

ANDREW JOHN EHRKE

VERSUS

THE STATE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA AND MAKONESE JJ
BULAWAYO 10 FEBRUARY AND 20 FEBRUARY 2014

J. Tshuma for the accused
T. Makoni for the state

Criminal Appeal

MAKONESE J: The laws regarding compulsory acquisition of agricultural land for resettlement, the rights of the new owners and the rights, duties and obligations of the former owners and occupiers of land designated and gazetted for such purposes is now fairly well settled in this country. Numerous Constitutional challenges have been made to the highest court in the land and there are a series of decided cases which have resolved most of the disputes and challenges.

This is an appeal against the decision of the Provincial magistrate sitting at Gwanda delivered 8th June 2012. Appellant was charged with contravening section 3(2)(a) of the Gazetted Land Consequential Provisions Act, [Chapter 20:28], as read with Section 3 (3) in that he failed to vacate a piece of land known as number 13A Eltham Park, Matopo, despite the land having been unlawfully Gazetted. The Appellant was cautioned and ordered to vacate the farm within 14 days. His appeal is against both conviction and sentence.

The Appellant's grounds of appeal are couched in the following terms:-

- “1. The learned magistrate erred in convicting the Appellant who is not the owner of the farm but merely an employee.
2. The learned magistrate erred in accepting that the State had proved the elements of the crime, namely that the State had proved both
 - (a) the factual control
 - (b) the mental state

Wherefore the Appellant will pray that the conviction be set aside and the

appellant be found not guilty.”

The trial magistrate responded to the Notice of Appeal in the following terms:-

“Ad para 1

The submissions in this paragraph are disturbing. One would think that by now it should have long dawned on the Appellant that by operation of the law the farm ceased to belong to Mark Rodney Davies way back on 7th November 2003 and that it now belongs to the State. The court therefore did not err on this as the farm does not belong to that Rodney Davies referred to.

Ad para 2

Appellant told the court he was on the farm on behalf of his boss Davies who has relocated to some place outside the country. He accepts neither he nor his boss has any three documents which legalise the use of the farm, that is an offer letter, a lease or permit. Clearly therefore he is an illegal occupant.

Ad para 3

It is difficult to follow what is being argued here. Maybe the problem is that the Appellant was a self actor then. Appellant did not even deny what is being referred and he could not have denied because all is very clear.”

The facts of this matter are fairly narrow. On the 7th November 2003, Lot 13A Eltham Park, Matopo was gazetted for resettlement in the Government Gazette, General Notice Number 556/03. In about the year, 2007 Appellant was employed by one Mark Rodney Davies who was the owner of the farm, as “a caretaker” for the said farm. Appellant, aged 62 years, and a retired civil servant moved on to the property on the basis of an employment contract. At that time the Appellant claims he was not aware that the land he was occupying was gazetted land in, terms of the Act. The Appellant says that if he had known that the land was gazetted he would not have accepted the job in the first place. The Appellant says he only received information that the farm had been acquired by the State in the year 2010. Appellant told the trial court that he did not vacate the property as the police at Matopo told him that he should stay at the property while they looked for his employer. He further states that he was advised that he would be visited by officials from the Ministry of Lands. He was arrested in April 2012 and charged for occupying gazetted land without lawful authority. The provisions of section 3(3) of the Gazetted Land (Consequential Provisions) Act are as follows:-

“If a former owner or occupier of Gazetted land who is not lawfully authorized to occupy, hold or use the land does not cease to occupy, hold or use that land after the expiry of the

appropriate period - - he or she shall be guilty of an offence and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both such fine and such imprisonment.”

Mr *Tshuma* for the Appellant strongly argued that the learned magistrate had erred in convicting the Appellant who was not an occupier in terms of the Act. His argument was that an employee does not fall within the definition of an “occupier” as contemplated by the legislature in section 3(2) (a) and section 3(3) of the Gazetted land (Consequential) Provisions Act. Further he contended that the state did not prove beyond reasonable doubt that the Appellant had the requisite *mens rea* to commit the offence charged.

Mr *Makoni* appearing for the State contended that the appeal has no merit as it had been accepted by the court *a quo* that the appellant has been in occupation of Lot 13A Eltham Park, Matopo after such land had been gazetted on the 7th of November 2003 and further, the appellant conceded that in 2010 he subsequently became aware that he was occupying gazetted land.

It is my considered opinion that the Appellant is covered by the definition of “occupier” as envisaged by the Act. When the land was gazetted, the former owner of the farm or a person or individual purporting to remain on the land as “caretaker” could not remain on the land legally, without an offer letter, a permit or land settlement lease issued in terms of the Act. When the Appellant remained on the gazetted piece of land, with full knowledge that the land belonged to the State, he could only do so illegally, unless he had possession of either an offer letter or a permit or lease. The intention and purport of section 16B (of the previous Constitution) is that land distribution can only take place when the Gazetted Land is vacated by the former owner, or his agents, employees or assigns. The Appellant’s argument that he lacked the *mens rea* to commit an offence is simply untrue and untenable because he remained on the piece of land with full knowledge of the consequences. In other words, and simply put, the prosecution of the Appellant would not have been necessary had he voluntarily vacated the gazetted piece of land. The factual control and *animus possidendi* (intention to control the thing) as laid down by the authors Van Der Merve and de Waal, The Law of Things and Servitudes (page 49) is clearly satisfied by the facts of this matter. See also *Commercial Farmers Union and Others v Minister of Lands and Rural Resettlement and Others* SC 31/10 at page 22 of the cyclostyled judgment where the Honourable CHIDYAUSIKU (CJ) states:-

“It therefore follows that the conflict between the individual applicants and former owners or occupiers of land on the one and the holders of offer letters on the other hand is a conflict between legally entitled occupants, that is , the holders of offer letters, and the illegal occupants, the former owners and occupiers.”

In, the event, the appellant has failed to show that the trial magistrate erred in his application of the law to the facts. The Appellant was properly convicted and this appeal is devoid of any merit.

I, would, accordingly dismiss the appeal.

Kamocha J.....agrees

Webb, Low & Barry, appellant’s legal practitioners
Criminal Division, Attorney General’s Office, state’s legal practitioners