WILLIAM WACHENUKA
versus
JOHN STRONG
and
ROBERT STRONG
and
MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 18, 25 June 2015, 22 July 2015

Urgent Chamber Application

Applicant in person
C Venturas, for the 1st and 2nd respondents
R Chaundura and Ms *R. Mutandwa*, for the 3rd respondent

CHIGUMBA J: The question that falls for determination in this matter is whether the *mandament van spolie,* and an interdict are two mutually exclusive remedies or whether they dovetail, as a matter of law. The applicant is a self actor who filed an urgent chamber application in which he sought the restoration, full possession, usage and access to the grading sheds, workshop, irrigation pump station, borehole and compound houses on Plot 7 of Lot 1 of Disi Estates Farm in Mvurwi. Applicant also sought an order barring the first and second respondents and all those claiming occupation through them, from entering Plot 7 without his consent, from disrupting his farming operations, from vandalizing his equipment, and an order that all illegal structures erected be demolished. Applicant asked that the court permanently interdict the first and second respondents from conducting any permanent activity commercial or otherwise, which might interfere with his own commercial activities. The terms of the final order sought by the applicant were that this court declare that he is fully entitled to the sole possession of, and exclusive use of the compound houses, barns, sheds, irrigation pump station offices, workshop

and boreholes located inside Plot 7 of Disi Farm, and that a final interdict be issued barring these respondents from interfering with his farming operations.

At the hearing of the matter counsel for the first and second respondents submitted that some of the structures in question, that the applicant sought an interdict and a declaratur over, were not located in Plot 7 as alleged but in Plot 6. The applicant being a self actor, could not assist because he was somewhat emotional when requested to address this issue. Counsel for the third respondent had no meaningful submissions to make, so I directed that the parties attend on Disi Farm and ascertain the truth on the ground, before coming back to address me on the merits of the matter. The applicant deposed to something termed an 'affidavit of evidence', which he attached to his application. In that affidavit applicant purported to support himself in his bid to have the matter dealt with via the urgent chamber book. At the hearing of the matter Mr. *Venturas* for the first and second respondents took issue with this highly irregular document. It was not made or signed by a legal practitioner in terms of the rules of this court. He however appeared to concede that the matter ought to be heard as a matter of urgency, because the parties relationship on their neighboring farms was now untenable and volatile. In the interests of justice, and in a bid to avoid non-suiting the self acting applicant, the matter was heard on the merits.

It is common cause that the applicant was allocated 294 hectares of farming land in 2008 in terms of a valid offer letter, for plot 7 of lot 1 of Disi Farm in Mvurwi, that the first respondent, the former owner of the whole of Disi Farm before its subdivision, was subsequently allocated Plot 3 of Lot 1 of Disi Farm, that applicant entered into an agreement with Tobs Strong Private Limited on 29 September 2014. In his founding affidavit, applicant averred that he produces 17 000 kilogrammes of chickens per cycle which he rears on his farm, and that he currently has five hectares of horticulture under cultivation. He alleged that first respondent and or his agents were encroaching on his land and vandalizing irrigation and other equipment. Applicant submitted that in terms of the ***Land acquisition Act* [*Chapter 20:10*]** land is defined as any interest or right in land which includes anything permanently attached or growing on land. In light of this definition, it was contended that applicant was not under any legal obligation to share any of the facilities on his 'land' with these respondents.

Applicant averred that on 5 May 2015, employees of the first respondents removed borehole pumps and sabotaged his crops under irrigation. On 2 June 2015, these employees

allegedly used aggression and put their own locks on a pump station belonging to the applicant, locked the borehole, stole a starter and an MCB, and prevented applicant's own employees from working. The respondents' employees were allegedly armed with side arms and shotguns, and threatened the applicant's employees with death if they returned to work. These incidences were reported to Mvurwi police station. Applicant averred that he had been despoiled of the borehole compound houses, and pump station, which he has a clear right to. It was submitted that applicant's potatoes which are under irrigation are likely to wilt of the relief sought is not granted.

The opposing affidavit of the first and second respondents was deposed to by Lucinda Strong by virtue of a power of attorney and a board resolution by a company named Tobs Strong Private Limited (Tobs Strong). Plot 3 of Lot 1 of Disi Farm is operated by Tobs Strong Private Limited, which is owned by the first and second respondents. The respondents averred that the applicant perjured himself as he was never in possession of the pump stations, and that there are criminal complaints which have been made against applicant which are pending hearing at Guruve magistrates court where applicant attempted to spoliate the respondents' access to the pump station and borehole. The respondents set out the history of the dispute between the parties, which dates back to 2008, and which gave birth to multiplicity of litigation, spawning no less than eight applications and counter applications between these same parties involving spoliation and contempt of court for failure to comply with this court's numerous orders. Charges of kidnapping police officers in the course of their duties were proved against the applicant who is currently out of custody on bail pending appeal.

Respondents submitted that they are the former owners of Disi Farm who have used the pump station and borehole in question for the last eight years. On 29 September 2014 second respondent and applicant entered into an agreement in terms of which the applicant acknowledged the existence of a court order in which Tobs Strong and its employees were allowed to have access to the pump stations on Plot 7, and agreed not to challenge the use of the facilities and the water in the dam on plot 7. In this agreement, applicant acknowledged that the pumps, motor, and switch gear facility which he had illegally removed belonged to Tobs Strong. In return Tobs Strong agreed not to press charges against the applicant for the theft of its property. The parties agreed to endeavor to work together in a neighborly fashion in future.

The respondents denied that applicant did anything more than market gardening on Plot 7. Respondents challenged the applicant to prove that they vandalized his crops, or that their employees acted aggressively towards his employees whilst armed. They denied vandalizing the pump station, and attached proof that in fact they are the ones who pay for the electricity that the pump station uses. It was averred on behalf of the respondents that the borehole in question was located on Plot 6 of Disi Farm which was allocated to the late Dhlembeu. A letter from the department of the Surveyor General was attached, dated 20 March 2013, as well as the general Plan for Lots 1-9 of Lot 1 Of Disi Estate of Disi Farm which allegedly shows that the borehole in question is located on Lot 6. The letter of 20 March 2013, addressed to Mr. Takawira by The Surveyor general E. Guvaza requested that title surveys be done for the 99 year leases of various farms, including lots 1-9 of Disi farm. Based on these title surveys, the borehole in question was allegedly located on Lot 6. The District Lands Officer Mr. C Gambiza, in a letter dated 17 June 2015 sought to clarify the borehole position. He stated that the borehole was squarely in Lot 6 which was allocated to Zvembeu, and not in applicant's Plot 7. Finally, it was submitted that the third respondent had not taken proper instructions in the matter before filing its opposing affidavit response of 15 June 2015.

The response of the third respondent was set out in the affidavit deposed to by Ms *Grace Tsitsi Mutandiro,* on its behalf. In that affidavit the stance taken was that the first and second respondents being the former owners of the whole of Lot 1 of Disi Estate had lost all rights title and interest in Disi Estate when it was acquired by the third respondent except for Lot 3. It was averred that all the pump stations and boreholes which the applicant alluded to belonged to him because they were located on Lot 7. After the parties consented to conducting an inspection in loco as suggested by the respondent, the third respondent filed a supplementary affidavit as directed when the parties initially appeared in chambers. The parties had been directed to elicit the presence of police officers from Mvurwi police station to keep the peace whilst the exercise was being conducted, in light of the death threat and possession of firearms allegations in the applicant's papers.

Ms *Rufaro Memory Mutandwa,* a law officer in the 3rd respondent deposed to the supplementary affidavit and set out the conclusions reached when the parties conducted an inspection *in loco* the 24th of June 2015. It is now common cause that the pump station is located in Plot 7, that the compound houses are located in Plot 7, that there is no functional borehole in

Plot 7, that the only functional borehole is located in Plot 6, that applicant has locked the borehole in Plot 6, that the applicant was cultivating potatoes in Plot 6 and not in Plot 7 as alleged in his papers, and that Plot 6 was not allocated to any of the parties to this dispute. The third respondent did not oppose the relief sought by the applicant. First and second respondents maintained that the applicant had no cause of action, that he had not been despoiled in light of his agreement with Tobs Strong of September 2013, and that they were entitled to the use and enjoyment of the pump station and other equipment such as compound houses and the barns which they had been awarded by an order of this court which remains extant.

The issue that falls for determination is whether the applicant has established a cause of action in his founding affidavit. Put differently, have the requirements of the *mandament van spolie* or of an interdict been established by the averments in the applicant's papers filed of record? There is added dilemma in that the applicant's papers aver that he was despoiled, and in the same breath that applicant seeks restoration of possession, he seeks an interdict. This in my view means that in order for the applicant to be entitled to the interim relief that he seeks, his papers must not only establish, on a *prima facie* basis, the requirements of spoliatory relief, they must also establish the requirements of an interdict. Are these two remedies mutually exclusive, or do they dovetail, as a matter of law? The purpose of the *mandament van spolie* is to restore unlawfully deprived possession at once to the possessor, in order to prevent people from taking the law into their own hands. It only operates in a case of unlawful deprivation of possession. (my underlining for emphasis) See ***Silberberg & Schoeman's The Law of Property.*** [1]

The law that applies to the remedy of *mandament van spolie* is settled. In *Nino Bonino* v *Delange* 1906 TS 20, the general principle was stated by INNES CJ as follows:

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his 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 inquiry or investigation into the merits of the dispute."

In *Diana Farm Private Limited* v *Madondo N.O & Anor* 1998 (2) ZLR 410 @413 the court set out the authorities as follows:

[1] 5th edition page288

> "The law relating to the basis on which a *mandament van spolie* will be granted is well settled. In *Davis* v *Davis* 1990 (2) ZLR 136 (H) at 141 ADAM J quoted with approval the following statement by HERBSTEIN J in *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753:
>
> "... two allegations must be made and proved, namely (a) that applicant was in peaceful and undisturbed possession of the property, and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent."

The court went on to say that:

> "The onus is on the applicant to prove the two essential elements set out above. Part of the second element is lack of consent. In *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79-80, it was said by GUBBAY CJ:
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> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:
>
> (a) that the applicant was in peaceful and undisturbed possession of the property; and
> (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.
>
> It was for the respondent to show that he had not consented to being deprived of possession. No onus rested upon the appellants, as the learned judge perceived, to establish the respondent's consent. Consent to the deprivation may be expressly given, as where the possessor is present at the time, is spoken to and gives his permission. Or it may be implied from the conduct of the possessor both before and after the removal of his property…Furthermore, the applicant's possession must not be mere physical possession. Physical possession must be accompanied by requisite animus or intent"

This was clearly expressed by ADDLESON J in *Bennett Pringle (Pvt) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 (E) at 233G-H as follows:

> "In terms of all the authorities cited, the `possession', in order to be protected by a spoliatory remedy, must still consist of the animus - the `intention of securing some benefit to' the possessor; and of detentio, namely the `holding' itself .If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is: (a) making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person." See also ***Commercial Farmers Union & 9 Ors v The Minister of lands & Rural Resettlement & 6 Ors***[2]**.**

It is common cause that the applicant is the holder of a valid offer letter to plot 7 of Lot 1 of Disi Estates and that he is making physical use of this property and deriving benefit from it. The same applies to the pump station and the compound houses. The evidence does not support

[2] SC31-10

applicant's assertion that the borehole that he is allegedly being deprived use of, is located in Plot 7.

The evidence shows that the only functional borehole which is located in plot 6, although applicant is making physical use of it and deriving benefit from it, to the extent of locking it, has never been accessed by the first or second respondents or tampered with by them or their agents. Applicant has clearly secured the use of the borehole in Plot 6 for his own benefit, and the borehole which is situated in Plot 7 is non functional, and not subject to any dispute. According to the time honored legal principle an application stands or falls on the basis of its founding affidavit. In the case of ***Mangwiza* v *Ziumbe NO & Anor***[3] it was held that in application proceedings the cause of action must be set out fully in the founding affidavit. The court relied on the ancient case of ***Coffee, Tea and Chocolate Co Ltd* v *Cape Trading Company 1930 CPD 81*,** as authority for that proposition. Applicant did not refer to the borehole on plot 6 in his founding affidavit. He has not asked the court to make an order in regard to it, and had not produced any evidence to show any entitlement to its use or enjoyment. He has not alleged that first and second respondents are depriving him of his use or enjoyment of it.

There is no evidence that applicant has been deprived of the use of the borehole in plot 7, it is common cause from the inspection *in loco* that this borehole is out of commission. The applicant consented to the use of the pump station in Plot 7 by Tobs Strong, in an agreement dated 29 September 2014. He not only consented, he acknowledged the existence of a court order which gave the respondents and their employees the right to access that pump station and the water in the dam on Plot 7. There is nothing in the applicant's papers which were filed of record which shows that the applicant either cancelled this agreement, or had the order of this court overturned. In the presence of such an order conferring access and enjoyment and use of the pump station on the respondents, it cannot be said in all earnest, that applicant was deprived of such use. The respondents are doubly insulated against such a claim by the agreement between the parties, and an order of this court, which is extant.

It is my view that although the applicant has 'physical' possession (*detentio)* of the pump station because it is located on Plot 7, he lacks the (*animus*) in full, as he is not entitled to the exclusive enjoyment of the benefit of the pump station. He lost the right to sole or exclusive

[3] 2000 (2) ZLR 489(SC)

enjoyment to the respondents through an order of court. He endorsed the 'sharing' of the enjoyment of the pump station with the respondents when he entered into an agreement with their company Tobs Strong in 2014. The applicant failed to establish entitlement to sole or exclusive possession of the pool pump, the grading sheds, workshop, or compound houses. He was not in peaceful or undisturbed possession of this property, and he was not unlawfully deprived of it. Possession was disturbed by the order of court, and by the parties' agreement. The requirements of spoliation were not met.

An interdict is a judicial order in terms of which a person is prohibited from committing a threatened wrong or from continuing an existing one. The interdict granted may be final or temporary.. In an application for a temporary interdict, the applicant need not establish a clear right, but a prima facie right, though open to some doubt. See ***Silberberg & Schoeman p 308.*** Turning to the requirements of an interdict, they are equally trite. The requirements of an interdict are as follows:

i. A clear or definitive right- a prima facie right, though open to some doubt-this is a matter of substantive law.
ii. An injury actually committed or reasonably apprehended-an infringement of the right established and resultant prejudice.
iii. The absence of similar protection by any other ordinary remedy-the alternative remedy must be; adequate in the circumstances; be ordinary and reasonable; be a legal remedy; grant similar protection. See ***Tribac (Pvt) Ltd*** **v** ***Tobbacco Marketing Board***[4]***, Setlogelo*** **v** ***Setlogelo***[5]***,Flame Lily Investment Company (Pvt) Ltd*** **v** ***Zimbabwe Salvage (Pvt) Ltd & Anor***[6]***, Boadi*** **v** ***Boadi & Anor*** [7]***, Diepsloot Residents' and landowners' Association & Anor*** **v** ***Administrator Transvaal .***[8]

Bearing in mind that at the interim stage these requirements need only be established on a *prima facie* basis, we find that the applicant, as the holder of a valid offer letter to Plot 7 of lot 1 of Disi

[4] 1996 (2) ZLR 52 (SC) @56

[5] 1914 AD 221 @ 227

[6] 1980 ZLR 378

[7] 1992 (2) ZLR 22

[8] 1994 (3) SA 336 (A) @ 344H

farm, has a clear right to all the movables and immovables situated therein. For the same reasons that we find that the applicant was not entitled to sole or exclusive possession of the pump station, compound houses, and grading sheds, we find that the applicant's clear right conferred by his offer letter was not infringed. Applicant's right to exclusive use was taken away by a court order which is extant, to date. Further applicant entered into an agreement in terms of which he accepted the validity of this court order, and agreed to abide by it, in exchange for immunity from prosecution over allegations of theft and vandalisation of property at the instance of the first and second respondents. There cannot therefore be any injury committed against the applicant's right.

Applicant failed to discharge the onus to prove dispossession, and to prove that his right was infringed unlawfully. See ***Pool & Underwater Repair & 3 Ors* v *Jameson Rushwaya and Anor*** [9]**.** Spoliation and interdict are two separate and distinct remedies which have different requirements. The court in **Pool & Underwater Repair (*supra*)** also said that in the case of applications for spoliatory relief, the *onus* is on a balance of probabilities given that the relief is final in effect. It is trite that an interdict can be issued on an interim basis, in which case the onus would be to establish its requirements on a *prima facie* basis, not on a balance of probabilities. The higher burden of proof would only apply to the granting of a final interdict.

Some of the other differences between the two remedies include but are not limited to the following:

1. The burden of proof. A *mandament van spolie* may only be granted on the basis of proof on a balance of probabilities because it is final in effect even if granted provisionally, whilst an interim interdict may be granted on the basis of proof on a prima facie basis, though open to some doubt, subject to confirmation on the basis of proof on a balance of probabilities on the return day.
2. In order to qualify for spoliatory relief, one does not need to allege or prove that one has a clear right which has been infringed, or a prima facie right which is open to some doubt, which is about to be infringed. All that one has to do is to prove possession that one was in peaceful and undisturbed possession of the property at the relevant time. Possession is not necessarily established by proof of ownership, or by establishment of a

[9] Sc 32-12

right, but by evidence of physical care and control and exclusive enjoyment of the property.

3. Once unlawful dispossession of peaceful and undisturbed possession is established the availability of a suitable alternative remedy is not a bar to the grant of spoliatory relief, whereas an interdict may not be granted where there is another remedy which grants similar protection, is adequate in the circumstances; is ordinary and reasonable; and, is a legal remedy.

There is no basis from the applicant's averments in his founding affidavit, coupled with other documentary evidence on which the court can rely on to award spoliatory relief on a balance of probabilities, or an interim interdict on a prima facie basis which is open to some doubt. It is unfortunate that the applicant as self actor failed to appreciate the differences between the two remedies, and that, in attempting to avail himself to both remedies; he failed to establish his entitlement to either remedy. The requirements of these two remedies as a matter of law, do not dovetail, they are irreconcilable in some aspects, the most important of which in my view, is the significant difference in the burden of proof which must be established, on an interim basis. The applicant is not entitled to the relief that he seeks, for these reasons. To discourage the multiplicity of litigation that has plagued these parties since 2008 to date, and the frequent abuses of this court's processes, on an urgent basis no less, the applicant is ordered to pay the respondents' costs on a legal practitioner-client basis.

Messrs Byron Venturas & Partners, 1st & 2nd respondents' legal practitioners
Civil Division of the Attorney General's Office, 3rd respondent's legal practitioners