GEORGE V. WATSON

And

PAXIE WATSON

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & MABHIKWA JJ
BULAWAYO 12 NOVEMBER 2018

Criminal Appeal

J. Tshuma for the appellants
Ms N. Ndlovu for the respondent

MABHIKWA J: The appellants were convicted of contravening section 3 (2) (9) as read with section 3 (3) of the Gazetted Lands (Consequential Provisions) Act, Chapter 20:38, "failure to vacate Gazetted Land", in that without any lawful authority from the acquiring authority, the appellants occupied and used Double O Ranch and failed to vacate the piece of land, forty-five (45) days after the fixed date contrary to the provisions of the Act.

In short, it was alleged that the appellants, aged 37 and 73 years respectively are a man and his mother. They both reside at Double O Ranch in Gwanda, Matabeleland South. In 2003, Double O Ranch was identified for resettlement and was published in the Government Gazette of 21 March 2003. Thereafter, there was no publication of any withdrawal to that compulsory acquisition. In terms of the Act, former owners of Gazetted land should vacate the said land forty-five (45) days after the fixed date (20th December 2006) when the Act came into operation in this case. The appellant allegedly continued to occupy and use the gazetted land without a permit from the Acquiring Authority. On 13 October 2016, they were allegedly reminded by one Madodana Dodzi, the Chief Lands Officer for Matabeleland South Province. They remained in occupation of the gazetted land leading to a report being made against them to the police. After the trial, they were both convicted and as follows:

(a) The 1st appellant was ordered to pay a fine of $130,00 or undergo 60 days imprisonment.
(b) The 2nd appellant was cautioned and discharged.

Dissatisfied with both the conviction and sentence the two appellants appealed to this honourable court. Their defence in the lower court was that they were in lawful occupation of the property having been granted a permit to remain there in about the year 2007. In the year 2011, they were given a map showing the boundaries of the property they were supposed to occupy, thereby confirming the permit and permission to remain in occupation. Originally, the 2nd appellant and her late husband were the owners of Double O. Ranch. It measured approximately 10 000 hectares in extent. In the year 2007, it was acquired under the Land Reform Programme in terms of Amendment number 17 to the Zimbabwean Constitution. The appellants contend that at the time of the acquisition, they were advised to remain on the farm by officials from the Ministry of Lands and Rural Resettlement (hereinafter shortened to "The Ministry of Lands"). After that permit and advice, they remained with a portion of the farm known as "the remaining extent of Double O Ranch measuring approximately 2 000ha from the original 10 000ha. In 2011, they were given a map by the same Ministry of Lands showing the extent of their allocation. The rest (8 000ha) were parceled out and allocated to other land seekers or put aside for the communal lands grazing. The map, given to them and dated 27 November 2009 was tendered in evidence I must state at this stage that it is the state's argument that being given the map by the Lands Officer did not amount to a permit to occupy the remaining extent of Double O Ranch in terms of the Act. The state further argued that any other action by any office, individual or authority did not matter at all for as long as it was not written.

(a) Offer letter; or
(b) Permit; or
(c) Land lease agreement

The state argued that the appellants should not succeed *in casu* as they had none of the above.

Nine (9) years after the acquisition, the appellants remained in occupation of the 2 000 hactres of the Ranch. I am also alive to the argument as to whether the map given to the appellants simply refers to "Double O Ranch" or the "Remaining Extent of Double O Ranch".

In 2016, under cover of case number HC 2216/16, the appellants approached the High Court for an order declaring that they were the lawful occupiers of the remaining extent of Double O Ranch. The Ministry of Lands were cited in that application but chose not to oppose the matter. Appellants argue that this was a tacit admission that they were lawful occupants of the 2 000ha.

On 13 October 2016, the applicants were given a notice to wind up their business and vacate the piece of land but they did not, relying on the representations that had been made to them by the Ministry of Lands.

Issues

The issues to be determined are:

(i) Did the court *a quo* err in finding that the representations made to the appellants by the District Lands Committee, the Ministry of Lands, and other Government officials together with the map given to them did not amount to a "permit"?
(ii) Did the court *a quo* err in finding that the appellants had no "permit" in violation of the Agricultural Land Resettlement (Permit Terms and Conditions) Regulations?
(iii) Did the court *a quo* err in finding that the state had proved the criminal offence charged beyond reasonable doubt.

It is true as pointed by the state for the respondent that the question of what amounts to "lawful authority" for the purposes of section 3 of the Gazetted Lands (Consequential Provisions) Act, Chapter 20:28 has been subject of many disputes that the superior courts have had to resolve over the years. It is true that section 2 of the said Act provides that "lawful authority" means:-

a) An offer letter; or
b) A permit
c) A land settlement lease

The definitions part refers to the following;

"Offer letter" means a letter issued by the acquiring authority to any person that offers to allocate to that person any gazetted land or a portion of gazetted land described in that letter.

"Permit" used as a noun means a permit issued by the state and which entitles any person to occupy and use resettled land.

> "land resettlement lease" means a lease of any gazetted land, or portion thereof issued by the state to any person whether in terms of the Rural Land Act (Chapter 20:18) or the Rural Land Resettlement Act, (Chapter 20:17) or otherwise.
>
> The term "acquiring authority" is also defined.

I must hasten to state that sadly, the Agricultural Land Settlement (Permit Terms and Conditions Regulations, 2014, SI 53 of 2014 was passed in 2014, perhaps to correct and regulate what had become problem areas, but this was long after occupation and use of some gazetted lands. In my view, it is for this reason that the issue of retrospective effect of the legislation almost always comes up in these disputes but the Act did not specifically state that it would apply retrospectively.

It is true also that in *Douglas Stuart Taylor-Freeman* vs *The Senior Magistrate, Chinhoyi & Anor* CCZ-10-14.

Chief Justice CHIDYAUSIKU (as he then was) held that "lawful authority" means an offer letter, a permit and a land settlement lease. The state has argued *in casu* that the documents attached to the appellants' defence outline at the lower court did not amount to "offer letters", "permits" or "settlement leases" issued by an "acquiring authority". They do not constitute lawful authority to provide a defence to the charge. I am convinced however, that the learned Chief Justice's finding was premised on the "Gazetted Lands (Consequential Provisions) Act, Chapter 20:28 as read with "the Agricultural Land Settlement (Permit Terms and Conditions) Regulations, 2014, SI 53 of 2014".

As stated above, it was common cause in this matter that:

a) The farm was first gazetted in 2007 as the state says it was 1st acquired in 2003. The appellants simply state that it was acquired and listed in the schedule of gazetted land in 2007 (Schedule 7 of 2007).
b) There was no offer letter from the acquiring authority.
c) There was no written permit from the acquiring authority.
d) There was no written land settlement lease issued by the Minister of Lands.

Also common cause, or at least undisputed, were the following facts:

1. The 1st appellant and her late husband were the former owners of Double O Ranch. She now resides at what is known as the remaining extent of Double O Ranch with her son the 1st appellant.

2. The farm, Double O Ranch initially measured approximately 10 000 ha. It was then acquired for resettlement and gazetted in 2007.
3. Subsequently, it was divided into two (2) blocks. Eight thousand (8 000) ha was allocated to the Siyoka Community for grazing. The appellants remained with a portion of the farm, known as the remaining extent of Double O Ranch and measuring approximately 2 000ha.
4. In the year 2011, the appellants were given a map by the Ministry of Lands which showed the remaining extent of Double O Ranch.
5. In a letter dated 30th August 2016 the Provincial Administrator for Beitbridge was advised to respect the recommendation made by the District Lands Committee that appellants remain in occupation and one of the 2 000 ha being the remaining extent of Double O Ranch.
6. In 2011 also, a meeting was called at Double O Ranch at the instance of the District and Provincial Lands Committees. In essence, various government departments and officials including the said committees themselves, the Member of Parliament for Beitbridge, the Minister of State for Matabeleland South Province, Police officers and other support staff were present. The meeting was to show to stakeholders, including the appellants, the boundaries of the remaining extent of Double O Ranch, and the 2 000ha to be held and used by the appellants. This is also where the map was given to them.
7. The appellants had a recommendation letter from the District Lands Committee and were supported by the Provincial Lands Committee that they be granted a permit in respect of the 2 000ha. The Gwanda Rural District Council went on to collect rentals from the 1st respondent in respect only of the remaining 2 000ha. Other government officials visited and assured the appellants to work the farm and the banana production projects. These officials included the then Vice-President P. Mpoko and the Minister of State for Matabeleland South Province encouraging them not to vacate the portion of the farm. The appellants were even invited by Government officials to teach communities in Binga how to grow bananas.
8. On 22 February 2015, the 1st appellant filed a second land acquisition form at the recommendation of the then District Land Officer, a Mr Maseko.
9. The appellants were continuously assured that a written land settlement lease in respect of the 2 000ha was in progress.
10. In addition, the following exhibits were produced to show the appellant's source of belief.

(i) Exhibit B – a letter from the Ministry of Local Government, Public Works and National Housing for Matabeleland South Province. It was written by the Provincial Administrator presumably in his/her capacity as chairperson for the Provincial Lands Committee. It is headed:

"Re: Gwanda DLC: Position on Double O Ranch

The letter went on to state that it should be noted that the District Lands Committee had recommended that the Watsons remain in occupation and that the District Lands Committee had instructed them to produce separate sections, one for the banana fruits and infrastructure on 2 000 ha whilst the remainder of 8 000ha be set aside for the Siyoka communal grazing lands. In that letter, the Watsons and the Siyoka communities were advised to respect the Gwanda District Lands Committee decision and mandate in respect of the lands under its jurisdiction.

ii) Exhibit A – A map showing the 2 000ha as the portion of Double O remaining to the appellants after the other 8 000ha had been set aside for Siyoka communities. True, this map did not, as the prosecutor submitted elsewhere, state that there is a remaining extent of Double O Ranch. But I must say that the map at page 186 of the record of proceedings clearly states in bold block letters – "DOUBLE "O" SUBDIVISION" and also is inscribed somewhere in the middle "Remaining Extent … 2 000HA"

iii) Exhibit B_2. A letter by the Chief Executive Officer of the Gwanda Rural District Council, a Mr R. Sibanda. It was written "to whomever it may concern". It was as follows;

"BALANCE STATUS FOR DOUBLE O MAKHADO FARM

The above named farm is situated in Gwanda Rural District Council area and it was 2 000 hactres in size.

The farm belongs to Mr Watson who has paid up the Unit Tax of the farm up to 31 December 2011.

Mr G. V. Watson has been making payments to this office.

For: Chief Executive Officer"

> iv) Exhibits G ……. Shows copies of receipts for payments for Unit Tax made to the Gwanda Rural District Council in respect of the 2 000ha. Mr Watson was even written a reminder on 10 August 2016 to pay the amount of $3 128,60 being an amount due on land levy. Exhibits C5 to C10 show about 18 copies of receipts paid for "storage levy" to the Lower Mzingwane sub-committee Council in respect of the Makhado Ranch from May 2013 to June 2015 to ZINWA.

In my view, any reasonable person in the same circumstances as above, with such representations and assurances from Government officials and offices would have genuinely believed that they had the "permission" or "permit" to occupy the 2 000hactres. It is a question of terminology really, as to whether "permission" or "permit" is used as a noun, adjective or verb.

In *S* v *Rodgers* HB-47-15 (HC 3187/13), the appellant had been convicted of contravening the same section 3 (2) as read with section 3 (3) of the Gazetted Lands (Consequential Provisions) Act, Chapter 20:28. He had been sentenced to a wholly suspended 3 months imprisonment sentence plus his eviction together with all those claiming to occupy through him from the property known as being the remaining extent of Olympus Block at West Nicholson. He appealed against both conviction and sentence.

Just as was the case *in casu*, the learned trial magistrate had found that the only kind of permit envisaged by the Gazetted Lands (Consequential Provisions) Act was a written document and not any other kind of permit. My brother, Honourable Justice MAKONESE held, with TAKUVA J concerning that:

> "In my view, the reasoning is flawed. As at the date of arrest and prosecution of the appellant, there was no statutory provision stating what a permit should provide in form and content. The legislature, having seen the need to clarify the legal requirements regarding permits and to consolidate the practice, passed the Agricultural Land Resettlement (Terms and Conditions) Regulations, SI 53/2014. These regulations now provide clearly for the issue of a written permit to occupants and beneficiaries of gazetted land. The regulations further set out a pro-forma on the permit contemplated in the Gazetted Lands (Consequential Provisions) Act".

The trial magistrate *in casu* makes the same flawed reasoning. In addition, he appears to hold that SI 53/2014 operates retrospectively. The statutory instrument was passed long after the appellants had continued to occupy the remaining extent of Double O Ranch from 2003 to 2007, right up to 2015 and 2016 when they were then arrested and prosecuted. The issue does not so much

relate to the time the appellant is arrested and prosecuted but to the time of occupation.

In *S* v *Rodgers (supra*), the magistrate made a pertinent comment and finding but came to a wrong conclusion. He had found that the accused had committed the offence under the mistaken belief that the map given to him together with its endorsement "remaining Extent for Farmer" amounted to a permit, and that had he not acted on this belief, he would not have committed the offence. He held that the belief was not unreasonable, considering the apparent conduct of the officials from the Ministry of Lands" who gave him the map.

See also *Nkomo & Anor* vs *Attorney General & Ors* 1993 (2) ZLR 452 and *Wallls* vs *Walls* 1996 (2) ZLR 117 on the issue of government officials issuing permits by endorsement of permits, assurances, verbal and visual identification and allocation of portions of land to previous land owners.

See also *S* v *Jemwa* 1973 RLR 357, that where an accused person is given advise on an administrative matter by a responsible public official whose duties include the administration of the particular statute to which the matter relates, and where the accused genuinely believes that the official is sufficiently familiar with the Act, then if the accused bona fide acts on that advice, he should be permitted to set-up an exception to the inordinate *juris* rule, the defence of claim of right.

See also *S* v *Biddlecombe* HB-62-15, per TAKUVA J with MOYO J concerning also *Mhondoro* vs *Mutambu & Ors* HC 3879/13 on the question of a permit.

In other matters and *in casu*, the issue of the retrospective application of a statute has been extensively discussed. I do not intend to repeat the discussion and the law herein.

It is settled law that a law or statute does not apply retrospectively unless it specifically states so. There is a presumption against retrospective application of a law. One cannot be prosecuted and be punished for an act that was not a crime at the time he committed it.

I agree that there are striking similarities between the Rodgers case and the current one. In fact, the common cause facts together with the exhibits shown above go far beyond. I am convinced that the appellants reasonably and genuinely acted on the map, the documents, the actions, the assurances and representations given to them by the various government officials and officers especially the District and Provincial Lands Committees and the Gwanda Rural District Council.

I must also state that the applicants are further vindicated by Part VIII. Sections 236 and 237 of the Criminal Law (Codification and Reform) Act, Chapter 9:23. Section 236 reads as follows:

"236. **When mistake or ignorance of law a defence**

1. Subject to this part if a person –
   (a) Does or omits to do anything which is an essential element of a crime in terms of any law, and
   (b) When he or she did or omitted to do the thing, he or she did not know that his or her conduct was unlawful because he or she was genuinely mistaken or ignorant as to the relevant provisions of the law;
   The person shall not have a complete defence to a charge of committing that crime unless the person's mistake or ignorance as to the relevant provisions of the law was directly brought about by advice given to him or her by an administrative officer whom he or she had reason to believe he was charged with the administration of the law concerned and was familiar with its contents."

Section 237 also deals with claims of right and mistakes of mixed law and fact.

Having said the above, I must say that it should be remembered that this is a criminal matter. There is usually a temptation in land matters to confuse criminal cases of land occupation with the usual civil land ownership disputes. The onus still remains with the state to prove beyond reasonable doubt that the accused committed the criminal offence. I do not intend to repeat herein what "beyond reasonable doubt" means. I am not convinced that beyond reasonable doubt, the appellants in this matter, at the time they occupied the remaining 2 000 hectares of Double O Ranch, had unlawfully and intentionally intended to contravene section 3 (2) as read with section 3 (5) of the Gazetted Lands (Consequential Provisions) Act, Chapter 20:28.

In any case the state had initially filed an opposition and heads of argument. However at the hearing of this appeal. The state counsel indicated that the basis of that application was the constitutional court judgment which they now realize is slightly defective and distinguishable. Counsel thus conceded that *in casu*, the appeal was merited and should succeed. We are convinced that the concession was judiciously made.

Accordingly:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

Makonese J …… I agree

Webb, Low & Barry, appellant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners