the correctness of the concession by the state. It is for these reasons that we allowed the appeal and set aside the appellant's conviction and quashed the sentence imposed by the court *a quo*.

BERE J agrees.

Rubaya & Chatambudza, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners