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Judgment No. 65/07
Civil Appeal No. 154/06

FANTAISIE FARMS (PVT) LTD & FOURTEEN ORS v (A) F.T. MANYERUKE & ORS (B) (1) HIPPO VALLEY ESTATES LIMITED (2) TRIANGLE LIMITED (ADDITIONAL RESPONDENTS)

SUPREME COURT OF ZIMBABWE
CHEDA JA, GWAUNZA JA & GARWE JA
HARARE, JUNE 25, 2007 & SEPTEMBER 11, 2008

A P de Bourbon SC, for the appellants

T Mugadza, for the respondents

S Moyo, for the additional respondents

CHEDA JA: The appellants were the registered owners of farms on which they cultivated and produced sugar cane in the Hippo Valley and Triangle area.

Their farms were acquired by the State in terms of s 8(1) of the Land Acquisition Act [*Cap* 20:10] and allocated to the first group respondents who settled thereon (hereinafter referred to as the settlers).

The additional respondents are sugar cane millers.

The settlers produced sugar cane and delivered it to Hippo Valley Estates Limited and Triangle Limited the additional respondents for milling.

On realizing that they would be facing conflicting claims from the appellants and the settlers, for the proceeds of the cane that had been milled, the additional respondents initiated interpleader proceedings at the High Court.

The appellants opposed this action. The High Court resolved the matter by ordering that the settlers be awarded the proceeds of the sugar cane that they produced during the existence of the acquisition orders made by the Minister of Lands, Agriculture and Rural Resettlement (hereinafter referred to as the Minister).

This is an appeal against that decision.

At the beginning of the hearing of this appeal, Mr *Moyo* indicated that he was not going to argue for the additional respondents but would merely await the decision of the Court.

In the Notice of Appeal the appellants stated as follows:-

> "The appellants appeal against that part of the judgment in each case in which the High Court of Zimbabwe ordered the payment to the settlers by the additional respondents of the proceeds of sugar cane harvested and delivered to one of the Additional respondents during the life span of an order made in term of s 8 of the Land Acquisition Act [*Cap* 20:10] and against that part of the order for costs which directed the appellants to pay one of half of the costs of the additional respondents."

The grounds of appeal were stated as follows:-

"1. The court *a quo* erred in failing to consider the validity of any order made in terms of s 8 of the Land Acquisition Act [*Cap* 20:10], especially in the light of orders of the Administrative Court and the High Court, and in light

of the decision of this Honourable Court in the matter of *Bon Espoir (Pvt) Ltd v Chabata & Ors*. Judgment SC 45/2003.

2. The *court a quo* erred in failing to consider in each case whether or not the purported acquisition of the farm was lawful and thus whether any occupation thereof, and any farming activities on such farm, by any respondent was lawful.

3. The court *a quo* erred in finding that for the time an order in terms of s 8 of the Land Acquisition Act [*Cap 20:10*] was in effect the respondents, as beneficiaries chosen by the acquiring authority to farm the land were entitled to the proceeds therefrom, especially in that:-

   (a) the orders made in terms of s 8 of the Act were invalid; and

   (b) the respondents were not registered as cane growers in terms of the law.

4. The court *a quo* erred in finding that it was lawful for the additional respondents to make payments to the respondents, notwithstanding that they were not registered growers of sugar cane in terms of the Sugar Control Production Act [*Cap 18:09*], or erred in failing to find that such a payment would be unlawful.

5. The court *a quo* erred in failing to find that any lease of the farms would be unlawful as there was no appointed Agricultural Land Settlement Board in terms of the Agricultural Land Settlement Act [*Cap 20:01*]."

The central issue in this appeal is reflected in the appellants' prayer which reads as follows:

"WHEREFORE each of the appellants pray that their appeal be allowed with costs and that in each case the Order of the High Court be altered to one reading:

1. All the proceeds from the delivery of sugar cane to a miller shall be paid by the miller to the person (company) in whose name the farm from which the sugar cane was registered in respect of the seasons 2002/2003, 2003/2004 and 2004/2005.

2. The second and further respondents will pay the costs of the interpleader."

Section 8 of the Land Acquisition Act *supra* provides as follows:

> "Immediately after making an order in terms of subs (1) an acquiring authority may –
>
> (a) …
>
> (b) In relation to any agricultural land acquired for resettlement purposes exercise any right of ownership including the right to carry, demarcate, and allocate the land concerned for agricultural purposes, without undue interference to the living quarters of the owner or occupier of that land."

The settlers in this case were allocated the farms by the Minister in terms of that section. This was agricultural land. The settlers carried out agricultural activity on the land.

Once acquired, the land fell in the hands of the Minister and he had all the right to allocate it.

The appellants argued that because the acquisition orders were subsequently set aside the Minister's actions were invalid right from the beginning and therefore the settlers have no lawful right to the proceeds of the sugar cane that they delivered to the millers during the period of the acquisition.

It is common cause that the acquisition orders were successfully challenged by the appellants and subsequently set aside.

What then is the legal position regarding the cane produced during that period?

The appellants contend that if the acquisitions were unlawful then the settlers should not benefit from the proceeds of the sugar cane.

There is nothing on the record to suggest that the settlers knew, or were aware, that in settling them on the sugar cane farms the Minister was not acting in accordance with the provisions of the relevant law. It was not for them to question the legality of the Minister's actions. They were being settled by a Government Minister, unlike where persons invaded and occupied the land on their own.

If the Minister was wrong in so settling them, or if he failed to observe or comply with certain provisions of the law, that was a matter for the Minister and not the settlers. Anything wrong in the procedure followed in setting them can only be attributed to the Minister and not to the settlers. They were not aware of anything wrong. They were therefore *bona fide* occupants of land regarding its fruits or produce.

Maarsdorps Institutes of South Africa Law Vol. II The Law of Things 8 ed By C G Hall, states on p 42 that:

> "A *bona fide* possessor acquires all the fruits gathered by him before the *litis contestatio* in an action regarding the possession or ownership of the ground whether they have been consumed or are still in existence; but he is bound to restore to the owner of the property all fruits actually gathered by him after *litis contestatio*, because by *litis contestatio* a *bona fide* possessor becomes converted into a *mala fide* possessor. He is even liable for the fruits which he might have gathered after the *litis contestatio* but negligently omitted to gather."

On page 43 the writer also states, and I quote:-

> "But where a person has built with his own material, or planted his own trees, or sown his own seed, or made other improvements, at his own expense, or by means of his own labour, on the land of another, and the latter claims back his property the former is entitled to claim compensation for all necessary and useful expenses he has incurred."

The following statement also appears on this same page:-

> "A lessee under a 99 year lease who has *bona fide* occupied land adjoining that leased to him has, however, been held to be entitled to recover the amount by which the land has been enhanced and has a *jus retentioonis*."

In the *South African Law of Property, Family Relations and Succession* by R.W. Lee, we also find the following at p 11:

> "*Bona fide* possessor. A *bona fide* possessor is not answerable to the person actually entitled for acts done by him in accordance with his supposed title, nor for the loss or deterioration of the thing possessed which occurred before he became aware of the other's right."

In *Van Leuwen's Roman Dutch Law*, 2 ed vol. 1, by Mr JUSTICE KOTZE, at p 183, we find the following by *Grot* 11:6 wherein he says:-

> "By being in possession of property, which we *bona fide* believe to be our own, we also acquire, per *consequentiam rei*, the dominium of the fruits of such property."

The above authoritative positions were followed in the case of *Fletcher & Fletcher v Bulawayo Waterworks Co.* 1915 AD 636, where the owner of a piece of land claimed compensation for water which the respondent had pumped from a well that had been unknowingly sunk, which overlapped into the plaintiff's property and payment of profits.

HOPLEY J, held as follows on page 639 of the judgment:

"I have no difficulty in finding as a fact that defendants were *bona fide* occupiers or possessors of this piece of ground over which their operations extended and that they thought they were sinking on Slot's ground. I am also of opinion that such of their work as was of a permanent nature was done *pro domino* in the genuine belief that it would be theirs for the term of their lease and would at its expiration, or of its renewals as stipulated, revert to Slot as was agreed upon by the terms of the lease."

He went on to say at page 641:

"As regards the claim for an account, I cannot see on what principle it is made.

That water which the defendants won from underground was not the plaintiff's water and the fact that it was got through the misplaced well did not make it theirs. It was something like an animal *ferae naturae* captured or shot by a trespasser which does not by such act become the property of the owner of the land on which it was captured or killed: or the water might be likened to fruits won by a *bona fide* possessor trespassing on another's ground. The law on that point being that all fruits gathered by a *bona fide* possessor before *litis contestatio* are acquired by him for himself.(my underlining) (see *Maarsdorps Institutes*, vol 2, p 52."

The claim in Fletcher's case failed because after *litis contestatio* took place no more water was taken.

For a further discussion of some of the principles referred to in this matter, see the following cases -

1. *Rubin v Bothat* 1911 AD 568;
2. *Getz & Getz v Minister of Mines*, 1916 SA (TP8) 66;
3. *Wynland Construction (Pvt) Ltd v Ashley-Smith en Andere* 1985(3) SA 798;
4. *Odendaal v VanDudtshoon* 1968 (3) SA 442E;

5. See also *The South African Law of Property, Family Relation and Succession by* RW Lee, A M Honone and T W Price.

By comparison the Judge in the court *a quo* awarded the settlers the proceeds of the sugar cane produced during the existence of the acquisition orders only and not after.

The appellants argued that the production of sugar cane by the settlers was in contravention of the Sugar Production Control Act [*Cap* 18:09]. I do not see how the sugar cane, if produced in contravention of that law, becomes the property of the appellants.

Section 11 of the Sugar Production Control Act provides as follows:-

> "No person shall grow sugar cane for the purpose of delivering to a factory unless he is licensed as a grower."

Section 22(1) provides that:

> "Any person who contravenes this Act shall be guilty of an offence and liable –
>
> (a) in the case of a first conviction, to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding six months;
>
> (b) in the case of a second or subsequent conviction, to a fine not exceeding four hundred dollars or imprisonment of twelve months or to both such fine and imprisonment."

The settlers have not been charged with the offence of producing sugar cane without a licence. Even if they had been charged with such an offence there is

nothing in the Act to suggest that they should be deprived of the sugar cane, or that the sugar cane could then become the property of someone who did not produce it.

There is nothing in the Act to suggest that the miller should retain the proceeds for himself or for any person other than the one who delivered it for milling.

The appellants also raised issues about the allocation of land without the Land Board and Water Board. These are issues which should be raised with the Minister and not the settlers.

The appellant also said the Judge in the court *a quo* was wrong in having regard to s 8(2)(b)of the Land Acquisition Act in the absence of such a valid order being in force.

As has already been pointed out, once it was accepted that such orders had been issued, their validity had nothing to do with the settlers but with the Minister as he was eventually challenged in Court and the orders were set aside. The appellants cannot say that such orders were set aside then turn around and deny their existence at the same time.

The appellant submitted that s 8 of the Sugar Production Control Act provides that:-

> "No miller shall receive sugar cane grown in Zimbabwe for the manufacture of sugar other than from a grower or his duly authorized servant or agent"

and that the term –

> "grower means a person who grows sugar cane for the purpose of delivering to a factory and who is licenced in terms of this Act."

It should be noted that this offence is for the miller, but the miller has not been charged with this offence and it is therefore irrelevant to raise this point against the settlers.

The issue of sugar quotas is also the responsibility of the Minister and not the settlers. The Minister settled them and asked them to produce sugar cane.

One relevant observation is that since the appellants were not the ones who produced and delivered the sugar cane in question to the millers they have no basis for claiming the proceeds either and it would have been wrong for the millers to give the proceeds of the sugar cane to the appellants who were not the growers of the sugar cane concerned.

It is irrelevant to say that up to the time of *litis contestatio* there had been no lawful acquisition. What is relevant is that up to the time of *litis contestatio* the settlers were *bona fide* occupiers of the sugar cane farms.

The additional respondents were correct to institute interpleader proceedings because it was not for them to determine who was lawfully entitled to the

proceeds of the sugar cane once the proceeds were likely to be claimed by different parties. This was a proper case for the interpleader procedure.

It was suggested by the appellants that the Association of the settlers had no right to represent them. There is no reason why the settlers cannot be represented by their Associations as there is an affidavit showing that the persons listed in it had authorized the Association to represent them.

The Judge in the court *a quo* was correct in pointing out that some of the issues raised by the appellants were irrelevant as they concerned the Minister's actions and not those of the settlers.

For these reasons I am satisfied that there is no merit in the appeal and it is dismissed with costs.

GWAUNZA JA: I agree

GARWE JA: I agree

Coghlan, Welsh & Guest, applicant's legal practitioners
Mutezo & Co., respondent's legal practitioners
Scanlen & Holderness, additional respondent's legal practitioners