DUDLEY RODGERS

**versus**

THE STATE

HIGH COURT OF ZIMBABWE

MAKONESE & TAKUVA JJ

BULAWAYO 26 JANUARY AND 12 MARCH 2015

**Criminal Appeal**

Mr *J. Tshuma* for the appellant

Mr *T. Makoni* for the respondent

**MAKONESE J:** The appellant was convicted by a magistrate sitting at Gwanda on a charge of contravening the provisions of section 3 (2) as read with section 3 (3) of the Gazetted Lands (Consequential Provisions) Act *[Chapter 20:28].* The appellant was sentenced to three months imprisonment, which was wholly suspended. In addition the appellant and all those claiming occupation through him were issued with an eviction order from the property known as the Remaining Extent of Olympus Block, West Nicholson. The appellant appealed against the whole judgment, challenging both his conviction and sentence.

The issues arising in this appeal are these:

a) Whether the learned trial magistrate misdirected himself in finding that a permit granted in terms of the Gazetted Lands (Consequential Provisions) Act is required to be in writing.

b) Whether the learned magistrate misdirected himself in finding that the appellant was in unlawful occupation of the property.

c) Whether this Honourable court must interfere with the sentence imposed by the learned magistrate on the grounds that it induces a sense of shock in the circumstances of the case.

Background

In the Government Gazette published on 7November 2003, notice was given in terms of the Land Acquisition Act [*Chapter 20:10*], that government intended to compulsorily acquire the Remaining Extent of Olympus Block for the purposes of resettlement. In terms of the notice the appellant was required to vacate the property within a period of forty-five days. The appellant remained in occupation of the property and indicated to the Ministry of Lands officials that during the land redistribution exercise, in 2003 a large portion of his farm measuring approximately 8900 hectares was acquired by the Government for resettlement. The acquired land was allocated and subdivided for resettlement by various A1 farmers. 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 was 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.

On 25 August 2011 the Minister of Lands and Rural Resettlement signed on offer letter in respect of the Remaining Extent of Olympus Block, in favour of Mr Muwoni. When Mr Muwoni attempted to evict the appellant from the land in dispute, appellant communicated with the District Lands officer and reminded him of the map and that he had been guaranteed that he would remain on the allocated land. The dispute could not be resolved resulting in the criminal prosecution of the appellant for failing or refusing to vacate gazetted land.

I now propose to deal with the issues for determination in *seriatim:*

WHETHER THE APPELLANT HAD A PERMIT

The learned trial magistrate held 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. In my view the reasoning is flawed. As at the date of the arrest and prosecution of the appellant, there was no statutory provision setting out 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 in this regard, passed the Agricultural and Land Settlement (Permit and Conditions) Regulations, Statutory Instrument 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 of the permit contemplated in the Gazetted Lands (Consequential Provisions) Act.

In his reasons for sentence the learned trial magistrate had this to say:

“I have particularly considered that the accused’s moral blameworthiness was very low. Indeed he committed this offence under the mistaken belief that the map that he was given, together with the endorsement on it “Remaining Extent for farmer”, amounted to a permit. Had he not held this mistaken belief, he would certainly not have committed this offence. And the belief was not unreasonable, regard being had to the apparent conduct of the officials from the Ministry of Lands who gave accused the map I have referred to above.” (emphasis mine)

The magistrates’ comments cannot be faulted. The appellant led oral evidence which was not disputed to the effect that besides the oral permission and authorization, there was conduct by Ministry of Lands officials which amounted to overt acceptance of his occupation of the property, and the legitimacy of his presence on that piece of land. In my view, before the promulgation of the Agricultural Land Settlement (Permit Terms and conditions) Regulations of 2014, the appellant was perfectly entitled to assert that the map given to him by authorized officials, coupled with the verbal assurances given to him by Ministry of Lands officials amounted to a permit as envisaged by the Gazetted Lands (Consequential Provisions) Act.

It is settled law that there is a presumption against retrospectivity of legislation, and that legislation does not govern past incidences, unless the contrary is expressly stated or necessarily inferred from the legislation.

See *Nkomo and Another* v *Attorney General and Others* 1993 (2) ZLR 422 and *Walls* v *Walls* 1996 (2) ZLR 117.

It is clear that before the passing of the Agricultural Land Settlement (Permit Terms and Conditions) Regulations, there was no legislative provision requiring that a permit should only, be in writing. There was no legislative provision setting out the form and content of such a permit. In practice, therefore, responsible government officials issued permits by endorsement on maps, by verbal and visual identification and allocation of portions of land to previous owners.

WHETHER THE LEARNED MAGISTRATE MISDIRECTED HIMSELF IN FINDING THAT APPELLANT WAS IN UNLAWFUL OCCUPATION OF GAZETTED LAND

Once the learned magistrate made a specific finding that the appellant held a reasonable belief that he had a lawful right to remain on the property in dispute as a result of advice given to him by officials of the Ministry of Lands, then the defence of a claim of right would be available to him. The position was articulated in the case of *S* v *Zemura* 1973 RLR 357, where it was held that when an accused person is given advice 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 as an exception to the *ignorantia juris* rule, the defence of claim of right.

*In casu*, it is not in dispute that the appellant openly occupied the piece of land on the advice of the Ministry of Lands officials. He was encouraged to assist the A1 farmers surrounding him. He was given a map indicating the portion of land allocated to him. He held the genuine belief that he was entitled to remain in occupation in accordance with the law. I am not satisfied that the state proved the essential elements of the charge beyond reasonable doubt. As I have already explained, the trial magistrate’s comments in his reasons for sentence, do give credence to the conclusion that the conviction is unsafe.

WHETHER THE SENTENCE WAS APPROPRIATE

I must comment on the propriety of the sentence imposed by the trial court. The sentence imposed in this matter was three months imprisonment wholly suspended for five years on condition appellant did not within that period commit an offence involving the holding, using or occupation of gazetted land without lawful authority and for which he is sentenced to imprisonment without the option of a fine. In addition the learned magistrate ordered the eviction of the appellant from the property. Firstly, the sentence is rather unusual in that the suspended sentence did not make sense at all regard being had to the fact that appellant was being evicted from gazetted land on the date of the sentence. There was no likelihood of appellant occupying another piece of land in violation of the Act. The suspended sentence served no useful purpose. In terms of section (3) of the Act the appellant was liable to pay a fine not exceeding level seven or to imprisonment not exceeding two years or to both such fine and imprisonment. A sentence of an appropriate fine would have served the justice of the case.

In the circumstances, given the facts the learned court *a quo* found to have been proved, it was improper to convict the appellant. The court *a quo* accepted that the appellant acted on the advice of the Government officials from the Ministry of Lands. It was accepted that, but for that advice, the appellant would not have committed the offence charged.

I would, accordingly order as follows:

1) The appeal is hereby allowed

2) The conviction and sentence are hereby set aside.

*Webb, Low and Barry*, applicant’s legal practitioners

*National Prosecuting Authority*, respondent’s legal practitioners

Takuva J, ………………………………………… agrees