

TIMOTHY SEAN WHITE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE & TAKUVA JJ
BULAWAYO 11 JULY 2016 & 26 JANUARY 2017

Criminal Appeal

S. Collier for the appellant
Ms S. Ndlovu for the respondent

TAKUVA J: This is an appeal against the whole judgment and sentence of the Magistrates' Court sitting at Gwanda. The appellant was charged with contravening section 3(2)(a) as read with section 3(3) of the Gazetted Lands (Consequential Provisions) Act, Chapter 20:28 in that he continued to occupy state land being Lot 2 of Lot 36 Essexvale Estate, Umzingwane District [the farm] without any lawful authority.

Appellant pleaded not guilty to the charge but was convicted following a full trial and sentenced to eviction from the land in question and payment of a US\$300,00 fine. He then filed this appeal on the following grounds:

- i. The learned magistrate erred in finding that the appellant did not have the lawful authority to occupy the farm.
- ii. The learned magistrate erred in failing to consider that the High Court of Zimbabwe, a superior court had already made a finding that the appellant had lawful authority to remain on the land in question.
- iii. Alternatively, that the learned magistrate misdirected himself in failing to consider that the appellant had been instructed to remain on the farm by representatives of the Ministry of Land and Rural Resettlement, the appellant relied on those representations and therefore occupied the land under the assumption that he had the lawful authority to be there.
- iv. The learned magistrate erred in failing to consider that the appellant's mining rights in respect of the land conferred a right of occupation in respect of those portions covered by mining claims. The appellant was found guilty of unlawful occupation of the whole extent of Lot 2 of Lot 36 of Essexvale when he had the lawful right to occupy a portion thereof."

Ad sentence

There are two grounds of appeal against sentence namely:

- “(i) The sentence imposed by the learned magistrate induces a sense of shock due regard being had to the fact that the appellant occupied the farm in question because he was instructed to remain there by representatives of the Ministry of Lands and Rural Resettlement.
- (ii) The sentence imposed by the magistrate whereby the appellant was sentenced to eviction from the farm in question failed to take into account the fact that the appellant had mining rights in respect of the farm and that such a sentence would contravene those mining rights to the appellant’s detriment.”

The following facts are common cause:

- (i) The appellant was the former owner of the farm.
- (ii) The farm was gazetted in the year 2003 and the appellant continued to occupy, hold and use the gazetted farm after that date.
- (iii) The District Lands Committee recommended that the appellant be offered that farm in 2003.
- (iv) In the same year, a certain Colonel Nare attempted to take up occupation of the farm and the appellant approached the Chief Lands Officer for the Province of Matabeleland South who advised the appellant to remain on the farm. The Colonel was then relocated to another farm.
- (v) The appellant then continued occupation of the farm from the year 2003 to the year 2007 without incident.
- (vi) On 17 May 2007, appellant was given a letter from the Acting Chief Lands Officer. The letter stated as follows:

“To whom it may concern

Re: Farming operations at Lot 2 of Lot 36 Essexvale Estate by Tim White

The above matter refers.

Mr Tim White is currently farming at the above quoted property and has made an application for an offer letter to the Ministry of Lands.

Your assistance is always appreciated.”

The letter was signed by R. Mthimkhulu the then Acting Chief Lands Officer for Matabeleland South Province.

- (vii) On the basis of what appellant believed to be a verbal permit and with the assistance of the afore mentioned letter, the appellant continued peaceful occupation of the farm in question from the year 2007 to the year 2014.
- (viii) In the year 2014 Mr Zenzo Ntuliki was issued with an offer letter for the farm. The appellant was then charged with the offence of unlawful occupation of State Land in about February 2015.
- (ix) The appellant is the holder of certain mining claims on the farm and copies of the relevant certificates of Registration are defence exhibits IV and V at pages 81 to 84 of the record.
- (x) Mr Zenzo Ntuliki, the offer of the farm attempted to assert his rights in the High Court of Zimbabwe by way of urgent chamber application under cover of case number HC 217/15. The matter was heard in chambers before the Honourable Mrs Justice Moyo on the 17th day of February 2015 and the application was dismissed.

Before dealing with the grounds of appeal, I must point out that the respondent conceded at the hearing of the appeal that the conviction was unsafe. We however reserved judgment in order to closely consider the legal principles inherent herein.

In dismissing issues raised in grounds (i), (ii) and (iii) the court *a quo* exclusively relied on the Constitutional Court's decision in *Taylor-Freeme v The Senior Magistrate, Chinhoyi & Anor* 2014 (2) ZLR 498 (CC). In that case CHIDYAUUSIKU CJ held *inter alia* that:

“the clear and unambiguous meaning of s 2 (1) of the Act was that “lawful authority” meant an offer letter, a permit and a land settlement lease. The documents produced by the applicant were not offer letters, permits or land settlement leases issued by the acquiring authority. A letter from the late Vice President, the Presidium or any other member of the Executive did not constitute “lawful authority” in terms of the Act.”

While I accept that the Chief Justice was not specifically dealing with the definition of a permit or what form a permit should take, I do not agree that his comments can be termed *abiter dictum*. I refer here to page 511 of the judgment paragraph D-E where he said;

“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 Ministry of Lands, Land Reform and Resettlement is not “lawful authority”. (my emphasis)

In casu, the appellant relied on a letter from the erstwhile Chief Lands Officer in the Ministry of Lands, Land Reform and Resettlement in Matabeleland South Province. By parity of reasoning, this letter does not constitute “lawful authority”. For that reason, the court *a quo*'s finding that the appellant did not have lawful authority to occupy the farm is unassailable. To be more precise, the letter does not on the authority of the *Taylor-Freeme* case *supra* amount to a permit.

The appellant argued in the alternative that the representatives of the Ministry of Lands and Rural Resettlement led him to believe that he was in lawful occupation of the farm. It is common cause that the appellant remained in occupation of the farm in question for eleven (11) years as a result of the representations made to him by representatives of the Ministry of Lands and Rural Resettlement, specifically certain verbal representations made from 2003 to 2006 and the letter given to him in the year 2007. In dismissing this defence, the learned magistrate again relied on the reasoning in the *Taylor-Freeme* case and concluded that; “In the *Taylor-Freeme* case, CHIDYAUSIKU CJ, dealing with a similar defence of mistake of law, said, “the applicant’s defence of a mistake of law is frivolous and vexatious. If the applicant was serious about this defence, he would have left the farm when he was charged. The fact that the applicant is still occupying the farm makes nonsense of this defence.” This is exactly what befalls the accused in the present case.” (my emphasis)

In my view in adopting this reasoning hook, line and sinker, the court *a quo* fell into error in that the *Taylor-Freeme* case is distinguishable on the facts relating to the defence from the one

in casu. In the former, the applicant had raised two contradictory defences namely that (1) he did not own the farm and was not in occupation thereof and (2) that he had lawful authority to occupy, hold or use the gazetted land from the late Vice President Msika and officials from the Ministry of Lands, Land Reform and Resettlement.

In casu, the learned magistrate failed to take into account that the appellant had always maintained that he had a permit to remain in occupation of the land in question. The defence of a mistake of law was raised as an alternative defence, not as a sole defence. In that regard, it would not make sense to expect him to abandon his rights immediately after his arrest.

The Law

The full meaning of the legal principle of *ignorantia legis nemi nemi excusat* is that ordinarily an accused person cannot raise the defence that he made a mistake of law. However, on the basis of the aforesaid principle, an exception exists where the mistake of laws arose from the incorrect legal advice of a government official. In *S v Davy* 1988 (1) ZLR 38 (SC) it was stated that:

“It necessarily follows that in my opinion the rule that ignorance or mistake of law is no excuse, which judicial officials have applied for so long in this country in conformity with both English law and the decisions of the South African courts prior to the advent of *de Blom’s* case *supra* remains valid. Its strength has hardly been shaken. It is, however, subject to the exception that where the appellant acted upon incorrect advice as to the law, given by a government official who is primarily responsible for the administration of the particular statute to which the matter relates, his ensuing mistake of law is a good defence.” (my emphasis)

Similarly, in *S v Zemura* 1974 (1) SA 584 (RA), the court stated that;

“When an appellant is given advice on an administrative matter by a responsible public official whose duties include the administration of a particular statute to which the matter relates and where the appellant genuinely believes that the official is sufficiently familiar with the Act his department administers to be competent to give the advice sought, then if the appellant *bona fides* acts on that advice he should be permitted to set up as an exception to the *ignorantia juris* rule, the defence of a “claim of right” should that advice prove to be wrong and this notwithstanding the fact that the claim may involve setting up the defence of a mistake of law.” (emphasis added)

The defence has since been codified. Section 236 of the Criminal Law (Codification and Reform) Act Chapter 9:23 provides 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 was charged with the administration of the law concerned and was familiar with its contents.
- (2) ...” (emphasis added)

The synopsis of this section is that;

- (i) The *actus reas* must be an element of a crime.
- (ii) There must be a genuine mistake or ignorance of the relevant provisions of the law.
- (iii) The mistake or ignorance must be brought about by advice given by an administrative officer charged with the administration of the law concerned who was familiar with its contents.

In casu, it is undisputed that representatives of the Ministry of Lands and Rural Resettlement, namely the District and Provincial Lands Committees and the Chief Lands Officer

himself made representations to the appellant to remain in occupation of the farm. The appellant believed and relied on this advice and stayed put for eleven years. In 2015 these representatives changed their position and decided to bring a criminal charge of unlawful occupation against the appellant.

In his evidence, Romeo Mthimkhulu stated that his day to day duties included land acquisition, resettlement and estates management. It is common cause that this is the same officer who wrote two letters, one in 2007 and another in 2010 recommending the appellant to remain in occupation of the land in question pending the approval of his application for an offer letter by the Ministry of Lands. According to the Chief Lands Officer, these recommendations had the blessing of the relevant district and provisional land committees as confirmed by the following exchange on page 18 of the record of proceedings;

- “Q - How else do you know the accused?
- A - He used to come to my office in connection with his recommendation for a piece of land by the District Lands Committee
- Q - How long was accused recommended to remain on the land in question?
- A - It was open until 2014 when the structures that had recommended him withdrew the recommendation.
- Q - What does this recommendation really mean?
- A - It means the decision of the acquiring authority is being in favour of the person, then he gets an offer letter.
- Q - Briefly in summation, you say the land was acquired in 2003, and accused was recommended by the District Lands Committee, until 2014?
- A - Yes. The recommendation ceased in 2014. Even the provincial land committee had recommended him.”

In his evidence in chief and under cross-examination, the appellant consistently stated that he relied on the officials who told him to remain on the farm and be productive. When it

was put to him by the prosecutor that the letter simply confirmed that he was currently farming at the farm, his answer was;

“A I believed it to confirm that I was in lawful occupation of the farm.”

Applying the law to these proved facts, I find that the learned magistrate misdirected himself when he dismissed the appellant’s defence of mistake or ignorance of law arising from wrong advice given to him by Mr Mthimkhulu, the District and Provincial Land Committees to remain on the farm after the expiry of the appropriate period. The defence has merit and the appellant should have been found not guilty and acquitted.

In my view it is totally unfair and not in the interests of justice and public policy for Government officials charged with administration of particular statutes to give incorrect advice for whatever reason and then unashamedly turn around and recommend and vigorously support the prosecution of the innocent recipients of their bad advice. Such conduct should be frowned upon by the courts, for to tolerate it could very well promote abuse of office and corruption by public officials to the detriment of society in general.

I note also that the appellant argued in the alternative that he was in lawful occupation of a portion of the land by virtue of his rights as a holder of mining claims. It is common cause that the appellant holds mining claims whose registration certificates were tendered as defence exhibits IV and V at pages 81 – 84 of the record. Original certificates were produced at the hearing of the appeal. The land in its entirety is only 142 hectares of which 30 hectares is covered by the mining claims. In dismissing the issue of the appellant’s mining claims the learned magistrate stated;

“The accused raised the issue of mining claims as an alternative defence I will not dwell much on this issue because it is clearly an irrelevant issue. Mining claims are governed by the Mines and Minerals Act, and holding mining claims has nothing to do with whether or not one has “lawful authority” to occupy gazetted land”.

I take the view that the learned magistrate's error is self-evident in that he failed to appreciate that the appellant's mining claims gave him a right of occupation entirely distinct from any rights that the appellant may have been granted under the land reform programme.

In terms of section 178 (2) of the Mines and Minerals Act Chapter 21:05, a person who holds a mining claim holds corresponding surface rights in respect of the land. The section provides;

“178 Surface rights miners

(1) ...

(2) Every miner of a registered mining location shall have and possess the following respective surface rights –

(a) The right subject to any existing rights, to the use of any surface within the boundaries thereof for all necessary mining purposes of his location; and as against the holder of a prospecting licence or of any other mining location the right, except as in section three hundred and fifty-seven provided, to the use of all surface within such boundaries.”

Quite evidently, the holder of a registered mining location has the right to the use of any surface within the boundaries thereof. In casu, the appellant is at the very least, lawfully authorized to occupy certain portions of Lot 2 of Lot 36 of Essexvale by virtue of his mining rights. If the state wished to charge the appellant with unlawful occupation of the remaining extent of Lot 2 of Lot 32 of Essexvale then it should have indicated as such in the charge.

The net effect of this is that even if the appellant had not been granted any rights of occupation by the Ministry of Lands and Rural Resettlement, the state did not have the lawful authority to deprive him of his mining rights by barring him from the land. Appellant had a right to occupy a portion of the land in question and therefore could not be found guilty of occupying its entire extent.

For these reasons, it is ordered that:

(1) The appeal be and is hereby upheld.

(2) The conviction and sentence of the Magistrates' Court be and are hereby set aside.

(3) The appellant be and is hereby found not guilty and acquitted.

Makonese J I agree

Webb, Low & Barry incorporating Ben Baron & Partners, applicant's legal practitioners
Prosecutor General's Office, respondent's legal practitioners