

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:-

CROWN

Appellant

And

TEBELLO KHOROMENG

Respondent
(Accused)

JUDGEMENT

Coram : Hon. Mr. Justice T. E. Monapathi

Date of Hearing : 24th October 2011

Date of Judgement : 19th September 2013

SUMMARY

Where a recommendation was made to allocate a site, it is not sufficient where there was no actual allocation was made. Such recommendation is not a letter of allocation. Nor can it be said that title was granted Appellant was therefore not justified to occupy the site. The appeal succeeded.

CITED CASES

***Attorney General and Another v Moletsane and Others LAC
(2005-2006) 146***

STATUTES

Land Act No. 17 of 1979

Roads Reserves Act No. 24 of 1969

Survey Act No. 24 of 1998

BOOKS

Principles of South African Law, Wille

[1] The Crown appealed against the judgement of the Magistrate of Qacha's Nek of the 22nd September 2009. The Respondent (Accused) was charged with four (4) counts which were as follows:.

- a. A) Firstly, in count 1, contravention of section 87 (1), of the ***Land Act No. 17 of 1979*** in that upon or about March 2008 and at or near Qacha's Nek urban area, the Accused did unlawfully and intentionally occupy land without proper authority;
- b. Secondly, in count 2, contempt of court for defiance of order of court in CC 25/2007;
- c. Thirdly, in count 3, contravention of section 17 (4) of ***Land Survey Act No. 14 of 1980*** by destroying survey marks lawfully placed at the place (site) in question;
- d. Fourthly, in count 4, contravention of section 22 (c) of ***Roads Reserves Act No. 24 of 1969*** by encroaching his fence on (to) the road.

Accused was acquitted on all counts. The Crown was dissatisfied with the decision and has appealed to this court.

[2] The Accused's grounds of appeal were as follows:

2.1 The court misdirected itself when it said that there was a proper allocation of the site by the Council to the Accused.

2.2 The court had misdirected itself by ruling that Exhibit "E" was tantamount to or was a legal document for allocation of land. The author of the said exhibit, 'Masetori Makhetha as Chief Physical Planner and or in he said capacity as the Commissioner of Lands had no authority to allocate sites in terms of the law in terms of the law, the only body entitled to allocate land and issue legal documents in Lesotho was the Community Council.

2.3 The Accused was fully aware that his occupation of the site in question was unlawful and had been ordered by the court in certain case number CC 25/2007 to vacate the premises unlawfully allocated/occupied. The findings of the court *a quo* in the said CC 25/2007 show that the right procedure was not followed. This is in essence was the reason why the allocation was said to be unlawful. The Accused further encroached on to the public road as shown in the record.

[3] What the Accused contended was that the evidence led by the Crown in so far as it is relevant established the following facts:

- a) That accused successfully/applied to the Letloepe Community Council for the allocation of a certain business site situated within the Qach's nek Urban Area. He was informed of the success of his application and a recommendation was made. He was accordingly advised to await the decision from relevant departments. That would include the Planning Authority, Principal Land Surveyor and Letloepe Community Council. This court noted that PW1 'Makatleho Mohasi testified that the said recommendation was over turned. Furthermore the Accused was never granted a particular site;
- b) The Accused erected poles round the said site; which he subsequently removed in compliance with the Qacha's Nek Magistrate's Court Order in a certain CC25/2007, having confirmed that there were certain defects or short-comings. This court observed that this was because the Accused was never ultimately granted a site but nevertheless he occupied or unallocated site;

c) The Planning authority working in consultation with the office of Principal Land Surveyor determines and designates land for allocation and adjusts site boundaries. This court again took notice that as per PW4 Chief Lands Officer, Accused's application could not be granted because it was alleged that it was full of irregularities. For example, Accused had engaged his own private Physical Planner contrary to the law that one cannot survey his own site.

i) The site allocated to the Accused was not surveyed at the behest of the official channels or offices; and given a Plot Number with the object of rectifying the short-coming in the allocation process as identified by Magistrate Court in its ruling in CC25/2007. The Respondent was only duly informed of the recommendation and advised to pay the valuation fee so that title could be given to him, which he duly paid. But such site was never pointed out to the Accused.

d) Despite to the developments referred to at (c) (i) above; the Accused erected poles on a site not allocated or formally surveyed.

[4] The Accused's evidence sought to establish the following facts: That Accused believed that he had rights over the site in question since it was allocated to him. The allocation was never revoked. That the Respondent did not disobey the court because he removed the poles which the court had ordered him to remove. The grounds of appeal are in the main directed against the unassailable findings of the court. Most importantly that beside the recommendation there had never been a direct allocation to the Accused of a particular site.

[5] Accused submitted the decision which the Accused was advised to await from the relevant department was ultimately given in the form of exhibit "E". That Accused was a *bona fide* occupier inasmuch as he had been allocated the site. The he *bona fide* believed that Exhibit "E" rectified the deficiencies identified by court in his title. The contents of the said document lent support to such construction. The Accused consequently submitted that the Crown had not proved its case beyond reasonable doubt. Most importantly that the allocation was never revoked. I was not persuaded that the Exhibit "E" constituted a letter of allocation. incidentally a letter of allocation would point at or identify a particular piece of land. This was not done.

[6] It is trite law that where *mens rea* is an element of the crime charge-liability is dependent upon the requisite state of mind (guilty mind) being present in all the elements of the crime. A *bona fide* occupier is a person who occupies land under a *bona fide*, but mistaken belief, that he has title of the land. See Wille's ***Principles of South African Law***, 5th ed p 191. The Accused then submitted that to challenge the legality of allocation, by establishing procedural infirmities in the process – is no answer to the lesser claim of *bona fide* occupation. See ***Attorney General and Another v Moletsane and Others LAC (2005-2006) 146*** at 151 para (11).

[7] It was submitted that on the totality of the evidence tendered the Accused contention in the court *a quo* that his occupation of the site was lawful had merit, inasmuch as it was predicated on the following established material facts.

- (a) that he was allocated the site following his application. The infirmities identified by the court in the allocation process, namely; allocation of an un-surveyed site; had been rectified by competent authority;
- (b) Respondent was required to pay some fee in order to rectify the defects in his title. In the premises set forth, the Crown could not be held to have proved the presence of a guilty mind on the part of the Respondent in respect

of the elements of unlawfulness and lack of proper authority in count 1.

[8] According to the Accused clear evidence shows that the Planning Office (which acts on behalf of the Commissioner of Lands) plays a very important role in issues relating to land allocation as the ultimate authority. For example this is the office which determines and designates land for allocation, adjust site boundaries.

[9] More significantly as PW8 (The Chief Physical Planner) indicated in her evidence advises council on such issues. So that the Respondent was entitled to rely on the representation of PW8 as articulating the correct position in so far as they related to his title.

[10] Consequently, as further submitted, there is merit in the court *a quo* conclusion that the representation of PW8 constituted the decision the Respondent was advised to await by the Letloepe Community Council; and was also, at least inferentially understood by Respondent as a measure intended to regularize his title in consonance with the court order in CC25/2007. Put in other words that the Accused would believe that his title was in order. I disagreed. The Accused would not have a right to believe that he

was allocated a site where none was pointed out or identified. Significantly, he did not have a document of title.

[11] It was submitted by the Accused that nothing turns on the fact that Respondent was not shown the site by the council. There is no confusion regarding its location. It is a surveyed site with an official number, and it is duly depicted in the official map. The court *a quo* cannot be faulted in its observation that title to land includes the right to occupy.

[12] That the above by the court *a quo* as submitted further finding is consistent with the principle enunciated in the ***Moletsane*** case (*supra*) to the effect that a *bona fide* occupant who has effected useful improvements on the land, albeit not a holder of certificate of allocation, cannot be evicted from the land by the government without compensation. See ***Moletsane*** Case (*supra*) p. 155 para [22] refer also to para 3.2 above. There is a distinction in my view. There must be a distinction to a situation where title to particular land is disputed as against where no particular piece of land was allocated by authority.

[13] It was clear so the Accused submitted from the Crown's grounds of appeal and heads of argument in support thereof that its case was premised on the statutory requirements of lawful allocation; and did not address the position of the common law right of a *bona fide* occupant, on the basis of which the court *a quo*

rightly acquitted the Accused. In my view there is no merit at all in relying on the common law where a statute was precise as to how title was to be acquired in terms of the law.

[14] The grounds of appeal were well couched not devoid of particularity. I did not agree that the judgement of the court *a quo* was well reasoned. In acquitting the Accused on the ground that the Crown had failed to prove its case beyond reasonable doubt in respect of count 2, and failed to adduce *prima facie* evidence in respect of counts 3 and 4, cannot be faulted. All the findings of the court were well grounded on the evidence of the eight (8) witnesses of the Crown.

[15] It was lastly submitted in all the circumstances of this matter that the appeal ought to be dismissed. I did not agree with respect. Accordingly the Accused is guilty as charged.

[16] I took it that it would be inconvenient to send the matter back to the court *a quo* for sentence. It was wise to this court to compose proper sentence.

[17] Having found the Accused guilty as charged it is necessary to impose appropriate sentences for each offence. I observe that ordinarily the matter ought to be set to the magistrate who had this Accused acquitted.

[18] Sending the matter to the court *a quo* is bound to be very inconvenient. This so considering that the matter is an old one. Retracing the magistrate and resetting up the hearing in Qacha's Nek's will be cumbersome if not unmanageable. Consequently I took it that it is necessary that I impose the sentences as follows:

- a) The Accused is to pay a fine of M500.00 and shall vacate the site within 30 days in terms of section 87 (1) as in Count I;
- b) The Accused shall pay a sum of M100.00 fine as in Count II;
- c) The Accused shall pay a sum of M100.00 or 1 month imprisonment as in Count III;
- d) The Accused shall pay a M50.00 or three months as in Count IV.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Appellant	:	Adv. Mofoka
For Respondent	:	Adv. Z. Mda KC