S v Biddlecombe (HCA 98/09) [2015] ZWBHC 62 (13 May 2015);

Search Summary:

Land – acquisition – agricultural land – occupation of – need to have lawful authority – such can include permit issued by State – land handed by acquiring Ministry to another Ministry – latter Ministry giving undertaking to sign a long lease with occupier – occupier having lawful authority to occupy and use land

Headnote and Holding:

The appellant's farm had been expropriated for re-settlement, but he did not vacate the farm. He was charged with contravening s 3 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28], the charge alleging that he had continued to occupy the farm without lawful authority, "lawful authority" being defined as (a) an offer letter; or (b) a permit; or (c) a land settlement lease. "Permit" is defined as "a permit issued by the State which entitles any person to occupy and use resettlement land".

The appellant produced documentary evidence to show that the farm was removed from the control of the Ministry of Lands, Agriculture and Rural Resettlement (the acquiring authority) to the control of the Ministry of Environment and Tourism because of the business operations carried out on the farm by the appellant and his company. An undertaking was then made to the appellant and the company that upon such transfer, the Ministry of Environment and Tourism would sign a 25 year lease with the appellant and his company. The appellant argued that he therefore had a "permit" to remain on the farm. He also argued the defence of mistake of law. It was conceded by the State in argument that a proper interpretation of the definition of a "permit" in the Act is that it can be issued by "any state organ" unlike an offer letter that can only be issued by the "acquiring authority". It was conceded that the definition of a "permit" was wide.

Held:

(1) the land reform policy is multifaceted in that it focuses on different uses of acquired land. What happens in practice is that once land is gazetted and acquired by the State through the "acquiring authority", thatauthority can transfer the land to another ministry for occupation and use in accordance with that ministry's requirements and needs. Gazetted land, for example, can be transferred from the Ministry of Lands to the Ministry of Local Government for urban expansion. It can also be transferred to the Ministry of Environment and Tourism in order to boost or promote proper management of government's wild life policy. The argument that, notwithstanding such transfers, the Ministry of Lands retains the mandate to authorize the use and occupation of such transferred land becomes untenable, not only because it defies logic and common sense, but because it contradicts the clear meaning of the definition of the word "permit" in the Act. The letters thenappellant had received constituted a permit as defined. Consequently, he had lawful authority to occupy and use the farm.

(2) While ignorance of the law is generally not an excuse, a person may be excused from criminal liability where such a person has been misled into breaching the law by government agents. Where the State has misled a man into a contravention of the law, as a matter of public policy he should be entitled to an acquittal. It was clear from the correspondence that the appellant was indeed misled by government officials into breaching the provisions of the Act. It was unfortunate that the Ministry of Environment and Tourism had taken a long time to finalise the 25 year lease with the appellant, but this bureaucratic delay was not of his making and should therefore not place him at any disadvantage.

MICHAEL GREGORY BIDDLECOMBE

And

THE STATE

IN THE HIGH COURT OF ZIMBABWE

TAKUVA & MOYO JJ

BULAWAYO 6 OCTOBER 2014 & 14 MAY 2015

Advocate P. Dube for the appellant

T. Hove for the respondent

Criminal Appeal

TAKUVA J: This is an appeal against the decision of the magistrates' court sitting at Gwanda, in which the appellant was ordered to stand trial on allegations of contravening the provisions of section 3 of the Gazetted Land (Consequential Provisions) Act Chapter 20:28 (hereinafter "the Act")

The factual allegations were that on 19 May 2006, the state acquired Famona Farm in terms of section 16 (B) (2) (a) (iii) of the Constitution of Zimbabwe by publishing general notice 128 of 2005 in the Government Gazette (Extraordinary) of the 19th of May 2006. The appellant then failed to comply with the provisions of section 3 of the Act. Specifically it was alleged that the appellant failed to vacate the acquired land within 45 days from the fixed date which was the 20th day of December 2006. Essentially the charge was that appellant had continued to occupy the farm without lawful authority.

After the ruling, the appellant appealed to this court. On 9 September 2013, both parties filed what they termed "stated case on a point of law arising on appeal." The document states:

"Background and Accepted Facts

1.On the 29th November 2010, the above cited appeal was called before this Honourable Court.

2.Upon hearing the parties briefly the court directed that counsel for the respondent must investigate the authenticity of the letters filed of record by the appellant.

3.Such letters related to Famona Farm, the farm in respect of occupation of which the criminal charges against the appellant were levelled, which charges the appellant moved unsuccessfully to quash, leading to the present appeal.

4.The letters purported that Famona Farm had been transferred from the control of the Ministry of Environment and Tourism.

5.Further, the letters reported that the Ministry of Environment and Tourism desired to leave the farm for stated reasons, in the control and administration of the appellant and his company, GAMESTONE SAFARIS.

6.Counsel for the respondent had investigated the letters and can confirm before this Honourable Court that the letters have been written with the authority of the Ministry of Environment and Tourism and that this Ministry has consented that the appellant and GAMESTONE SAFARIS remain in occupation and control of the farm.

7.<u>The parties, therefore agree that:</u>

7.1 Famona farm has been acquired by the state:

7.2 The State is now the owner of the farm;

7.3 The administration of Famona Farm, however, has been removed from the Ministry of Lands, Agriculture and Rural Resettlement, to the Ministry of Environment and Tourism;

7.4 The Ministry of Environment and Tourism administers the farm on behalf of the State.

<u>POINTS OF LAW</u>

At the present time, with the leave of this Honourable Court, the parties agree that they will, when the appeal is called, argue only the following points of law:

8.1 whether the letters produced of record by the appellant, emanating from the Ministry of Environment and Tourism, amount to a “permit” or other legal authority for the appellant to remain on the farm;

8.2 whether, therefore, the charges against the appellant were incompetent, standing to be quashed by the trial court, by reason that the appellant had lawful authority to remain on Famona Farm.”

Appellant’s argument is two pronged. Firstly, he argues that he had lawful authority in the form of letters from certain government departments to remain on the farm. Secondly, he relies on the defence of mistake of law. I will deal with these grounds seriatum but before I do that let me examine the essentials of the offence the appellant was charge with.

Section 3 (1) and (3) of the Act read as follows:

“(1) Subject to this section, no person may hold, use or occupy gazetted land without lawful authority;

(2) …

(3) if a former owner or occupier of gazetted land who is not lawfully authorized to occupy, hold or use that land does not cease to occupy, hold or use that land after the expiry of the appropriate period referred to in subsection (2) (a) or (b), or, in the case of a former owner or occupier referred to in section 2(b), does not cease to occupy his or her living quarters in contravention of proviso (iii) to section 2 (b), he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

Section 2, in which the definitions are contained, is also relevant in the following parts:

1. in its definition of lawful authority, as follows;

"lawful authority" means

a. an offer letter; or

b. a permit; or

c. a land settlement lease

and "lawfully authorized" shall be construed accordingly"

1. in its definition of offer letter:

"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;" and

1. in its definition of permit;

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

From the above, it is clear that the following are the essential elements of the charge;

(a) the accused must be a former owner or occupier;

(b) of gazetted land;

(c) who has not ceased to occupy, hold or use that land;

a. after the expiry of the appropriate period referred to, and

b. has no lawful authority to occupy or use that land.

In casu, the only issue is whether or not appellant has lawful authority to occupy or use that land. It was contended on appellant's behalf that he had permission to remain on the farm. This permission arose from the various negotiations, representations and undertakings by government officials. The essence of the representations was that the farm would be removed from the control of the Ministry of Lands, Agriculture and Rural Resettlement the acquiring authority to the control of the Ministry of Environment and Tourism because of the business operations carried out on the farm. Further, an undertaking was then made to the appellant and the company that upon such transfer, the Ministry of Environment and Tourism would sign a 25 year lease with the appellant.

Appellant attached the following correspondence by consent of the respondent:

1. Appendix 1 a letter dated 1 November 2007 advising appellant of the initiative to transfer the farm from the Ministry of Lands, Agriculture and Rural Resettlement, to the Ministry of Environment and Tourism;

2. Appendix 2 a letter from the Director General of the Zimbabwe Parks and Wildlife Management Authority, confirming the strategic location of and business at the farm on 18 February 2008.

3. Appendix 3, a letter dated 9 November 2010, served as apparent from the stamp and signature acknowledging receipt of a copy on the Minister of Lands and Rural Resettlement on 9 November 2010, which advised that a 25 year lease was being prepared in favour of the company.

4. Appendix 4, letter from appellant dated 16 November 2010, accepting the offer of a 25 year lease.

5. Appendix 5, letter dated 20 February 2012 advising that deliberations were being held between the Ministries of Lands & Rural Resettlement and Environment and Tourism, concerning the farm in issue.

6. Appendix 6, letter dated 12 July 2012, advising that the farm had been formally transferred from the control of the Ministry of Environment and Tourism.

The respondent while acknowledging the authenticity and sources of the above letters insisted that the appellant did not have lawful authority because he does not possess an offer letter issued by "the acquiring authority" i.e. the Ministry of Lands. However, respondent conceded that a proper interpretation of the definition of a permit in the Act is that it can be issued by "any state organ" unlike an offer letter that can only be issued by the "acquiring authority". Put differently it was conceded that the definition of a "permit" is wide.

In my view the land reform policy is multifaceted in that it focuses on different uses of acquired land. What happens in practice is that once land is gazetted and acquired by the State through the "acquiring authority" that authority can transfer the land to another ministry for occupation and use in accordance with that ministry's requirements and needs. Gazetted land for example can be transferred from the Ministry of Lands to the Ministry of Local Government for urban expansion. It can also be transferred to the Ministry of Environment and Tourism in order to boost or promote proper management of government's wild life policy.

For these reasons, the argument that notwithstanding such transfers the Ministry of Lands retains the mandate to authorize the use and occupation of such transferred land becomes untenable, not only because it defies logic and common sense, but because it contradicts the clear meaning of the definition of the word permit in the Act.

In casu, the inter-ministerial process has since been finalised in July 2012, as seen from appendix 6. As matters stand, the farm in issue is now under the control of the Ministry of Environment and Tourism, which, based on their business operations and record, is willing to permit appellant and the company to occupy and run the farm on the basis of a twenty-five year lease.

In view of the wide definition of the word permit, I find that the letters of 16 November 2010 and 12 July 2012 in particular constitute a permit as defined in section 2 of the Act. Consequently, the appellant had lawful authority to occupy and use the farm in issue.

As regards the second ground of appeal, the contention is that the appellant was misled into breaching the provisions of the Act by government officials. The argument is that, subjectively the appellant believed, based on what was stated and undertaken to him, that he had the right to remain on the farm. He believed that all steps requisite to the regularization, or formalization of his stay were being taken. Indeed a firm decision to transfer control of the farm from one Ministry of another was taken in July 2012.

It is trite law that while ignorance of the law is generally not an excuse, a person may be excused from criminal liability where such a person has been misled into breaching the law by government agents – see *S* v *Davy* 1988 (1) ZLR 386 (SC) where GUBBAY JA (as he then was) stated as follows:

"It necessarily follows that in my opinion the rule that ignorance or mistake of law is no excuse which judicial officers have applied for so long in this country in conformity with both English law and the decision 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 accused acted upon incorrect advise 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. See *S* v *Zemura, supra* at 377 E – G. As expressed by LEWIS AJP in *S* v *Bledig & Anor* 1974 (1) RLR 100 (AD) at 109A. 'There is something in the nature of an estoppel present when the state prosecutes a person for certain conduct when he has been induced by advice received from a responsible representative of the state to embark on such conduct.'

Clearly the exception is grounded in reasons of public policy. Where the state has misled a man into a contravention of the law as a matter of public policy he should be entitled to an acquittal. But care must be taken not to extend the exception beyond the strict limits of *Zemura's* case, for to do so would be "extremely dangerous and would tend to frustrate the enforcement of statutory provisions." See *Bledig's* case *supra* at 108 in fine."

In casu, it is clear from the numerous correspondence referred to that the appellant was indeed misled by government officials into breaching the provisions of the Act. It is unfortunate that the Ministry of Environment and Tourism has taken a long time to finalise the 25 year lease with the appellant. However, this bureaucratic delay is not of the making of appellant and should therefore not place him at any disadvantage – see *DPP* and *Minister of Justice and Constitutional Development* v *Phillips* (803/2011) [2012] ZASCA 140 (28 September 2012).

I find therefore that appellant's occupation of the farm was not illegal on the grounds that he had lawful authority to remain on the farm.

Accordingly, the appeal is allowed.

Moyo J …….I agree

Webb, Low & Barry, appellant's legal practitioners

Prosecutor General's office respondent's legal practitioners