

GRAMARA ENTERPRISES (PVT) LTD
and
COLIN BAILIE CLOETE
versus
THE MINISTER OF STATE FOR NATIONAL SECURITY
RESPONSIBLE FOR LAND, LAND REFORM and
RESETTLEMENT
and
MR NORMAN KAPANGA

HIGH COURT OF ZIMBABWE
MAVANGIRA J
Harare, 13 and 24 November 2008, 25 February and 29 April 2009

Urgent Chamber Application

D P Drury, for the applicants
N Mutsonziwa, for the first respondent
G N Mlotshwa, for the second respondent

BACKGROUND

MAVANGIRA J: Certain preliminary matters were raised in this matter on 13 November 2008. The court's ruling was delivered in chambers on 24 November 2008. The parties were then directed to file heads of argument in respect of the merits of the matter. Although time limits were agreed upon for the filing of the heads of argument, it was also understood for reasons explained by Mr *Drury*, that there was a possibility of failure to file the applicants' heads of argument strictly within the stated time limits. In that eventuality there would also be a resultant delay in the filing of the respondents' heads of argument. The applicants' heads of argument were then filed on 19 December 2008. However, those of the respondents were only filed on 4 February 2009. This has resulted in the delay in the delivery of this judgment.

THIS APPLICATION

Under case number HC 7256/07 and on 7 January 2008 the applicants in this matter approached this court for a *mandament van spolie* and obtained a provisional order against these same respondents. They now approach this court seeking another provisional order against the same parties and in respect of the same piece of land on the basis that the

instant application is based on new or fresh acts of spoliation that have occurred subsequent to the issuance of the provisional order in HC 7256/07.

The terms of the order sought by the applicants are as follows:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this honourable court of why a final order should not be made in the following terms –

1. That it be and is hereby declared that applicants are entitled to remain in peaceful undisturbed occupation and use of the property called Remainder of Lot 7 of Chingford Farm measuring 121,49 hectares situated in the district of Hartley (Chegutu) (Chingford) until such time as applicants ... should it become necessary or expedient ... are lawfully removed from the property through an eviction order from a competent court which has final effect.
2. That it be and is hereby declared that the second respondent and all other persons claiming occupation, possession and use of Chingford did so unlawfully and without following due process to achieve vacant possession in circumstances amounting to spoliation.
3. That respondents be and are hereby interdicted from interfering in any way with applicants' normal business and farming operations and use of land and improvements or of threatening applicants, their representatives, employees or invitees on Chingford.
4. That the second respondent pay the costs of this application;
Alternatively: That the costs of this application be paid jointly and severally the one paying the other to be absolved.

INTERIM RELIEF

Pending determination of this matter, the applicants are granted the following relief:

- (a) That applicants possession, use and occupation of Chingford be and is hereby restored, so that the *status quo ante* prior to the second respondent's summary assertion to the use of land on Chingford is achieved and maintained.
- (b) That the second respondent and all other persons claiming occupation and possession through him of Chingford and/or all other persons not being representatives, employees or invitees of applicants' are directed to forthwith vacate Chingford and that all movable property introduced by them onto the property also be removed.

In the event that it becomes necessary or expedient, the Deputy Sheriff is hereby authorised and empowered to attend to the removal of all such persons and their property from Chingford. Pursuant thereto, the Deputy Sheriff is authorised and empowered to enlist the assistance of any member

of the Zimbabwe Republic Police – who are directed to provide assistance to the Deputy Sheriff – so that the provisions of this order are executed and implemented in full.”

The applicants’ papers show that after they had obtained the provisional order in HC 7256/07, the Deputy Sheriffs in Chegutu and Kadoma evicted the second respondent and his workers but it was only for a short while the second respondent ceased planting crops on Chingford Farm, the piece of land in question. The second respondent then started planting again. The applicants then decided for reasons stated in the founding affidavit and which may generally be described as reasons of convenience, to permit the second respondent to harvest his crop. Thereafter the second respondent concentrated his efforts on the adjacent property on which he put a winter wheat crop. The second respondent did not thereafter carry out any further farming activities on Chingford and did not interfere or disrupt the applicants’ activities on Chingford.

The fresh acts of spoliation that form the basis of the instant application allegedly began on 13 October 2008 at a time when the applicants had assumed that the second respondent had refrained from conducting any farming activities on Chingford. The second respondent sent a tractor driver who, without warning, commenced to disc a certain portion of land on Chingford. The applicant had earmarked this particular portion for a tobacco plant. On 19 October 2008 the second respondent used armed guards to stop the applicants’ workers from preparing land. The issue was temporarily resolved after the applicants reported the matter to the police. By the afternoon of the same day the tractor driver had been sent back and he resumed disking. The Police and the Deputy Sheriff were not of assistance to the applicants when this further activity was reported to them. The Deputy Sheriff finally attended and evicted the second respondent’s workers the following day. Within a few hours after their removal from the farm and after the Deputy Sheriff had returned to Chegutu, the second respondent and his workers immediately moved back onto Chingford. The applicants’ founding affidavit lists and gives details of further actions and activities that the second and his workers continued to engage in on Chingford thereafter.

The applicants contend that they are entitled to the protection of the law and that the spoliatory relief that they seek is justified in the circumstances. The second respondent on the other hand, contends that the offer letter that was issued to him by the first respondent in respect of the piece of land in question, being Chingford, is a valid defence to the applicants’ spoliation proceedings. He contends that the applicants’ ought not to be granted an order for spoliation because in taking occupation and making use of the farm land he was acting in terms of an offer letter which, in terms of the Gazetted Land Act, is lawful

authority to hold, use and occupy gazetted land. Reliance was also placed on *Silberberg & Schoeman* in “The Law of Property” (3rd edition) at p 281 where the following is stated:

“... a deprivation of possession will be lawful if carried out with the consent of the applicant, or **in terms of a statutory enactment**”

In *van t’ Hoff v van t’ Hoff & Ors* (1) 1988 (1) ZLR 294 (HC) at 296 B–C the position at law is stated thus:

“It is well established that in spoliation proceedings, all that the applicant needs to prove is that -

- (i) he was in peaceful and undisturbed possession of the property; and
- (ii) that he had been unlawfully deprived of such possession.

Once the applicant has proved these two elements, the applicant is entitled to have the *status quo ante* restored. See *Burnham v Neumeyer* 1917 TPD 630; *Nienaber v Stuckey* 1946 AD 1049.”

As to this being a correct statement of the law, there does not appear to be any dispute. The second respondent however has sought to persuade this court that by reason of the offer letter that he holds he did not commit spoliation.

In making reference to the learned authors Silberberg and Schoeman, the second respondent omitted to highlight the very pertinent statement made by the authors in a footnote to the portion stressed as being supportive of the second respondent’s case. The learned authors’ state:

“In *Minister of Finance v Ramos* 1998 (4) SA 1096 (C) CLEAVER J confirmed that where a dispossession is based on a statutory provision ‘such statutory (provision) must be restrictively interpreted. A person who invokes the protection of such a statutory provision will need to establish that he acted strictly within its terms’ (1101H). See eg *Sillo v Naude* 1929 AD 21 26; ...”

I am not persuaded that the gazetted Land Act has ousted or erased from our common law, the remedy of the mandament *van spolie* in matters of land acquisition. On the other hand the Act in question actually requires that the eviction of an owner or occupier of gazetted land must be by due process as prescribed in the Act. This is in fact in accord with the common law. It is trite that in spoliation matters “the court is not concerned with the nature of the applicant’s occupation. What it is concerned with is that the respondent should not take the law into its own hands”. See *Fredericks & Anor v Stellenbosch Divisional Council* 1977 (3) SA 113 (C). In *Chisveto v Minister of Local Government* 1984 (1) ZLR 248 (H) the following was stated:

“Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party ... lawfulness or otherwise of the applicant’s possession of the property does not fall for consideration at all. In fact the classic generalisation is sometimes made that in respect of spoliation actions ... even a robber or a thief is entitled to be restored possession of the stolen property.”

The arguments made *in casu* by the second respondent pertaining to his possession of an offer letter were also made and considered in *Karori (Pvt) Ltd & Anor v Brigadier Mujaji* HH 23-07. As aptly stated at p 3 of judgment in that matter, the State is after all enjoined by the gazetted Land (Consequential Provisions) Act [*Cap 20:28*] to institute eviction processes if it desires to remove “applicants” from an acquired property. In Amler’s *Precedents of Pleadings* (4th edition) at p 291 the following is stated:

“The possession is not possession in the juridical sense since it would suffice if the holding by the plaintiff was with the intention of securing some benefit for him. The *causa* for the plaintiff’s possession is irrelevant and it is also irrelevant whether the defendant has a stronger right of possession. Actual possession and not the right to possession is protected. *Yeko v Qana* 1973 (4) SA 735 (A)”.

For the above reasons it appears to me that the *mandament van spolie* is a live remedy that is in the circumstances of this matter available for the protection of the applicants. However, the terms of the final order sought in the provisional order sought by the applicants raise concerns with this court. It appears to me that in view of the pronouncements by the Supreme Court in *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture and Rural Resettlement & Ors* SC 36/04 the first and third paragraphs of the final order sought by the applicants cannot be allowed to stand as part of the final order to be sought by the applicants at the stage when confirmation of the provisional order will be sought. The substantive relief that the applicants seek therein is not competent in view of their position at law as stated in the *Airfield* case (*supra*). Since February 2009, communication has been made with the parties through the Registrar for the parties to appear in chambers. It was the court’s intention to seek the parties’ further submissions on the effect of the *Airfield* case on the terms of the Provisional Order sought by the applicants. Such appearance in chambers has not materialised to date. The court has had no option but to determine this aspect of the matter without the benefit of such further submissions from the parties. In the result, although the applicants’ application must succeed, the indicated paragraphs will not form part of the terms of the provisional order

granted. Costs will follow the event. A provisional order will therefore be issued in the following terms:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court of why a final order should not be made in the following terms:

1. That it be and is hereby declared that the second respondent and all other persons claiming occupation, possession and use of Chingford did not unlawfully without following due process to achieve vacant possession in circumstances amounting to spoliation.
2. That the second respondent pay the costs of this application.
Alternatively: That the costs of this application be paid jointly and severally the one paying the other to be absolved.

INTERIM RELIEF

Pending determination of this matter, the applicants are granted the following relief:

- (a) That applicants possession, use and occupation of Chingford be and is hereby restored, so that the status *quo ante* prior to the second respondents summary assertion to the use of land on Chingford is achieved and maintained.
- (b) The second respondent and all other persons claiming occupation and possession through him of Chingford and/or all other persons not being representatives, employees or invitees of applicants’ are directed to forthwith vacate Chingford and that all movable property introduced by them onto the property also be removed.
In the event that it becomes necessary or expedient, the Deputy Sheriff is hereby authorised and empowered to attend to the removal of all such persons and their property from Chingford. Pursuant thereto, the Deputy Sheriff is authorised and empowered to enlist the assistance of any member of the Zimbabwe Republic Police – who are directed to provide assistance to the Deputy Sheriff – so that the provisions of the order are executed and implemented in full.

SERVICE OF PROVISIONAL ORDER

That leave be and is hereby granted to applicants’ legal practitioners or the Deputy Sheriff to attend to the service of this order forthwith upon the respondent in accordance with the Rules of the High Court.