

JOHN OSWALD MEIKLE
versus
THE STATE

HIGH COURT OF ZIMBABWE
HUNGWE & MANGOTA JJ
HARARE, 8 July 2014 and 15 October 2014

Criminal Appeal

T Magwaliba, for the appellant
I Muchini, for the respondent

HUNGWE J: The appellant was convicted of contravening section 3(2) (a) as read with sub(s) 3 and 5 of the Gazetted Land (Consequential Provisions) Act, [*Cap 20:28*] ("the Act"). He was sentenced to US\$250-00 or 25 days imprisonment as well as a wholly suspended term of imprisonment. He appeals against both conviction and sentence.

Five grounds of appeal are advanced on behalf of the appellant. The first ground is that the court *a quo* erred in holding that the offences under the Gazetted Land Act are strict liability offences.

The second ground advanced was that the court *a quo* erred in holding that the appellant is in occupation of Coldstream Estate.

The third ground advanced was that the court *a quo* erred in imputing criminal liability to the appellant for conduct which ought to have been imputed to Allied Timbers (Pvt) Ltd.

The fourth ground of appeal was that the court *a quo* erred in holding that the acquisition of 51% of the shares in EC Meikle (Pvt) Ltd by the then Forestry Company of Zimbabwe (Pvt) Ltd was tantamount to a sale of land.

The final ground of appeal was that the court *a quo* erred in ordering the eviction of the appellant in circumstances where the appellant was not in occupation of Coldstream Estate.

The Act makes it a criminal offence for a former owner of land which has been gazetted to continue in occupation of such land 45 days after the fixed date without lawful authority. The appellant denied that he was in occupation of gazetted land without lawful authority.

Is the offence charged a strict liability offence?

The general rule is that *actus non facit reum nisi mens sit rea* or *nulla poena sine culpa* (there can be no criminal liability without fault) and that in construing prohibitions or injunctions, the legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable. *S v Arenstein* 1964 (1) SA 361 (A) @ p365. See also *S v Zemura* 1973 (2) RLR 357 (A).

In the case of statutory crimes not prescribed in the Criminal Law (Codification and Reform) Act, [Cap 9:23] the question whether or not an offence is one of strict liability depends on the express or implied intention of the legislature. In the majority of statutory offences, no express indication is given, one way or the other, regarding *mens rea*. The statute merely provides, as in the case of the Gazetted Lands Act, that any person who does a particular act is guilty of an offence. See Burchell and Hunt, *Principles of Criminal Law*, 2nd ed (Juta & Co) 1983 at pp 219 – 220.

In Zimbabwe, all of the cases where the courts have decided that strict liability was impliedly imposed relate to public welfare offences that involve prohibitions or duties designed to prevent grave potential danger to the welfare of the State generally or to public amenities. Public welfare offences include such things as public health legislation, safety regulations, legislation aimed at preventing contamination of drugs and foodstuffs which are being processed and manufactured, motor carriage and transportation regulations etc. See *R v GD Haulage (Pvt) Ltd* 1977 (1) RLR 24 (A). See also Feltoe G, *A Guide to the Criminal Law of Zimbabwe*, 3rd ed (Legal Resources Foundation) 2004, p 128

The rationale underlying the imposition of strict liability for the prosecution of public welfare offences will be immediately clear from the genus of crime at which such liability is aimed: it is necessary in a modern urbanised and industrial society to impose certain standards of conduct in the interest of the community at large. A strict liability is imposed where the maintenance of these standards would seriously be impaired if the defence of mistake or

blamelessness were to be generally admitted. Even where a case relates to the public welfare offence, the courts are generally reluctant to imply that the legislature intended strict liability. The reason for this is that strict liability is directly contrary to the basic principle that there should be no liability without fault. Academic writers, such as Burchell and Hunt, among others, have expressed a doubt whether it can be justified in terms of social and legal policy.

The learned trial magistrate's approach appears to have been that the offence charged fell under the rubric of the "strict/absolute" liability offences where, according to him, all the State needed to do was to prove that the accused committed the act constituting the offence in order to secure a conviction. This would be so notwithstanding the fact that the accused lacked *mens rea* for the offence. In this respect the learned magistrate fell into error as the authority he relied upon does not state what he states. Professor Feltoe dwells on and discusses the strict liability category of offences rather than absolute liability offences. In any event the offences created under the Gazetted Land Act do not fall within the unique category of public welfare offences. Accordingly, there is no justification for the departure from the presumption that there can be no criminal liability without fault in the prosecution of offences under this statute. The court therefore was obliged to inquire into the question whether there was an unlawful mental element on the part of the appellant in relation to the crime charged.

Did the appellant occupy gazetted land?

Even if it were assumed in favour of the State, that the requirement for *mens rea* was expressly or impliedly excluded by the legislature, it is trite that liability in strict liability offences is dependent on proof of the *actus reus* constituting the offence, in this case, occupation of the land. Burchell and Hunt put the matter thus:

"It must be stressed that even where the requirement of *mens rea* is expressly or impliedly excluded by the legislature, liability is dependent upon proof by the prosecution of the *actus reus*. It would have to be proved that the accused's act was both a voluntary one and that it was unlawful. It follows that although a defence which excludes *mens rea* would be irrelevant, a defence which excludes the unlawfulness of the *actus* (e.g. necessity, impossibility, authority) would remain open to the accused. Liability is therefore 'strict' rather than 'absolute'."

The undisputed evidence by the appellant was that the appellant was not in occupation of Coldstream Estate as alleged in the State Outline but that he resides at 'Mountain Home, Penhalonga'. The Gazetted Land Act does not define 'occupation'. *Black's Law Dictionary*, 5th ed (West Publishing Co) defines occupation as:

"Possession; control; tenure; use. The act or process by which real property is possessed and enjoyed. Where a person exercises physical control over land."

The Appellant does not possess or enjoy Coldstream Estate, nor does he exercise physical control over it. A company, Allied Timbers (Saligna) (Pvt) Ltd, in which he is a minority shareholder, enjoys control of the same. Clearly, the magistrate fell into error when he held that because the appellant is a minority shareholder of this company, he therefore, was in occupation of the land in question. As noted by Cilliers and Banade, an important consequence of the separateness of a company from its shareholders is that

"[t]he assets of the company are its exclusive property and the members have no proportionate proprietary rights therein. Only on liquidation of the company are the members entitled to share in a division of the assets of the company. Consequently, it is not necessary to transfer a company's assets when there is a change of membership...."

Cilliers and Banade, *Company Law*, 4th ed (Butterworths) 1982 @ p11

As such the magistrate erred in holding as he did that the appellant was in illegal occupation of the land through his minority shareholding. A company holds its property as its exclusive property not on behalf of its shareholders. In any event since the land in issue vests in the State by virtue of s16B of the old Constitution, the appellant cannot hold some proportionate right to land that is owned by the State simply because he is a 12, 5% shareholder in Allied Timbers (Saligna) (Pvt) Ltd.

Is the appellant criminally liable for acts of a company?

Coldstream Estate was formerly held by EC Mickle (Pvt) Ltd. This company, from the evidence on record, ceased to exist on 23 August 2006 when the Forestry Company of

Zimbabwe (Pvt) Ltd bought 51% of the shareholding in that company. The new company assumed the name Allied Timbers (Saligna) (Pvt) Ltd. It assumed the operations at Coldstream Estate. The law recognises that where a particular state of mind was an essential ingredient of an offence, that state of mind can be attributed to a company. *Director of Public Prosecutions v Kent and Sussex Contractors Ltd* [1944] KB 146. However such liability can only be attributed to a company in respect of the conduct and mental state of certain persons who control and direct its activities. *R v ICR Haulage Ltd* [1944] KB 551. The persons so acting must be considered the company itself, the mind of a company has been described as that of ‘somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation...somebody for whom the company is liable because his action is the very action of the company itself.’ *Lennard’s Carrying Co. Ltd v Asiatic Petroleum Co. Ltd* [1915] AC 705.

It follows that the procedure of prosecuting a company is that a director or servant of the corporate body is cited as a representative of the company, not its shareholders, as the offender. In the present case, Joseph Kanyekanye, the Group Chief Executive Officer for Allied Timbers Holdings under which Allied Timbers (Saligna) (Pvt) Ltd fell, according to the evidence on record, is the person who directed and controlled the affairs of the company carrying on business at Coldstream Estate. That company, as represented by Kanyekanye, ought to have been cited for the offence of occupying the land, if any criminal liability arose under the Gazetted Lands Act. In my view, the magistrate failed to appreciate the fact that Allied Timbers (Saligna) (Pvt) Ltd was different and separate from the appellant. The appellant in the circumstances, could not be held criminally liable for the acts committed by the company.

Finally, it follows from the above analysis that upon the compulsory acquisition of land, the company lost its rights in the land. But the company continued to exist. What was compulsorily acquired, through gazetting by the State, was the land, not the company. What was sold were shares in the company EC Miekle (Pvt) Ltd, no shares in the land acquired were sold, as held by the court *a quo*. The agreement on the sale of shares was a stand-alone transaction as the general rule is that shares are freely transferable in the manner provided for by the Companies Act, [Cap 24:03] and articles of association. The sale of shares agreement expressly

state that the land was formerly owned by EC Meikle (Pvt) Ltd. The court *a quo* therefore erred in equating the sale of shares to the sale of land.

In the result therefore we are satisfied that the conviction of the appellant in the court *a quo* was bad in law. The appeal succeeds. The conviction is quashed and the sentence is set aside.

MANGOTA J agrees.

Bere Brothers, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners

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