STAMATOULA RAFT
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA, MUSAKWA JJ
HARARE, 15 February 2017 & 1 November 2017

Criminal Appeal

Z Lunga, for the applicant
F Kachidza, for the respondent

CHATUKUTA J: The appellant is a former owner of Clifton of Lang, Mberengwa, measuring 2025, 8116 hectares (the farm). The farm was acquired by the Government and became State land in terms of the Government Gazette Extra Ordinary Volume LXXVIII No. 50, General Notice 457A of 2000 published on 6 October 2000. The appellant remained in occupation of a portion of the farm. On 22 October 2015, she was given notice by the Minister of Lands and Resettlement to vacate the farm by 17 February 2016. She did not vacate the farm by that date leading to her being charged with contravening s 3(3) of the Gazetted Land (Consequential Provisions) Act [*Chapter* 20:28] (the Act). She pleaded not guilty but was convicted after a full trial and sentenced to $150 or 30 days imprisonment with 3 months imprisonment wholly suspended for 5 years on condition of future good behaviour. In addition she was ordered to vacate the farm. Dissatisfied with the conviction, the sentence and the order for ejectment, she launched this appeal.

The appellant raised six grounds of appeal against conviction. She abandoned all the grounds of appeal except for one ground, that the trial magistrate had erred in holding that she did not have lawful authority to remain in occupation of the piece of land despite having produced letters authored by officials of the Ministry of Lands as proof that she had been permitted to remain in occupation. She further abandoned her application filed on 25 April 2016 for referral of the

matter to the Constitutional Court. The appeal against conviction shall therefore be determined on the sole issue whether or not the appellant had lawful authority to remain on the farm.

The applicant submitted that she placed before the trial magistrate proof of the lawful authority for her continued occupation of the portion of the farm, being:

(a) a letter dated 8 August 2002 written by one M. Nyarizengwe, a Chief Lands Officer;

(b) a letter dated 27 February 2014 written by one M. V. Zhou, an Acting District Lands Officer; and

(c) an assertion that she was assured by the then Governor of the Midlands Province, the late Dr Msipa, that she would remain in occupation.

Her contention was that the two letters were proof of the lawful authority envisaged in *s* 2 (1) of the Act as the letters emanated from the relevant ministry. The trial magistrate therefore erred in disregarding the letters as proof of authority to occupy the portion in issue. It was further contended, firstly, that a permit was not supposed to be issued by the acquiring authority as is required in the case of an offer letter. A permit can be issued by any official in the office of the acquiring authority. Secondly, it was contended that the permit envisaged by the respondent was a permit issued in terms of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations, 2014, Statutory Instrument 53 of 14 (SI 53 of 2014). The statutory instrument was published on 14 March 2014. As of the date of the publication of the statutory instrument and as far back as in 2002, she had already been permitted to occupy the portion of the farm. Therefore SI 53 of 2014 did not apply to her. In support of her proposition, she referred us to the case of *Dudley Rodgerss* v *The State* HCB 665/13 (HB 47/15) where the court of appeal acknowledged that in practice, responsible government officials issued permits by endorsement on maps, by verbal and visual identification and allocation of portions of land to previous owners.

The respondent submitted that the appellant did not have the lawful authority to occupy the portion of the farm. The only lawful authority provided for in s 2(1) of the Act could only be issued by the acquiring authority. In this regard, the respondent referred to the case of *Taylor-Freeme* v *The Senior Magistrate, Chinhoyi and Anor* 2014 (2) ZLR 498 (CCZ 10/14).

Section 2(1) of the Act provides that an offer letter; a permit; or a land settlement lease constitutes lawful authority. What constitutes lawful authority was discussed in *CFU & Ors* v

Ministry of Lands & Ors 2010 (1) ZLR 576 (S) where CHIDYAUSIKU CJ (as he then was) remarked at 591 E- G that:

> "The Minister has an unfettered choice as to which method he uses in the allocation of land to individuals. He can allocate the land by way of an offer letter or by way of a permit or by way of land settlement lease. It is entirely up to the Minister to choose which method to use. I am not persuaded by the argument that because the offer letter is not specifically provided for in the Constitution it cannot be used as a means of allocating land to individuals. I am satisfied that the Minister can issue an offer letter as a means of allocating acquired land to an individual. Having concluded that this Minister has the legal power or authority to issue an offer letter, a permit or a land settlement lease **it follows that the holders of those documents have the legal authority to occupy and use the land allocated to them by the Minister in terms of the offer letter, permit or land settlement lease**."(own emphasis).

In *Taylor-Freeme* v *Senior Magistrate, Chinhoyi & Anor* (*supra*), CHIDYAUSIKU CJ, referred at 510H-511A to the above remarks and further observed at 511 C-E that:

> "Lawful authority" means an offer letter, a permit or a land settlement lease. The documents attached to the defence outline are not offer letters, permits or land settlement issued by the acquiring authority. They do not constitute "lawful authority" providing a defence to the charge the applicant is facing.
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> The applicant did not have an offer letter, a permit or a land settlement lease. Accordingly, he had no lawful authority to occupy or continue to occupy the farm. The letters from the late Vice President Msika and those of the Ministry of Lands, Land Reform and Resettlement do not constitute "lawful authority". "Lawful authority" in terms of the Act begins and ends with an offer letter, a permit and a land settlement lease. A telephone call or a letter, even from the Minister of Lands, Land Reform and Resettlement is not "lawful authority".

It follows from these remarks that in order for a permit to be considered to be "lawful authority", it must be in writing, issued by the acquiring authority and directed to the person authorized to occupy state land. It is my view that the above remarks by CHIDYAUSIKU J put paid to the contention by the appellant, not only that the two letters from the Chief Lands Officer and Acting District Lands officer respectively but also that the assurance by the late Governor Msipa, were lawful authority. The applicant did not produce before the court a quo, or before this court, any document addressed to her and issued by the acquiring authority. The first document that the applicant alleges is proof of permission to remain in occupation is the letter dated 8 August 2002 (and marked 'Exhibit 7'). The letter is not addressed to the appellant. The letter is addressed to the District Administrator. There is no mention of the appellant's name in the letter. The letter reads:

> "**RE: OFFER OF CLIFTON FARM FOR RESETTLEMENT**
> This letter serves to confirm that the above stated farm measuring 2205 816 hectares and situate in your district has been offered to the Government for settlement. However, of the total area of 200ha

> were left around the existing business centre. This area is not to be allocated for settlement but is reserved for the expansion of the business area."

In addition to not mentioning the appellant, the letter does not indicate who is supposed to benefit from the area reserved for business expansion. There is no map or any document showing the demarcation of the reserved area. The appellant cannot therefore claim lawful authority to occupy an undefined area.

The second letter the appellant seeks to rely on as proof of "lawful authority" is dated 27 February 2014 and marked 'Exhibit 8. The letter faces the same fate as the first letter. It is not addressed to the appellant. It is addressed to "whom it may concern". The circumstances leading to the issuance of the letter were not placed before the court. Mr Zhou M.V, who authored the letter, acknowledges that records at the Ministry of Lands show that Clifton farm was indeed offered to the Government for resettlement purposes. Regarding the appellant's right of occupation, all that the letter suggests is that the district lands committee unanimously agreed to reserve 200 hectares of the farm for the appellant to expand her business center. What happened after the unanimous decision is what is of concern to the court. The letter does not indicate that the appellant was thereafter permitted to remain on the land.

In fact, the letter is self-contradictory. It states that the reserved 200 hectares of land is private property belonging to the appellant and at the same time acknowledges that the entire farm was offered for resettlement purposes. As at the writing of the letter, it was not in issue that the land vested in the State in terms of the then s 16B of the Constitution. The appellant had ceased to have any real rights over the property and consequently the reserved area could not be her private property. All that the appellant would have been entitled to was to remain on the farm if she were authorized to do so. The letter therefore gives an impression of an Acting District Lands Officer who was not knowledgeable of what he was writing about.

In comparison to these two letters is the offer letter dated 24 September 2015 and specifically identifying one T Zhou by name and identity number as the recipient of the offer letter authorising him to take occupation of the identified piece of land. If the appellant was indeed given permission to occupy part of the farm, she should have produced the authority in her name.

The appellant sought to rely on *Dudley Rodgerss* v *The State* (*supra*) as proof that permission to occupy acquired land need not be in writing and before the promulgation of SI 53

of 2014 was not necessarily in writing. The case is clearly distinguishable from the present case. The facts of that matter as set out at page 2 of the judgment are that the farm was (following acquisition) subdivided and allocated to various A1 farmers. The appellant was allowed to remain on 1000 hectares of the farm. MAKONESE J further summarised the facts as follows:

> "The Ministry of Lands officials visited the farm with a map and indicated that he would be allowed to remain on the Remaining Extent of Olympus block measuring 1000 hectares. He was shown the boundaries on the map and was advised that the A1 farmers surrounding him would dip their cattle at his dip tank. The lands committee also requested the appellant to assist the A1 farmers in maintaining their livestock. The map handed to the appellant forms part of the appeal record and confirms that a portion on the map marked "Remaining Extent of Olympus" was reserved for the farmer (the appellant). It is that piece of land that is the subject of this appeal."

It is therefore apparent from the above facts that the appellant in that case was in possession of and produced a map before the court which spoke of the allocation of the piece of land in issue to him and therefore the extent of the area. In the present matter, the applicant did not produce any map showing the extent of the land reserved for her. The present case is, in that regard, substantially different from the *Rodgers* case.

My point of divergence with the court in *Rodgers* case, however, is whether or not permission granted for the continued occupation of acquired land prior to the promulgation of SI 53/14, be it verbal or in writing, is valid lawful authority for the continued occupation. The court in *Rodgers* case ruled that prior to the promulgation of SI 53/14, there was no legislative provision in setting out the form and content of a permit. The then prevailing practice of endorsement on maps, verbal and visual identification and allocation of portions of land was therefore lawful permission of occupation of state land.

Reference is made to the earlier observations by CHIDYAUSIKU J in *CFU*, the import of which is that lawful authority must be in writing. The decision was made on 26 November 2010 and before the promulgation of SI 53 of 2014. The rationale for the requirement that lawful authority, including a permit, has to be in writing is obviously that the Ministry being a government department, would be required for certainty to maintain records of who has been awarded what land, where and the extent of the land. Oral and visual allocations would open the entire resettlement exercise to untold abuse and disputes. One shudders to think what would happen if all the allocations were verbal and not backed by any document. It would be the law of the jungle.

In light of the issues raised with regard to the two letters heavily relied on by the appellant, it is evident why the trial magistrate was not satisfied that these letters qualified as lawful authority as envisaged by the Act. For these reasons the appeal against conviction cannot succeed.

Assuming I am wrong in concluding that a permit had to be in the form of a document, whatever authority that had been granted to an occupier before the promulgation of the Act had been invalidated by the promulgation of the Act. My view is fortified by the provisions of s 6 of the Act. Section 6 provides for the validation of offer letters issued on or before the fixed date. The section reads:

> "Any offer letter issued on or before the fixed date that is not withdrawn by the acquiring authority is hereby validated."

The only previous lawful authority that has been validated is any offer letter issued before the promulgation of the Act. I am mindful of the cardinal rule that there is a strong presumption against a retrospective construction of legislation. (See *Nkomo and Another* v *The A.G and Others* 1993(2) ZLR 422 (5) at 429A-C and 433C). I am however of the view that, by necessary implication, the legislature did not validate any other previous forms of lawful authority other than offer letters. (See *Agere v Nyambuya* 1985 (2) ZLR 336 (SC) at 339A-C). Had the legislature intended to validate all other forms of previous lawful authority, including the authority relied on by the appellant, it would have specifically stated so in section 6 as it did regarding offer letters.

Turning to the appeal against sentence, the appellant did not address the court, both in her heads of argument and during the hearing of the appeal, on the appeal against sentence. It is therefore deemed that she abandoned the appeal against sentence. In any event, the sentence was not manifestly excessive and does not induce a sense of shock to warrant any interference by the court of appeal. Section 3 (5) of the Gazetted Land (Consequential Provisions) Act makes it mandatory that once a person is convicted of contravening the same, the court shall issue and order for evict of the accused.

It is accordingly ordered that the appeal be and is hereby dismissed.

MUSAKWA J concurs……

Lunga Gonese Attorneys, legal practitioners for the appellant

The National Prosecuting Authority