IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C of A (CRI) N0.7/13

In the matter between

TEBELLO KHOROMENG **APPELLANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

CORAM: SCOTT AP
HOWIE JA
LOUW AJA

HEARD: 4 APRIL 2014

DELIVERED: 17 APRIL 2014

SUMMARY

Contravention of section 87 (1) of the Land Act 17 of 1979 – wrongful occupation of land – mens rea a requirement – appellant believing he was entitled to occupy land – conviction set aside.

JUDGMENT

SCOTT AP

[1] The proceedings giving rise to this appeal have their origin in the Magistrates' Court, Qacha'sNek, where the appellant faced four charges; namely:

(1) Contravening section 87 (1) of the Land Act, 17 of 1979, as amended by Act 23 of 1989, by unlawfully and intentionally occupying land without proper authority to do so;

(2) Contempt of an order of court in case number CC25/2007 by intentionally failing to remove

poles which he had erected on a site in the urban area of Qacha'sNek when ordered by the Court to do so;

(3) Contravening section 17 (4) of the Survey Act, 14 of 1980, by unlawfully moving, obscuring or destroying survey marks that had been placed there;

(4) Contravening section 22 (c) of the Roads Reserve Act, 24 of 1969, by constructing a fence within the road reserve.

[2] The appellant was discharged on counts 3 and 4 at the close of the Crown's case. He gave evidence on counts (1) and (2) and was subsequently acquitted on those counts. The Crown appealed to the High Court, seemingly against the appellant's acquittal on counts (1) and (2). The High Court, however, set aside the acquittals on all four counts, substituting convictions on those counts and imposing fines in respect of each. It is now the appellant's turn to appeal. He does so with the leave of the court a quo.

[3] The charges all relate to the occupation by the appellant of a site in the urban area of Qacha'sNek around

the perimeter of which he had erected poles and a fence, and his entitlement to do so. It is convenient therefore to set out briefly by way of a background to the questions in issue the procedure followed in the allocation of land and ultimately the conclusion of a lease with the Crown.

[4] Allocations of land are initiated by the planning section of the Department of Lands, Surveys and Physical Planning (the L.S.P.P.) in the Ministry of Local government. It investigates and determines whether land is available for allocation and, if so, prepares plans. These are sent to the Survey section of the L.S.P.P. A survey is carried out where after the matter is sent back to the planning section. The latter advertises the availability of the land in question and the public is informed that applications may be lodged at the district offices of the municipality in question. Applicants are required to complete a prescribed application form which, in the case of urban properties within the area of the Letloepe Community Council, is considered by the allocating committee of that council. If approved by the committee, the application is referred to the full council for approval. Upon approval by the council,

the applicant is informed and taken to the site by council officials who point out the site and its dimensions to the applicant. The applicant pays the advertised amount and a completed *"Form C3"* is handed to him. A lease is drafted and after its approval by the Land section of the L.S.P.P. is forwarded to the Commissioner of Land for signature and lodged in the Deeds office. A successful applicant need not wait for a lease to be signed before taking possession and developing the site. He or she may do so on receipt of the completed *"Form C3".*

[5] In 2003 the planning section identified four plots for allocation situated close to the taxi rank in the township of Qacha'sNek. One of them was the plot subsequently occupied by the appellant. There appears, however, to have been a problem arising from the need to accommodate a road alignment and the allocation process was taken no further.

[6] Two years later in 2005 the appellant applied to the Letloepe Community Council for the allocation and grant to

him of a lease of the plot in question being one of the plots referred to above. The application was on the prescribed form and was accompanied by a *"Map"* showing the plot. It does not appear from the record, but it does seem likely that the *"map"* referred to was in fact a plan prepared by the planning section in 2003. The allocation committee of the Community Council considered the application on 14 February 2005 and recommended to the council that it be granted. The recommendation was subsequently approved by the Council. The appellant was informed that his application had been granted but was told by the Council officials to wait for the assessment by other departments before taking occupation. No *"Form C3"* was issued.

[7] By 2007 there had been no progress and the appellant, no doubt growing impatient, erected poles around the perimeter of the plot preparatory to erecting a fence. The Council went to court obtaining an interdict restraining the appellant from occupying the property until duly authorised to do so. In response to the interdict the appellant removed the poles.

[8] Having been told that there had to be an assessment by other departments, the appellant approached the Chief Physical Planner in the L.S.P.P in Maseru, Mrs Masetori Makhetha (PW8), in 2007 and told her that he had been allocated the site by the Letloepe Community Council and that he required documents relating to the site so that he could have access to it. He also showed Mrs Makhetha a plan of the site which presumably had been drawn by a surveyor at the appellant's instance. Mrs Makhetha explained that there were matters that had to be attended to, that the 2003 planning required adjustment because of the need for a road and that a resurvey was necessary.

[9] Mrs Makhetha subsequently wrote to the Principal Technical Officer in the L.S.P.P office informing him of the need to develop the area in question. It was found necessary to survey and evaluate the fourth plot (presumably the plot allocated to the appellant). This all took time, but when it was done Mrs Makhetha wrote a letter to the appellant on 10 October 2008 in which she recorded that the proper procedures had not been followed by the Letloepe Community Council when allocating the

site to the appellant and that *"in order to correct the error"* the appellant was to pay the sum of M8000, being the premium due before the lease could be issued. The body of the letter reads:

> *"Re: Application For Plot Near The Busstop in Qacha'sNek*
>
> *Your application for plot number 415181-255 refers:*
>
> *We note that the Letloepe Community Council had already allocated the plot to you, even though proper procedures were not followed. The finding of Magistrate's Court on the matter upholds this (CC 8 of 2008).*
>
> *As the Planning Authority we are bound by duty to make a decision on the matter. In order to correct the error you are advised to pay the premium due on this piece of land so that title can be issued in your name. The land premium has to be paid before the lease is issued.*
>
> *The premium payable is M8000. Please pay this amount to the Accounts Section of the Department of Lands, Surveys and Physical Planning, Maseru."*

The letter was signed by Mr Makhetha *"FOR COMMISSIONER OF LANDS".*

[10] Armed with the letter, the appellant paid the M8000, for which he was given a receipt, and proceeded to re-erect the poles and put up a fence around the site. The prosecution followed.

[11] In the Court a quo Monapathi ACJ pointed out that the letter of 10 October 2008 was not a letter of allocation. In other words, it was not the *"Form C3"* which would have authorised the appellant to take occupation of the site. Furthermore, the site had not been pointed out or identified to the appellant as the Council's procedure required. In these circumstances the learned judge held that the appellant was not entitled to take occupation of the site, nor could he have believed that he was. I accept that the letter of 10 August 2008 did not in law entitle the appellant to occupy the site. I cannot, however, accept that the Crown had discharged the burden upon it of proving that the appellant did not believe that he was.

[12] It was common cause that the Crown bore the onus of proving *mens rea* on the part in the appellant for

the purpose of obtaining a conviction on count 1 and that the standard of proof was proof beyond reasonable doubt. Similarly, for the purpose of obtaining a conviction on count 2, the Crown was obliged to prove that the appellant knowingly and deliberately acted in defiance of the interdict. (I shall deal with counts 3 and 4 later.) There was no direct evidence that the appellant knew that he was acting unlawfully. To discharge the burden upon it the Crown was accordingly obliged to rely on an inference arising from the proved facts. The evidence does not, in my view, justify such an inference. On the contrary, the evidence suggests the opposite. The appellant's application for the allocation of the site was granted by the Community Council. There was nothing to suggest that he was aware of the details of the Council's somewhat elaborate procedural requirements following a successful application. He was told merely that he would have to wait for an assessment by other departments. When nothing was done he approached the Chief Physical Planner who was prepared to make the effort to resolve the matter. She explained the difficulty to the appellant and took steps to have he area resurveyed. On 10 October 2008 she wrote on behalf of the Commissioner Lands saying that the

proper procedures had not been followed and what the appellant would have to do *"to correct the error"*. On receipt of the letter the appellant did as he was told and paid the premium of M8000. Having done so, and thereby corrected the error, he re-erected the poles and built a fence around the site. His conduct is inconsistent with the adverse inference the Crown seeks to draw and in my view the appeal on counts 1 and 2 must be upheld.

[13] There remain counts 3 and 4. It will be recalled that the appellant was discharged on these counts at the end of the Crown case. In the event of the appeal being upheld the correct procedure would have been to remit the matter to the Magistrates' Court to enable the appellant to give evidence. It was not competent to substitute a conviction on appeal. In the event, it is of no consequence as in my view the Magistrate correctly discharged the appellant on these counts. As far as count 3 is concerned there was not a tittle of evidence that the appellant had moved, obscured or destroyed any survey marks. As to count 4, the Crown called two witnesses. The first, after some uncertainty, testified that the road reserve extended

some 6.5 metres from the edge of the carriage way and that the appellant's fence which was erected 4 metres from the carriage way accordingly encroached on the reserve by 2.5 metres. The second witness, who happened to be the more experienced, testified that the road reserve extended 4 metres from the edge of the carriage-way. It was common cause that the fence was erected 4 metres from the edge of the carriage-way. On the latter's evidence there was accordingly no encroachment. The Magistrate noted the contradiction and, in my view, correctly accepted the evidence of the second witness. The appeal on these counts too must be upheld.

[14] The following order is made.

(1) The appeal is upheld.

(2) The convictions and sentences imposed by the Court a quo are set aside and the following order is substituted:

"The appeal is dismissed"

_____

D.G. SCOTT

ACTING PRESIDENT

I agree

_____

C.T. HOWIE

JUSTICE OF APPEAL

I agree

_____

W.J. LOUW

ACTING JUSTICE OF APPEAL

For the Appellant: T. A. Lesaoana

For the Respondent: S.P. Mathe