HILLPASS ESTATES (PVT) LTD
versus
STATE

HIGH COURT OF ZIMBABWE
HUNGWE & BERE JJ
HARARE, 4 August 2015 & 30 November 2016

Criminal Appeal

Ms *N G Maphosa,* for the appellant
E Mavuto, for the respondent

HUNGWE J: The appellant was convicted of contravening s 3 (2) (a) as read with section 3 (3) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20: 28*], ("the Act") that is to say that from 17 September 2003 to date the appellant unlawfully held, used or occupied gazetted land without lawful authority from the State. The appellant was fined US$400,00, The appellant appeals against both conviction and sentence.

Several grounds of appeal against conviction were advanced. Firstly it was contended by the appellant that the court *a quo* erred in finding that Greycourt Farm, Banket was State land.

Secondly, it was contended that the court *a quo* erred in finding that the consent order which the appellant obtained in the Administrative Court in 2002 was rendered ineffective and was negated by the promulgation of the Constitutional Amendment Act No 17 of 2005.

Thirdly it was argued that the court *a quo* erred in dismissing the appellant's defence of claim of right.

Fourthly, it was submitted that the learned magistrate erred in finding that the appellant did not have lawful authority to stay on Greycourt Farm simply because it did not hold an offer letter, permit, or land settlement lease.

Fifthly, the appellant contends that the learned magistrate erred in holding that the appellant had no common law right to of lien over the farm.

Sixthly, the appellant argued that the court *a quo* erred in finding that the State witness Lovemore Vambe's evidence proved the state case beyond a reasonable doubt.

The seventh ground of appeal was that a fine of US$400,00 was excessive in all the circumstances of this case.

Finally, the appellant contended that court *a quo* erred in giving the appellant only seven days within which to vacate Greycourt Farm, Banket.

In a short and precise judgment the learned magistrate dealt with both the factual issues relevant to the determination of the present appeal as well as the legal issues arising from an interpretation of the evidence led at trial.

As I understood Ms *Maphosa's* argument, it is this; because the appellant was given an assurance that it has been recommended that it remained in occupation of certain portion of Greycourt Farm.Further, so the argument went, since there were certain oral assurances given to the appellant's representatives by individuals who wielded influence, then the appellant acted under a *bone fide* but mistaken belief that it was entitled to remain in occupation of the farm. This is particularly so in light of the circumstances surrounding the acquisition procedures during which certain concessions were given by the State. The further argument was raised that subsequent legislation could not possibly override an order by consent given in favour of the appellant in the Administrative Court. As such, there was no valid acquisition of the farm since the farm was not relisted for acquisition prior to the Constitutional Amendment Act Number 17 of 2005. The argument is quite attractive. *Ms Maphosa,* for the appellant, skilfully and eloquently argued the appellant's case with admirable clarity and erudition. However, in my view, her argument failed to deal with the effect of the determination of the same issues she raised which were argued and decided finally in the matter of *Commercial Farmers Union & Others* v *Minister of Lands and Rural Resettlement & Others* SC31/10 cited by the learned trial magistrate.

It must be accepted that Constitution of Zimbabwe Amendment Act, Number 17, of 2005, made all previously gazetted land State land by the stroke of the pen. I am unable to disagree with the finding by the learned magistrate that as at the date of prosecution, Greycourt Farm was such gazetted land. Once this is appreciated, it follows that in order for the appellant to lawfully remain on the farm without risk of prosecution for the offence for which it was convicted, the appellant needed to acquire and secure authority from the acquiring authority. The acquiring authority in this case was and remained the Minister of Lands representing the President of the Republic of Zimbabwe. In previous Administrative

Court proceedings the appellant had dealt with the Minister or his officials in Harare. The appellant therefore knew from where it could secure such authority. To seek to rely on the letter of recommendation from the District Co-ordinating Committee to the Provincial Lands Officer in Chinhoyi on a matter for which a constitutional amendment had been passed affecting the rights of the former owner was clearly disingenuous on the appellant's part. A recommendation by a district lands committee, in my view, cannot be such an authority on land matters whose recommendation could be raised to the level of an authorised representative of the President. Had this been so, there would have been some merit in Ms *Maphosa's* argument.

In any event, I am of the view that the amendment was so drastic and cross-cutting since it relieved the State of the need to follow the previous strict procedures in respect of acquisition of land for resettlement purposes. The directors of the appellant were quite clearly aware of the ramifications of the amendment hence they did not physically remain on the farm, as the evidence shows. It must have been understood that the company's rights in the land had been acquired. This factor distinguishes the present matter form the two matters cited by Ms *Maphosa*, *viz John Oswald Meikle* v *The State* HH-565-14 (per HUNGWE J) and *Dudley Rogers* v *The State* HB-47-15 (per MAKONESE J).

As for the argument that the appellant enjoyed a lien at common law on the basis that it had not been fully compensated by the acquiring authority, the answer is that the matter stood to be decided in terms of the relevant legislation and administrative procedures which the legislature in its wisdom specified. The absence of such a provision implies that the legislature did not deem it appropriate that a former owner could hold on to land on that basis when the land was required for resettlement purpose. The right is simply not recognised in the relevant legislation dealing with land acquisition and resettlement and associated matters. It seems to me therefore that the only defence available, as pointed out in the *Commercial Farmers Union* (*supra*) matter, is if the appellant could show that it held a permit as defined in the Act. Without that the matter remained heavily tilted against it. In the result I am unable to find any basis to disturb the conviction.

As for sentence, this is a matter largely in the province of the trial court unless it can be shown that the court acted on a wrong sentencing principle resulting in a shockingly severe sentence. The facts show that the appellant was quite aware of the risk it ran by remaining on the farm. I find nothing perverse in the sentence imposed by the court *a quo*.

In the result the appeal is dismissed in its entirety.

BERE J authorises me to state that he agrees with this judgment.

Sawyer & Mkushi, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners