HH 3-2003
CRB B 2673/02

ANTHONY BERTRAM MICKLETHWAIT
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 17 December, 2002 and 8 January, 2003

Miss *Travlos* for applicant
Mrs *Ziyambi* for respondent

Bail Appeal

CHINHENGO J: The appellant is a farmer in Nyanga District. He was served with an order in terms of s. 8 of the Land Acquisition Act (Cap. 20:10) (hereinafter called "the section 8 order") sometime in 2000. According to his warned and cautioned statement which he gave to the police on 28 August, 2002, the section 8 order had two flaws. The section 8 order related not to the appellant, but to an entity called Astro African Enterprise Company which was the title holder of the farm from 1910. The section 8 order also referred to a piece of land far larger than what the appellant owns. The appellant stated that after receiving the section 8 order in 2000, nothing was done about it in that year or the following year. It was only in the year 2002 that he was charged with the offence of contravening proviso (ii) to s. (9)(1)(b) of the Land Acquisition Act [Chapter 20:10] (hereinafter called "the Act"). The charge reads -

> **"Contravening section 9 (1)(b) of the Land Acquisition Amendment Act 6/2000 as read with section 9 (2) of the Land Acquisition Amendment Act 6/2000 in that on 10th day of August 2002 and at Rodel Ranch, Juliasdale, Nyanga, Anthony Bertram Micklethwait failed to comply with the conditions of an eviction order issued to him by the State, that is to say, failed to vacate his acquired farm 'Rodel Ranch' after three months".**

The appellant applied for bail to the magistrates' court at Mutare and he was

admitted to bail on payment of $5 000. He was, in addition, ordered to vacate his farm and not to visit it except under police escort. He later applied to have this condition altered and it was altered to provide that the appellant may visit the farm only with a police escort or with the approval of the "Lands Committee". It is against the decision of the magistrate imposing this amended condition that the appellant appealed to this Court. He sought to have this condition set aside and replaced with a condition to the effect that he may remain on his farm until he is properly evicted following a conviction in terms of s. 9(2) of the Act or an order by the Administrative Court confirming the compulsory acquisition of his farm.

The appellant's contentions are that -

a) the condition imposed by the magistrate's court amounts to an eviction and that the magistrate's court is not empowered to make such order prior to the appellant's trial and conviction;

b) the imposition of what amounts to an eviction order at remand stage offends against the presumption of innocence, hence the Act empowers a Court to issue an order of eviction only after conviction;

c) the condition, amounting as it does to an eviction order, offends against all notions of justice and fair play as it requires the appellant to cease all agricultural actions and to vacate his home and place of employment before he has been found guilty of any criminal conduct;

d) the condition imposed is unduly onerous;

e) he has not been treated equally before the law because other persons who are alleged to have committed the same offence have been granted bail without being ordered to vacate their farms.

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The simple question to be answered in this appeal is whether a court may impose a condition that a person charged with contravening proviso (ii) to s. 9(1)(b) of the Act may not remain at his property before he has been tried and convicted. Three decisions of this Court are relevant to a determination of the question before me. The first case is a short judgment by KAMOCHA J handed down on 10 September, 2002 in the matter of *Keith Croshaw* CRB 2412/02, *Rita Lewis* CRB 2406/02 and *Derrick Scutt* CRB 2434/02. The three appellants had been charged with contravening proviso (ii) s. 9(1)(b) of the Act and on being admitted to bail a condition that they be evicted from their farms was imposed. In setting aside that condition KAMOCHA J curtly stated at p 1-2 of his judgment the following:

> "Quite clearly the magistrate did not have power in law to impose such a condition which can only be imposed on people who have been convicted. The appellants have not yet been convicted.
> **The State had argued that a magistrate had a discretion to impose any condition in a bail application. I did not understand the State Counsel to suggest that the magistrate has a licence to impose conditions which are contrary to law. The magistrate cannot impose conditions which should only be imposed to *(sic)* convicted persons.**
> I am satisfied that the magistrates were wrong in law to impose such a condition.

The appeal therefore succeeds. It is ordered that the offending condition be and is hereby revoked…."

The second decision is that in *Peter John Rawson Hubert and William Watson Mackinney* v *The State* HB 111/2002 in which, on admission of the appellants to bail the following condition was imposed -

> **"Accused ordered (*sic*) not to go back to the farm unless with prior arrangements with the police".**

CHIWESHE J found that the condition was proper. At p 2 of his judgment he reasoned thus:

> "I do not understand the magistrate by imposing that condition to have evicted the appellant from his farm. A prohibition from returning to the farm pending trial is not in my view an eviction. The appellant cannot go back to the farm without prior arrangements with the police. The condition applies to the appellant personally. It does not apply to those who may claim lawful presence on the farm through the appellant, such as members of his family and his employees. He has not been ordered to remove his farm implements, produce or other belongings. The criticism levelled against the magistrate is therefore unwarranted".

The learned judge continued at p 3 of his judgment and said that:

> **"*Prima facie* the appellants' continued occupation of their respective properties is illegal, rendering them liable to criminal sanctions if convicted. That there is a *prima facie* case against the appellants is a fact that has not been disputed either in the court *a quo* or in this court. What appellants allege is the fact that they have a defence to the charge arising from the non-compliance by the State with the procedures laid down in the Act. The correct procedure for the appellants would have been either to challenge the validity of the section 8 orders served on them or to challenge the right of the State to place them on remand".**

The learned judge analysed the nature of the charges against the appellants in these words:

> **"What is the nature of the charges that the appellants face? Charges in terms of section 8 (1)(b) of the Act arise from the concept that an accused person has unlawfully remained in occupation of land in respect of which he is under orders to vacate. In that regard he is deemed to be interfering with the rights of the Acquiring Authority. It appears to me that where there is the existence of a *prima facie* case against the accused person, and where bail is granted, that a prohibition of the nature imposed by the magistrate would be proper and in the interests of justice. *Prima facie* the accused person's continued occupation of the property concerned constitutes an offence.**
>
> The legislature intended that persons served with section 8 orders vacate the properties concerned by the appointed date. That condition imposed by the magistrate is in line with the spirit and letter of the Act. The condition is of course temporary and subject to the outcome of the trial. It does not amount to an eviction".

CHIWESHE J distinguished the case before him from KAMOCHA J's

decision in the cases of *Croshaw, Lewis and Scott, supra*. He said at p 2-3 of his judgment that -

> **"My attention has been drawn to the judgment of my brother KAMOCHA J in the matter of *Keith Croshaw B 2412/02, Rita Lewis B 2406/02 and Derick Scutt B 2432/02*. Those cases are clearly distinguishable from the present cases. I have not had sight of the records of proceedings in the court *a quo* in those cases. According to the judgment the appellants 'were granted bail and attached to that was a condition that the appellants should be evicted from their properties. They were aggrieved by that condition and appealed to this court. Quite clearly the magistrates did not have the power in law to impose such conditions which can only be imposed on people who have been convicted. The appellants have not yet been convicted'.**
> Thus my brother KAMOCHA J was presented with cases in which the magistrates had ordered eviction before conviction. That such an order would be contrary to the provisions of the Act cannot be in dispute. In the present case however the magistrate did not order an eviction but a prohibition from returning to the properties concerned without police escort. The distinction is obvious".

The third case to come before this court was that of *Leita Mary Prior* v *The State* HH 163/02. In that case a magistrate had imposed, as condition (b) of the appellant's admission to bail that -

> "She does not return to her farm or homestead unless in the company of a police officer and for the purpose of removing her personal belongings".

SMITH J set aside that condition. He found it to be unreasonable. He considered and accepted the argument by Mr *Samkange* that that condition was tantamount to convicting the appellant when she was pleading not guilty to the charge of contravening s. 9(1)(b) of the Act. He also accepted that the condition was tantamount to sentencing the appellant before conviction. He rejected Mrs *Ziyambi's* argument that the condition was only a temporary measure pending the determination of the matter and that it did not infringe on the presumption of

innocence. He also rejected Mrs *Ziyambi's* contentions that, in the past, conditions have been imposed where an accused is asked to move off his place of residence pending the outcome of the matter for various reasons and that, because the farm forms the basis of the matter and there were settlers on the farm, the condition was imposed to preserve peace between the settlers and the appellant. The learned judge found that the condition was unreasonable because it did not oblige the police to accompany the appellant to her farm if she wished to return to it for any reason. Because the police were not so obliged she was potentially placed in a situation that she could not exercise a right granted to her by the order of the court. He found the condition to be unreasonable for various other reasons detailed in the judgment. At p 4 of his judgment SMITH J made what I consider to be a seminal observation. He said :

> **"I accept that, in terms of s. 116 of the Criminal Procedure and Evidence Act [Chapter 9:07], it is the magistrate who must exercise his discretion in granting bail. However, he must act reasonably in so doing. Can it be said that condition (b) is reasonable. I do not think so. The appellant is the owner of the farm in question. The right of ownership confers on her the right to occupy the property and to live in the house. Her right of ownership is being contested at present, but until such time as it is decided that she has lost her rights, she is entitled to exercise them. Subsection (2) of s.9 of the Act requires that a court convicting a person of contravening para (b) of subs (1) thereof shall issue an order evicting the person from the land in question. It is clear, therefore, that it is only after conviction that the owner can be evicted from his land. Condition (b), in effect, amounts to an eviction of the appellant from her land before she is convicted of any offence. That cannot be lawful".**

SMITH J, in my view, came to the same conclusion as KAMOCHA J. I agree with their reasoning and conclusions. It seems to me that in the *Peter John Rawson Hubert* case, *supra*, CHIWESHE J was preoccupied with semantics where he sought to distinguish the case before him from that decided by KAMOCHA J on

the basis that in the one before him the appellants had been "ordered not to go back to their farms unless with prior arrangements with the police" and in the one before KAMOCHA J the "appellants should be evicted from their properties". It does not appear to me that the condition was any different in its effect in both cases. In the case before KAMOCHA J, the magistrates could not have ordered the eviction of the appellants because, as recognised by CHIWESHE J at p 2 of his judgment, eviction usually involves the removal of the owner or occupier and all persons claiming the right of occupation through him together with their belongings. It is clear to me that in both cases KAMOCHA and CHIWESHE JJ were dealing with a prohibition against the appellants from returning to their homes, which condition was found to be both unreasonable and unlawful by KAMOCHA and SMITH JJ because they considered that it was tantamount to an eviction. Even CHIWESHE J accepted that an order which amounts to an eviction would be contrary to the provisions of the Act - see his remarks at p 3 of his judgment. In my view therefore, had CHIWESHE J not made a distinction between an eviction order proper and a prohibition from returning to the farm, which distinction as I have said, in my view, is more of form than substance, he would no doubt have arrived at the same conclusion as had KAMOCHA J and as did SMITH J later. I would therefore respectfully disagree with the conclusion reached by CHIWESHE J.

It is important to note that s. 8 (2)(b) of the Act, authorises an acquiring authority to exercise any right of ownership over the land subject to a section 8 order, including the right to survey, demarcate or allocate the land concerned, but without undue interference to the living quarters of the owner or occupier of that land. Although subs (3) of s. 8 of

the Act provides that the effect of an order made in terms of subs (I) thereof in that the ownership of the land specified therein immediate, vests in the acquiring authority, that is dependent on the section 8 order having been validly made. Thus SMITH J was correct when he said that in the case before him the appellant remained the owner of the land in question, that because she was contesting the validity of the section 8 order. Similarly, in this case the appellant is contesting the validity of the section 8 order that was served on him. Until the court determines that issue the provisions of s 8 (3) of the Act cannot apply.

At p 1-3 of his judgment in *Peter John Rawson Hubert, supra* CHIWESHE J stated that the appellants before him were charged with the contravention of s. 8(1)(b) of the Act "it being alleged that they unlawfully interfered with the rights of the Acquiring Authority by remaining in occupation of their farms having been served with orders in terms of s. 8 of that Act to vacate their respective farms". At p 3 his Lordship analysed the nature of the charge which the appellants were facing as I have already shown.

It seems to me that there was an erroneous reference, perhaps a typographical error, in the reference in CHIWESHE J's judgment to s. 8(1)(b) of the Act. That section does not exist in the Act. The section of the Act which makes it an offence to interfere with the acquiring authority's exercise of rights of ownership conferred by s. 8(2) of the Act is s. 8(7). If that was the section with which CHIWESHE J was concerned, then his conclusion may have been correct : a person who interferes with the exercise by the acquiring authority of the rights conferred on it by s. 8(2) may conceivably be excluded from the farm so as to enable the acquiring authority to exercise those rights. The reason for his exclusion will be the fact of interference and not the fact that he *prima facie* has committed an offence. If there was any basis for distinguishing the two cases, the one by CHIWESHE J from the one by KAMOCHA J, that distinction could only have been on this score.

If CHIWESHE J was dealing with a contravention of s. 9(1)(b) as read with s. 9(2) of the Act, which KAMOCHA and SMITH JJ were concerned with, then I must

confess that I find it difficult to appreciate the point of distinction. Section 9(1)(b) is not very elegantly drafted. It provides that the service upon the owner or occupier of a section 8 order "shall constitute notice in writing" to him that he should cease to occupy or use the land concerned and that if he fails to do so he shall commit an offence. It is not clear whether the making of the order constitutes notice that the owner or occupier is guilty of an offence if he fails to comply with the order or whether the creation of the offence is a separate provision. That an offence is created by s. 9(1)(b) only becomes apparent on a reading of s. 9(2). Section 9 (b) of the Act creates two offences - the first being a failure or refusal to cease to occupy, hold or use the farm forty-five days after receiving a section 8 order. The second is a failure or refusal to cease to occupy the living quarters ninety days after receiving a section 8 order. When a person is charged with contravening either s. 9(1)(b) as read with s. 9(2) or with contravening proviso (ii) to s. 9(1)(b), he can only be evicted upon conviction and upon an order for his eviction being made. For clarity s. 9(2) provides that -

> "A court which has convicted a person of an offence in terms of paragraph (b) of subsection (1) or proviso (ii) thereto shall issue an order to evict the person convicted from the land to which the offence relates".

I therefore agree with the conclusions reached by KAMOCHA J and SMITH J in the cases which I have cited, that a judicial officer is not empowered to evict an owner or occupier of any land the subject of a section 8 order or to do anything that amounts to an eviction, unless and until the owner or occupier has been convicted of the offence charged and the court, as it is obliged to do, has issued an order of eviction against him. It is clear therefore that, whilst the Legislature intended that a person served with a section 8 order should vacate the property on or before the appointed day, it also

deliberately created offences for failing to do so and mandated the courts to determine the issue and, if the person is convicted to order his eviction. If the Legislature had intended that upon the expiration of the forty five days in s. 9(1)(b) or the ninety days in proviso (ii) to s. 9(1)(b) a person should be evicted without a conviction, then it would have provided accordingly. In my view, the Legislature did not create an offence which would continue to be committed all the time that the person concerned remained on the farm after receiving a section 8 order. The offence of remaining on the farm is just one offence, regardless of the fact that the person so charged remains on the farm after being charged. As such, therefore, the contention that if the person returns to the farm pending trial he is committing or continuing to commit the offence is without substance. In its wisdom the Legislature determined that the offence is but one in respect of which a person may be charged, tried and convicted and that only upon conviction should he be ordered to vacate the land or dwelling concerned.

In this case, the charge against the appellant is an allegation that he committed the offence of contravening proviso (ii) to s. 9(1)(b) by continuing to occupy his dwelling place ninety days after he received the section 8 order. Whether he committed that offence or not is a matter to be determined by a court, and until that happens the presumption of innocence operates in his favour. In my view a condition of bail which removes him from his property amounts to an eviction of the person concerned. Such a condition is not only against the presumption of innocence but, it in effect, pre-empts the outcome of the criminal trial on the charge which the appellant faces. In that sense it amounts to an eviction which may be ordered only upon conviction. I do not think that it is necessary to deal with the other contentions advanced by the appellant. For the sake of clarity I need to emphasise that the scheme under the Act is that an owner or occupier of land which is under compulsory acquisition can only be evicted if (a) the Administrative Court confirms the acquisition of his property or (b) a court issues an order of eviction upon the person's conviction on a charge of contravening s. 9(1)(b) of the Act. Finally, I would recommend that those responsible for drafting charges of contravening s. 9(1)(b) of the Act must exercise care that the charges are properly formulated. The charges should make it clear which of the two offences in s. 9(1)(b) as read with s. 9(2) and in proviso (ii) to s. 9(1)(b), the person is alleged to have contravened. The charge which the applicant faces seems to suggest that an eviction order has been issued by the State. That cannot be so as an eviction order can only be

issued by a court after the conviction of the appellant.

The order which I make is the following -

The condition imposed by the magistrate that the Appellant vacate Rodel Ranch and that he shall not visit Rodel Ranch save under police escort or with the approval of the Lands Committee be and is hereby set aside and that it be replaced by the condition that -

> "The applicant (appellant) shall reside on Rodel Ranch until the finalisation of his case".

***HenningLock Donagher Winter, c/o Atherstone & Cook* , appellant's legal practitioners**
***Office of the Attorney General* for the respondent**