

CROWHILL FARM (PRIVATE) LIMITED
versus
MUSHAKUVANHU HOUSING CO-OPERATIVE TRUST
and
QUEEN OF GRACE ZIM ASSET TRUST
and
LEONARD NYAMUTAMBA
and
AMOS MUZA
and
PATRICK JIMA
and
ADWELL CHIMINYA

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 2 July, 3 August 2016

E Samurombe, for the applicant
Respondents in default

Urgent Application

MUSHORE J: The applicant approached this court on an urgent basis seeking an urgent order of spoliation. What had occurred, according to the applicant, was that on 24 June 2016, the respondents (who were apparently fully aware of the applicant's ownership of the land by virtue of registered title) invaded the applicant's property which was described simply as Echo of Borrowdale Estate. The property consists of numerous plots on an established piece of land of considerable extent. The applicant prepared and filed the current application on 28 June 2016.

As an aside, for some odd reason the record was mistakenly left in an office within the Registry and it was only because of the persistence of the applicant's legal practitioners who were keen to have the matter heard urgently, that Registry staff conducted a physical search and found the record in the wrong place on 1 July 2016. I found this out because I queried the delay because urgent applications ought to be allocated on an urgent basis for the

court to meet the 48 hour rule. I set the matter down for hearing in my Chambers on Saturday 2nd July 2016 at noon and the papers were served on all parties to attend at the appointed time.

The respondents did not attend and were in default despite having accepted service of the application. Even though the respondents were not in attendance I decided to hear full argument from the applicant's counsel because of the contentious nature of the subject matter which unfortunately land cases are notorious for. At the end of the hearing I gave my judgment *ex tempore*, again being mindful of the fact that this was a dispute over land. I granted the application for a *mandament van spolie*. The applicant's counsel recorded my reasons.

A little over a week later, I received a letter from the Registrar, asking for my reasons. The Registrar's letter was accompanied by a notice of appeal prepared and filed by the respondents in the Supreme Court. Oddly and without having sought my leave, nor seen my reasons, the respondents had noted an appeal. It would appear that they realised that they would have to obtain some type of leave and thus it appears that they sought and obtained leave from the Supreme Court. It need be noted, however that because the respondents framed the grounds of appeal from a blind perspective, the grounds have shortcomings. Further there is an element of mischief in the manner that they are crafted because they create the impression that the respondents were armed with my determination, where in fact they did not have it.

Be that as it may, in order to facilitate a complete record of proceedings for the appeal hearing, I hereby to furnish my reasons.

The application was one for an urgent order of spoliation. I agree with the submission made by counsel for the applicant at the hearing that a plea for spoliation is, by its very nature, urgent. An order for spoliation is granted in order to undo the unlawful taking of existing control without investigating its merits. See Silberberg and Schoeman; *The Law of Property* [1983 Edition] p 135. The principle upon which the *mandament van spolie* is based is expressed in the maxim *spoliatus ante omnia restituendus est*, which means that the person whose control has been taken unlawfully must be re-instated before the merits of the case are examined.

The applicant was in control of the property in question prior to the respondents' unlawful occupation as evidenced by photographs, shown to me during the hearing, of random wooden shacks being erected on various plots and across demarcated lines. The

applicant's exercised control and peaceful occupation of the land which it owned, as evidenced by the certificate of title and diagrammatic outlay of properly demarcated and serviced plots, which was illustrated by a somewhat bulky document annexed to their application.

There need not be an examination or investigation into the whys and wherefores required to establish a clear right in order for a *mandament van spolie* to succeed, by the very peculiar nature of the remedy sought. See Olivier, Pienaar, and van Der Walt, *The Law of Property*, [2nd Edition], at p 183:

“The most important difference between the interdict and the *mandamentum van spolie* is that in the case of an interdict the applicant has to prove that he has a clear right to the thing, while in the case of a *mandament van spolie*, the merits of the claim are to taken into consideration”.

The applicant has approached the court swiftly and properly in terms of the rules in order to avoid negating the final relief it seeks which is yet to be determined; and in order to demonstrate that it is opposed to the unlawful occupation. HLATSHWAYO J (as he then was) in *Gondo NO v Gondo NO* 2001 (1) ZLR 376 pp 380 [B to C] said:

“It is the essence of the *mandament van spolie* that it must be invoked within a reasonable time, otherwise the applicant may be taken as having acquiesced in the disturbance of the possession or practical relief may no longer be possible”.

The applicant's counsel proved that the applicant was in quiet and undisturbed possession of the property in question at the time that the respondents unlawfully invaded the property. The *status quo ante* the invasion needs to be restored.

After examining the application and hearing argument, I am satisfied that a basis for spoliation has been established. That being so, the applicant is entitled to the remedy it seeks sought, I therefore grant the application for spoliation as follows:

INTERIM RELIEF GRANTED

That pending determination of this matter the applicant is granted the following relief:-

- (i) The 1st to 6th Respondent, and all those claiming title and/or possession through them, be and are hereby ordered to vacate a certain piece of land being Crowhill Estate, measuring 1 784, 6088 hectares.

- (ii) That 1st to 6th respondents and all those claiming title, and or possession through them, be and are hereby ordered not to interfere in any way with the Applicant's quiet, peaceful and undisturbed occupation of Crowhill measuring 1 784, 6088 hectares.
- (iii) The *status quo ante* the 24th June 2016 enjoyed by the applicant, be and is hereby restored so that applicant continues to enjoy, peaceful, quiet and undisturbed possession of Crowhill Estate, measuring 1 784,6088 hectares.
- (iv) The Zimbabwe Republic Police together with the applicant's legal practitioners shall serve a copy of this order on all of the respondents, and those claiming title and/or possession through them, of Crowhill Estate, measuring 1 784, 6088 hectares.
- (v) Failure to comply with this order by any or all of those claiming title through them is deemed to be in contempt of this order.

Samundombe and Partners, applicant's legal practitioners