

BENIAS YORAMU AND 45 OTHERS
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA AND MUSAKWA JJ
HARARE, 18 July 2016 and 18 January 2017

Criminal Appeal

J Bamu, for appellants
E. Makoto, for respondent

MUSAKWA J: The appellants pleaded guilty to contravening s 3 (4) of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. Each appellant was sentenced to pay a fine of \$50 or in default thereof to undergo 15 days' imprisonment. In addition, the appellants were ordered to vacate Mgututu of Great B Farm, Mazowe on or before 10 September 2015. Appeal was noted against conviction and the order of eviction.

The facts are that the appellants resided at Mgututu of Great B Farm, Mazowe where they were employed before the farm was compulsorily acquired by the State consequent to the promulgation of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005. After the acquisition, the farm was subsequently subdivided into plots which were allocated to various beneficiaries. None of the appellants were allocated the land. Nonetheless the appellants remained at the farm compound where they used the houses and storage sheds. It is this occupation of the houses and other structures at the farm that gave rise to the prosecution of the appellants and the order for their eviction.

The ground of appeal against conviction is that the court *a quo* erred in convicting the appellants as they derived occupation from their contracts of employment with the previous owner. As against sentence it is contended that the court *a quo* erred in ordering the appellants' eviction when it is apparent that s 3 (5) of the Gazetted Land (Consequential Provisions) Act is not in conformity with s 74 of the Constitution. Allied to that is the contention that the court *a quo* erred in failing to refer the issue of constitutionality of s 3 (5) to the Constitutional Court when it had been specifically requested to do so. The last ground

of appeal is that the trial court erred in imposing a fine that was beyond the means of the appellants.

Fortuitously, the appellants were represented by Mr *Bamu* during their trial. There was no question of the appellants not having voluntarily and understandingly pleaded to the charge. Having become aware of the judgment in *Benias Yoramu and 45 Ors v The Prosecutor General CCZ 2/16* Mr *Bamu* informed this court that he was abandoning the appeal against conviction. The background to judgment number CCZ 2/16 is that, having been placed on remand on a charge of contravening s 3 (2) as read with s 3 (3) of the Gazetted Land (Consequential Provisions) Act, the appellants sought a referral of the matter to the Constitutional Court in terms of s 24 (2) of the former Constitution. The matter was dismissed with the Constitutional Court holding that there was no breach of a fundamental right and therefore there was no constitutional issue arising that warranted such a referral.

I now move to the issue of whether the trial court erred in declining to refer the matter to the Constitutional Court. The trial court, on its own accord raised the question of constitutionality of section 3 (5) of the Gazetted Land (Consequential Provisions) Act in light of s 74 of the Constitution. Having heard submissions the trial court declined to refer the issue to the Constitutional Court. It justified this on the reasoning that the issue had not been raised by counsel for the appellants. It is this ruling that was appealed against.

Section 74 of the Constitution provides that:

“No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”

On the other hand s 175 (4) of the Constitution provides that:

“If a constitutional matter arises in any proceedings before a court, the person presiding over that court may and, if so requested by any party to the proceedings, must refer the matter to the Constitutional Court unless he or she considers the request is merely frivolous or vexatious.”

Having invoked the issue of constitutionality on its own and having been requested to make a referral I do not consider that the trial court was correct in declining to do so for the reason that the issue had not been raised by the defence. The trial court could only have declined to make a referral on the basis that the issue was frivolous and vexatious. The case of *Martin and Another v Attorney-General* 1993 (1) ZLR 153 (S) is authority for the proposition that a request for referral of a matter to the Constitutional is predicated on whether the issue so raised is not frivolous and vexatious.

Irrespective of how the issue of the constitutionality of s 3 (5) came up, it appears the issue fits within s 175 (4) because a constitutional matter arose during the proceedings. I do not think that the appellants were precluded from requesting a referral simply because they are not the ones who raised the issue. It is unfortunate that the issue before the court *a quo* arose before the coming into operation of the Constitutional Court Rules, because the situation that the trial court found itself in is catered for in the rules. Without rules of procedure in existence, it is doubtful that the trial court was empowered to raise a constitutional issue on its own accord. Having made this observation the question is whether it is necessary for this court to make a determination of the issue in light of judgment number CCZ 2/16.

Mr *Bamu* submitted that the issue of the constitutionality of s 3 (5) has not been adjudicated upon. He further submitted that the provision is inconsistent with s 74 as it makes eviction mandatory following a conviction. Thus it takes away the discretion of the court.

Mr *Makoto* submitted that the appellants were abusing court process. This is because the Constitutional Court has already determined the same matter in CCZ 2/16. He further submitted that section 3 has been held to be constitutional. Thus the right of occupation that the appellants claim ceased upon the compulsory acquisition of the farm.

The matter relating to CCZ 2/16 was heard on 21 January 2015. The judgment was availed in June 2016. As already stated earlier on when the appellants were placed on remand for contravening s 3 (2) (a) as read with s 3 (3) of the Gazetted Land (Consequential Provisions) Act they applied for referral to the Constitutional Court the issue of the constitutionality of those provisions. Mr *Bamu* submitted that the Constitutional Court only determined the constitutionality of s 3 (2) and s 3 (3) and that the constitutionality of s 3 (5) is yet to be adjudicated upon.

In judgment number CCZ 2/16 GARWE JCC observed that the constitutionality of s 3 of the Gazetted Land (Consequential Provisions) Act has been upheld in a number of decisions. Reference was made to *Commercial Farmers Union And Ors v The Minister of Lands and Rural Resettlement and Ors* 2010 (2) ZLR 576 (S) which in turn cites *Tom Beattie Farms (Pvt) Ltd and Another v Ignatius Mugova and Anor* SC 32/09. GARWE JCC further observed that under the old and new Constitutions an occupier of gazetted or acquired land is liable to prosecution if he or she does not have lawful authority. In my respectful view the entire section 3 was held to be constitutional as opposed to Mr *Bamu*'s quest to have a piece-

meal approach to the entire issue and contend that subsection (5) has not been adjudicated upon.

In *Commercial Farmers Union And Ors v The Minister of Lands and Rural Resettlement and Others supra* CHIDYAUSIKU CJ expressed the following at 584-585:

“In terms of s 16 B of the Constitution, the individual applicants have been stripped of all the rights to the land they previously owned or occupied. Section 16B of the Constitution vests all the rights of previous owners and occupiers in the State. In *casu*, the only link the individual applicants have to the land is their continued occupation of the acquired land, which continued occupation has been rendered a criminal offence by an Act of Parliament authorised by s 16B (6) of the Constitution.”

Although the above remarks were made in the context of the former Constitution, they are equally applicable in the present context. Section 72 (6) of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013 provides that:

“An Act of Parliament may make it an offence for any person, without lawful authority, to possess or occupy agricultural land referred to in this section or other State land.”

It follows then that the continued criminalisation of unlawful occupation of agricultural or state land makes it untenable for one to argue that a provision empowering a court to order eviction following a conviction is unconstitutional. Eviction is a necessary sequel to a conviction for unlawful occupation of agricultural or state land. It would be absurd that the act of unlawful occupation of agricultural or state land is constitutional and on the other hand eviction from such land following a conviction is unconstitutional. It must be noted that in terms of s 3 (3) of the Gazetted Land (Consequential Provisions) Act a former owner or occupier of gazetted land can only occupy the living quarters for up to ninety days from the time the land is identified for acquisition. It could never have been the intention in the enactment of s 74 of the Constitution to confer a right that was extinguished by s 72 (6). In any event, if it is constitutional to prosecute and order the eviction of a former owner for contravening the same provision in Gazetted Land (Consequential Provisions) Act, the same equally applies to a former employee of a former owner whose occupation is dependent on the former owner.

In the result, it is ordered that the appeal be and is hereby dismissed.

CHATUKUTA J: agrees

Tamuka Moyo Attorneys, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners