

FIDELIS CHAUKE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE and MANGOTA JJ
HARARE, 3 and 11 June 2014

Criminal appeal

T. Bhunu, for the appellant
Mrs S. Fero, for the respondent

MANGOTA J: The appellant was charged with, and convicted of, the crime of theft as defined in s 113 (1) of the Criminal Law [Codification and Reform] Act, [*Cap 9:23*].

The State allegations were that, on 17 November 2012 and at Subdivision 5 Turkey Heart Farm, Lot 4 in Triangle, the appellant took the sum of \$54 466.73 which he held in trust for, and on behalf of, a partnership which one Takundwa Madziva and him formed and converted the amount to his own use. Nothing of the said sum was recovered, according to the State.

The appellant tendered a plea of not guilty to the charge. He admitted that Takundwa Madziva and him entered into a partnership for the production and sale of sugar-cane grown from the land-Subdivision 5, Turkey Heart Farm, Lot 4, Triangle-which government allocated to the appellant under its Land Reform Programme. The two, he said, created the partnership in August, 2012 and, on 3 May, 2012, he terminated the partnership. He stated that he terminated the partnership when he realised that the agreement violated s 13 of the Agricultural Resettlement Act. He maintained the position that neither the partnership which he said was, or is, illegal and, therefore, of no force or effect or the partnership's representative, Takundwa Madziva, could successfully cause him to be prosecuted and convicted in a criminal court. He insisted that the only recourse which remained open to the purported partnership or to its representative was to approach the civil court for redress.

The court which tried and convicted the appellant sentenced him as follows:

“3 years imprisonment which are wholly suspended on condition you retribute the complainant Takundwa Madziva his share of 70% of \$54 466.73 through the Clerk of Court Masvingo on or before 26 September 2013. The 15 months suspended at Triangle court on 9 January 2012 are further suspended for 5 years on the same conditions.”

The appellant appealed against his conviction. His main ground of appeal which the State was wise to make a concession to was, or is, that the partnership which Takundwa Madziva and him formed in August 2010 was illegal and, therefore, no criminal liability could flow from it.

From a reading of the record, there is no doubt that the parties partnership was the basis of the appellant's arrest, prosecution as well as conviction and sentence. The said partnership grew sugar-cane on the appellant's land, sold the same and realised the sum of \$54 466.73 which the appellant, according to the respondent, converted to his own use to the total exclusion of his partner, Takundwa Madziva. The conduct of the appellant in the mentioned regard did not go down well with Takundwa Madziva. He caused the arrest and prosecution of the appellant.

The appellant's argument was or is that the partnership was a clear violation of the law. He stated that his conviction was not only improper but was also a serious misdirection on the part of the trial court.

In support of his position in this mentioned regard, the appellant referred the court to subsections (1) and (2) of s 13 of the Agricultural Land Resettlement Act [*Cap 20:01*]. The section reads:

“Prohibition of cession etc

1. A lessee shall not
 - (a) -----
 - (b) enter into a partnership for the working of his holding;
2. A transaction entered into by a lessee in contravention of subsection (1) shall be of no force or effect” (emphasis added)

The wording of the above cited section is not only clear and unambiguous but it is also mandatory in nature. There is no doubt that the appellant falls into the definition of lessee as contemplated by s 13 of the Act. He held and holds the land on which the purported partnership grew sugar-cane in terms of an offer letter through which Government offered the land to him. He cannot, in terms of the law, enter into a partnership with any person(s) for working the land which Government offered to him. Any purported partnership which he entered into with some person or other in violation of that clear, unambiguous and mandatory provision of the Act is of no force or effect.

The State read the law correctly when the appellant filed an appeal with this court against conviction. It conceded, properly so, that the appellant's conviction was unsustainable. The court agrees with both parties in respect of this matter. It, in the premises, has no option but to sanction the appellant's prayer which the respondent supports.

The court has considered all the circumstances of this case. It is satisfied that the appellant was erroneously convicted. The court, in the premise, orders as follows:

1. That the appeal be and is hereby allowed.
2. That the conviction and sentence of the appellant be respectively quashed and set aside.
3. That the appellant be and is hereby found not guilty and is acquitted of the charge.

HUNGWE J agrees _____

cMuzenda & Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners