

REPORTABLE (1)

BENIAS YORAMU & 45 ORS
v
THE PROSECUTOR GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JCC,
GWAUNZA JCC, GARWE JCC, GOWORA JCC,
HLATSHWAYO JCC, PATEL JCC, et MAVANGIRA AJCC
HARARE, JANUARY 21, 2015

L Uriri with J Bhamu, for the applicants

E Makoto, for the respondent

GARWE JCC:

[1] After perusing the papers filed with the court and hearing oral submissions from counsel, this Court dismissed the application with no order as to costs and indicated that the reasons for the order would be made available in due course.

[2] The reasons follow hereunder.

FACTUAL BACKGROUND

[3] The applicants were employed by one Archie Black, a white commercial farmer, who owned a property known as Mgotu of Great B Farm, Mazowe (“the farm”). A notice of acquisition of the farm was gazetted on 8 September 2000. The farm was subsequently acquired by the State pursuant to the promulgation of the Constitution of Zimbabwe Amendment Act (No 17). It was then divided into thirty three plots and

allocated to various beneficiaries under the land reform programme. Following the acquisition of the farm by the Government, Archie Black left the farm. The applicants however remained on the farm and continued to use the farm compound, house and storage sheds situate on land allocated to one of the beneficiaries. The applicants were not formally engaged to provide services for any of the resettled farmers who had been allocated land on the farm.

- [4] The applicants were consequently charged by the State with the crime of contravening s 3 (2) (a) as read with s 3 (3) of the Gazetted Lands (Consequential Provisions) Act, [Chapter 20:28] (“the Gazetted Lands Act”), it being alleged that as “former occupiers of gazetted land” they had continued to use and occupy the farm without lawful authority. The Magistrates Court, Harare, then placed them on remand. Thereafter the applicants filed an application with the court for various issues to be referred to the Supreme Court.

THE APPLICATION FOR REFERRAL

- [5] In their founding papers, the applicants requested that the matter be referred to the Supreme Court in terms of s 24 (2) of the former Constitution. They alleged that they had either migrated to Zimbabwe a long time ago or had been born and bred on the farm and had worked for Mr Archie Black for many years. As part of their conditions of employment, Mr Black had provided them with accommodation, clean and safe drinking water, electricity, sanitary facilities and food rations.
- [6] Whilst accepting that title in the farm now vested with the Government, they however maintained that the acquisition of the farm had not signified the automatic termination of their contract of employment. They submitted that the acquisition had resulted in a transfer of the farming undertaking and consequently, in terms of s 16 of the Labour

Act [*Chapter 28:01*], the beneficiaries or holders of offer letters had assumed the position of employer, with the concomitant responsibility of employing them, on terms and conditions similar to those they previously enjoyed. They further submitted that their prosecution and possible eviction at a time when their employment had not been lawfully terminated violated their right to the protection of the law and in particular their labour rights and the right not to be subjected to inhuman and degrading treatment.

[7] During oral submissions before the Magistrates' Court, the applicants requested the court to refer the following questions to the Supreme Court:

- (a) whether the intention to evict the applicants, who have valid and subsisting contracts of employment and claim occupation through such employment, is a breach of their right to the protection of the law guaranteed under s 18 of the former Constitution.
- (b) whether the facts alleged constitute a criminal offence and, if not, whether the prosecution is not a breach of their right to liberty.
- (c) whether the prosecution and consequent eviction of the applicants is not a violation of their right to life and, in particular, livelihood.
- (d) whether the ejection of the applicants would violate s 11 of the former Constitution, and
- (e) whether the conduct of the State in seeking to eject its own people who have valid employment contracts entitling them to occupy premises at their place of employment is not in breach of s 15 of the former Constitution.

[8] At the hearing of the application Counsel for the respondent made the following submissions. Section 16B of the former Constitution provided for the compulsory

acquisition of agricultural land for resettlement and such land would vest in the State with full title therein. Section 16B (6) provided that an Act of Parliament may make it a criminal offence for any person to continue to possess, occupy or use acquired land without lawful authority. The prosecution of former owners or occupiers of gazetted land is therefore derived directly from the Constitution. As the applicants had no lawful authority to occupy a portion of the farm, they were liable to prosecution in terms of the Act. Further, it being common cause that they were residing on the farm, the applicants were therefore in occupation of acquired land. They had ceased being employees. Their employment had been terminated following the acquisition of the farm. The Labour Relations (Terminal Benefits and Entitlement of Agricultural Employees affected by Compulsory Acquisition) Regulations S.I 6/2002 was applicable to them.

[9] In a terse judgment, the Magistrates' Court ruled that "these issues" often arise in the lower courts and "have far-reaching implications on the rights of former employees of (*sic*) all gazetted lands". Consequently the court found that the application was neither frivolous nor vexatious and accordingly referred the matter to the Supreme Court in terms of s 24 (2) of the former Constitution.

SUBMISSIONS BEFORE THIS COURT

[10] In submissions before this Court, counsel for the applicants has argued that the matter turns squarely on the protection of the law guarantee enshrined in s 18 (1) and 18 (1a) of the former Constitution. In this regard the first question was whether the facts alleged, namely that the applicants, being former occupiers of gazetted land, had continued to use and occupy the farm in question, constitute a criminal offence. The applicants, their employment not having been terminated and in fact having been

transferred to another undertaking, remained employees of the new beneficiaries and by virtue of such employment, are entitled to continue to reside at the farm. Counsel also relied on the applicants' submissions made before the Magistrates' Court at the time of the application for referral.

[11] In his submissions, the respondent has taken the preliminary point that no constitutional issue arises from the prosecution of the applicants in this matter. Section 3 (2) of the Gazetted Lands Act refers to "every former owner or occupier" of gazetted land. Clearly applicants are occupiers and any suggestion to the contrary is untenable. Further, and in any event, a number of decisions of the Supreme Court, sitting as a Constitutional Court, have held that the prosecution of former owners or occupiers is not a violation of the right to the protection of the law or any other right under the Declaration of Rights. On the merits the respondent has submitted that the acquisition of land is not a contractual transaction and, therefore, the employment of the applicants was not transferred to the beneficiaries of the land redistribution programme. In any event, Statutory Instrument 6/2002 caters for the terminal benefits of farm workers, which are payable by the former owner upon acquisition of the farm.

ISSUES FOR DETERMINATION

[12] Flowing from the submissions made by counsel, a number of issues arise before this Court. These are, firstly, whether a constitutional issue arises before this Court. If not, then that is the end of the matter. Only if it does, would it be necessary to consider the second issue, namely, whether the facts as alleged disclose a criminal offence. If not, then the applicants would be entitled to the *declaratur* they seek that they have been denied the right to the protection of the law. If the facts disclose an offence, the third issue that would rise is whether the applicants remain employees of the holders of the

offer letters who are currently entitled in terms of the law to occupy and engage in farming activities on the farm.

WHETHER THE APPLICATION RAISES A CONSTITUTIONAL ISSUE

[13] The question is whether the prosecution of the applicants in the Magistrates Court under s 3 (2) (a) as read with s 3 (3) of the Gazetted Lands Act is a violation of the applicants' rights to the protection of the law.

[14] The application was referred on 7 June 2012 to the then Supreme Court sitting as a Constitutional Court in terms of s 24 (2) of the former Constitution of Zimbabwe. It was however only heard by the Constitutional Court on 21 January 2015. The application was therefore "a pending constitutional case" that fell to be determined by the Constitutional Court in terms of the new Constitution – paragraph 18 (1) and 18 (9) of part 4 of the Sixth Schedule to the Constitution.

[15] Section 3 of the Gazetted Lands Act has been held in a number of decisions of the Supreme Court sitting as a Constitutional Court to be constitutional.

15.1 In *Commercial Farmers Union & Ors v The Minister of Lands and Rural Resettlement & Ors* 2010 (2) ZLR 576 (S), 589 C-D, the Court remarked:-

"As regards the complaint that the individual applicants are being unfairly or illegally prosecuted for contravening s 3 of the Act, the answer is to be found in the case of *Tom Beattie Farms (Pvt) Ltd and Anor v Ignatious Mugova and Anor* Civil Application No. SC 32/09 in which this Court issued the order cited above. There is nothing in Mr *de Bourbon's* submissions that persuades this Court to revisit the order issued in *Tom Beattie's* case *supra*. This Court has determined that s 3 of the Act is Constitutional. It is not open to the applicants to contend that prosecutions in terms of s 3 of the Act are unconstitutional."

15.2 At p 592 A, the Court continued:

"..... It is quite clear from the language of s 3 of the Act that the individual applicants, as former owners or occupiers of the acquired land have no legal

right of any description in respect of the acquired land once the prescribed period has expired.”

15.3 By way of summary the Court further remarked at p 595 D-G:

“In conclusion, I would summarise the legal position as follows –

(1)

(2)

(3) Every former owner or occupier of acquired or gazetted land who has no lawful authority is legally obliged to cease occupying or using such land upon the expiry of the prescribed periodBy operation of law, former owners or occupiers of acquired land lose all rights to the acquired land

[16] The new Constitution in s 72 (6) provides that an Act of Parliament may make it a criminal offence for any person, without lawful excuse, to possess or occupy agricultural land. In effect therefore the new Constitution has not tampered in any way with the law as it existed under the former Constitution and in fact re-affirms that the provision remains the same.

[17] The applicants’ case is predicated on their understanding that as former employees of an undertaking that was transferred to the newly resettled farmer, they remained employees by virtue of s 12 (b) as read with s 16 of the Labour Act.

[18] I agree with the respondent that the question whether the applicants remain employees in terms of s 16 of the Labour Act is a question of interpretation. It is not an issue involving a breach of the declaration of rights.

[19] Under both the old and new Constitutions an occupier of gazetted or acquired land is liable to prosecution in the event that he or she does not have lawful authority for such occupation, a position conceded by Mr *Uriri*.

DISPOSITION

[20] In the circumstances, the referral of this matter to this Court was not proper as the application raised no constitutional issue.

[21] Even on the merits, it is clear that there was no transfer of an undertaking following the acquisition of the farm and its subsequent allocation to a number of beneficiaries. The Constitution itself makes it clear that anyone who possesses or occupies gazetted land without lawful authority may be guilty of a criminal offence. What constitutes lawful authority is defined in the Act. The applicants have no such authority. In these circumstances, there can be no question of the applicants having remained employees of, or the farming operations having been transferred to, the new beneficiaries.

[22] For the above reasons the matter was dismissed with no order as to costs.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JCC: I agree

GWAUNZA JCC: I agree

GOWORA JCC: I agree

HLATSHWAYO JCC: (comments not received)

PATEL JCC: I agree

MAVANGIRA AJCC: I agree

Zimbabwe Lawyers for Human Rights, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners