

TOP CROP (1976) (PVT) LTD  
and  
MALCOLM WILLIAM CLERK  
versus  
MINISTER OF LANDS LAND REFORM AND RESETTLEMENT  
and  
YVONE SAMUKELISO GUMEDE

HIGH COURT OF ZIMBABWE  
BHUNU J  
HARARE 19<sup>th</sup> March 2009 and 1<sup>st</sup> July 2009.

**Urgent chamber application**

Mr *Chikumbirike*, for the applicant

BHUNU J: This matter came before me as an urgent chamber application on 5 February 2009. At that hearing the applicants were represented by Mr *Drury* of *Gollop & Blank* whereas the second respondent was represented by Mr *Mlotshwa* of *Antonio, Mlotshwa and Co*. The second respondent is a director and shareholder of the first applicant which is the former owner of a certain piece of gazetted land known as Subdivision 21A of Weston situate in the district of Harare, formerly Salisbury.

The applicants approached this court on an urgent basis complaining that prior to 9 January 2008 they were in peaceful and undisturbed possession of the above mentioned property. On that date at approximately 11 am the second applicant was violently dispossessed of his peaceful and undisturbed possession of the same. The applicants therefore sought a spoliation order restoring the *status quo ante* pending the determination of the parties' competing rights by the courts.

The application was opposed. During the course of the hearing counsel for the applicants indicated that his client had been assaulted and violently ejected from the premises without being given time to collect his belongings. He managed to escape with only the clothes he was wearing. He has nowhere else to stay except the homestead at the farm in dispute. At that juncture I took up the issue with counsel for the second respondent who after consultation with his client stated that his client had no objection and had undertaken to grant the second applicant access to the main homestead and to reside there without any impediment.

It was then agreed by all the parties concerned that the second applicant's peaceful and undisturbed occupation of the main homestead be restored pending my judgment in the main application in this matter. In the light of that agreement I then directed the parties to draw up a consent order to that effect.

The second applicant later appeared before me represented by Mr *Chikumbirike* of Chikumbirike & Associates who appeared from the blue without having filed any assumption of agency and without the applicant's original lawyers having renounced agency. Despite initial reservations I finally granted Mr *Chikumbirike* audience on account that I considered the matter to be urgent.

The second applicant's complaint was basically that the second respondent had reneged from the previous undertaking before me, to grant him peaceful and undisturbed possession and occupation of the main house pending the issuance of my judgment in this case.

Following representations made by Mr *Chikumbirike* I made the following order on 19 March 2009.

**“In the result it is ordered:**

1. That pending the issuance of my judgment in this case the applicants' possession, occupation and control of the main homestead and outer buildings at lot 21A Weston Farm, be and is hereby restored as at 9 January 2009 thereby restoring the *status quo ante* as at that date.
2. That to the extent that it becomes necessary, the Deputy sheriff be and is hereby authorized and empowered to enlist the assistance of the Zimbabwe Republic Police, who are hereby directed to provide such assistance to the applicants so as to ensure that the provisions of this order are executed and implemented in full.
3. Costs are to be costs in the cause”.

Having granted the above interim order I did not then consider this matter to be urgent as the applicant had obtained partial relief pending the ultimate determination of the main application.

I now proceed to deal with the main application. The application has to do with the now very familiar disputes between former land owners whose land has been expropriated in terms of the Land Acquisition Act [*Cap 20: 10*] and new farmers who have been issued with offer letters by the acquiring authority authorizing them to occupy the acquired land.

Some former land owners are however, determined to remain on the acquired farms in total defiance of the law.

By the same token some new farmers are determined to eject the former land owners from their former farms regardless of common law principles forbidding self help.

Thus the former land owners are fastening onto the well known common law remedy of spoliation to hold onto their former land, whereas the new farmers are relying on constitutional and statutory provisions which had the effect of dispossessing the applicants of their land thereby paving way for the occupation of the land by new farmers in the face of vigorous objections. The dispute therefore to some extent amounts to common law versus statute.

Because of the frequency with which such cases have been coming to court, we continue to be bombarded with the same old tired arguments with monotonous repetition. The same lawyers appear to be handling cases of this nature, consequently fatigue appears to be setting in among them. As a result, they have now resorted to recycling and transplanting old heads of argument and regurgitating them in current cases as happened in this case.

This is despite the fact that in the landmark decision of. *Airfield Investments v The Minister of Lands, Agriculture and Rural Resettlement and 2 Others* SC 36/04 the Supreme Court has held that “An interim interdict is not a remedy for prohibiting lawful conduct”.

The common law principles of spoliation upon which the applicants’ application is founded are well known. The right to quiet and undisturbed possession of property cannot be disputed and that right is jealously guarded by our courts as expounded in the cases through the ages starting from, *Nino Bonino v de Lange* 1906 TS 120 through to *Karori (Pvt) Ltd v Brigadier Mujaji* HH 23–07, and a host of many other cases in our jurisdiction.

In the leading case of *Nino Bonino v De Lange* (*supra*) INNES CJ observed at page 122 that:

“It is a fundamental principle that no man is allowed to take the law into his own hands, nobody is allowed to dispossess another forcibly or wrongfully and against his own consent of the possession of property whether movable or immovable. If he does so the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any enquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority on a principle so clear.”

I do not understand INNES CJ in the above case to be saying that the Court will order restoration regardless of whether or not the applicant can lawfully possess the property in dispute.

The fundamental points for determination are therefore:

1. whether or not the respondents were in quiet and undisturbed possession of the property in question at the material time; and
2. whether or not they can lawfully possess the disputed property.

Section 16B of the Constitution introduced by amendment number 17 of 2005 had the effect of immediately acquiring all gazetted land and vesting its ownership in the acquiring authority. Section 3 of the Gazetted Land (Consequential Provisions) Act [*Cap 20 : 28*] provides that once agricultural land is acquired in terms of s 16B of the Constitution, the former owner or occupier shall cease to occupy, hold or use such land within 45 days from the date of notification and is confined to the main dwelling house for a period of 90 days. The section reads:

**“3 Occupation of Gazetted land without lawful authority**

- (1) Subject to this section, no person may hold, use or occupy Gazetted land without lawful authority.
- (2) Every former owner or occupier of Gazetted land—
  - (a) referred to in paragraph (a) of the definition of “Gazetted land” in s 2 (1), shall cease to occupy, hold or use that land forty-five days after the fixed date, unless the owner or occupier is lawfully authorised to occupy, hold or use that land;
  - (b) referred to in paragraph (b) of the definition of “Gazetted land” in section 2 (1), shall cease to occupy, hold or use that land forty-five days after the date when the land is identified in accordance with s 16B(2)(a)(iii) of the Constitution, unless the owner or occupier is lawfully authorised to occupy, hold or use that land;

Provided that—

- (i) the owner or occupier of that land referred to in paragraph (b) may remain in occupation of his or her living quarters on that land for a period of not more than ninety days after the date when the land is identified;
- (ii) the owner or occupier shall cease to occupy his or her living quarters after the period referred to in proviso (i).

- (3) If a former owner or occupier of Gazetted land who is not lawfully authorised 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 s 2(b), does not cease to occupy his or her living quarters in contravention of proviso (ii) to s 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 both such fine and such imprisonment.
- (4) Any person, other than a person referred to in subsection (2), who contravenes subsection (1), shall be guilty of an offence and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.
- (5) A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates.”

In interpreting the above section in the case of *Konrad Van Der Merwe v Nixon Chirinda and two others* HC 3217/07 a case on all fours with this case, OMERJEE J had this to say at page 6:

“Section 3 therefore, provides for what should happen after the acquiring authority has identified and gazetted a particular spread of agricultural land i.e. it stipulates the rights and obligations of the former owner/occupier of (gazetted) land and the rights and obligations of the acquiring authority. In this regard s 3 is to the effect that once the acquiring authority has identified and duly gazetted agricultural land i. t. o s 16B of the constitution, the former owner or occupier of that land shall cease to occupy, hold or use such land within 45 days of the date of posting the gazette notice, failure of which such former owner or occupier shall be guilty of an offence and liable to prosecution and punishment. This means that the former owner or occupier is dispossessed of any right to occupy, hold or otherwise utilize the farming land within 45 days of the land being gazetted.

It must be emphasized that the mere act of identifying and gazetting a particular spread of agricultural land by the acquiring authority, constitutes sufficient notice to the former owner or occupier of the fact that the State has immediately acquired the land and the full rights therein are now vested in the State.

However, the former owner or occupier remains in possession of some residue rights to continue to occupy, without disturbance, the living quarters on the land, but for a limited period of 90 days after the date of the gazette notice. He will thus be obliged to remove himself or vacate the living quarters on or before the expiry of this 90 day period, failure of which he will become liable to prosecution and punishment.” (My underlining.)”

I cannot agree more with his Lordship's sound interpretation of the law. I had earlier on reached the same conclusion way back in 1995 in the case of *Zakeyo Mereki v Bell In (Pvt) Ltd* HH 113-05 followed by UCHENA J in the case of *Katambora Estates (Pvt) Ltd v Bessie Niindara* HC 3995/2008. In *that* case UCHENA J had this to say:

“Subject to this section, no person may hold, use or occupy, gazetted land without lawful authority” In terms of section 3(1) lawful authority means –

- a) An offer letter; or
- b) A permit; or
- c) A land lease.’

It is common cause that the applicants do not occupy by lawful authority. They are however, by that defiance entitled to be evicted from the homestead by the (due) process of law. The acquiring authority is on the other hand entitled to use the farm as it pleases as long as it does not interfere with the former owner's living quarters, (homestead).”

I am in respectful agreement with his Lordship's observation. What emerges quite clearly from the above authorities is that the applicants were dispossessed of their land not by the respondents but by due automatic operation of law. For that reason it appears to me that when the second respondent took occupation of the land the applicants no longer had legal possession of that land. Their continued occupation of the land in defiance of the law was therefore a nullity as such possession was not recognised by law. On the contrary such possession was and is still prohibited by law. Thus in the eyes of the law the applicants were no longer in possession of the land and living quarters at the material time warranting protection of the law because the relevant statutory periods entitling them to occupy, hold or use the land had expired.

That being the case, it can hardly be found in the applicants' mouth to say that they were in peaceful and undisturbed possession of the disputed land when infact and in truth they are painfully aware that at the time the second respondent took occupation their possession was disturbed and precarious if not non existent by operation of law. I accordingly find it doubtful that the applicants were in peaceful and undisturbed possession at the material time despite the respondents' concession on this point

Looked at from a different angle. The spoliation provisional order being sought is a common law remedy. It is trite and a matter of elementary law that common law cannot be

used to modify statute let alone constitutional provisions. I am therefore of the firm view that where the constitution and an Act of parliament come into conflict with common law, common law must give way to constitutional and statutory provisions.

It is also my considered view, that the courts cannot use common law principles such as spoliation to authorize conduct which is forbidden by the legislator without usurping the function of Parliament. In this case the legislator has prohibited the occupation or use of gazetted land without an offer letter, a permit or land lease. The applicants not being in possession of any of those requirements, it follows that they are prohibited by law from occupying the disputed land.

That being the case, the Court cannot give an order which is at variance with the law without the Court itself contravening the law. I do not perceive any court in our jurisdiction ordering restoration of possession of dagga, a firearm or gold to a person without a license or permit regardless of the circumstances under which such person may have lost possession. The possession, occupation or use of land cannot be treated differently. This is for the simple but good reason that the Court cannot authorize an illegality under the guise of the common law principles of spoliation.

This prompted MALABA DCJ in the Airfield case (*supra*) to remark that:

“The appellant was acting in contravention of para (b) of subs (1) of the Act at the time it applied for the interim relief. It had not ceased to occupy, hold or use the land at the end of forty- five days from the date of service of the order of acquisition, nor had it ceased to occupy, hold or use the living quarters on the land at the end of ninety days from the date of service of the order of acquisition on it.

An interim interdict as a remedy for the prohibition of unlawful conduct could not be granted for the protection of the illegal activities of the applicant in other words the applicant wanted the Court to grant an order stopping the acquiring authority from acting lawfully so that it could continue to commit an offence in carrying out farming operations illegally.”

On the basis of such observation the Supreme Court dismissed the applicant’s appeal for an order restoring possession in circumstances akin to those of the applicant in this case. In this case the applicants want to prevent the holder of an offer letter legally entitled to occupy, hold and use the land from doing so in order that they can unlawfully occupy hold or use the land without an offer letter, permit or land lease in contravention of the law.

The above pronouncements and interpretation of the law emanating from the Supreme Court which is the court of last resort and has the final word on all matters of law constitute binding precedent and puts paid to the applicants' claim.

While I am aware of some judgments to the contrary emanating from this Court, I do not consider myself bound by those judgments which I do not agree with.

Since the prescribed statutory periods entitling the applicants to occupy, hold or use the disputed property have long expired by the passage of time, the applicants no longer have a prima facie right to possess the property warranting the protection of this Court.

In the result it is ordered that the applicants' application be and is hereby dismissed with costs.

*Gollop & Blank*, applicants' legal practitioners

*Antonio Mlotshwa & Co.* respondents' legal practitioners