

R.R ESTATES (PRIVATE) LIMITED
and
COLIN BRUCE NIENBAR
versus
HENRY NYIKADZINO
and
TAFADZWA NYIKADZINO

HIGH COURT OF ZIMBABWE
MATANDA-MOYO
HARARE, 30 June 2017 & 19 July 2017

Urgent Chamber Application

H. Mutasa, for the applicants
N. Chimuka, for the respondent

MATANDA-MOYO: This is an application for a spoliation order whereby the applicants pray for restoration of *status-a-quo* ante prevailing at Plot No. 1 Robbsdale Farm Mhangura as at 17 June 2017. On the return date the applicants would pray for a final order in the nature of an interdict where the applicants are barred from unlawfully interfering with the applicants farming activities at and occupation of Plot No. 1 Robbsale Farm.

The brief facts are that the applicants are in occupation of Plot 1 Robbsdale Farm in Mhangura. The Minister of Lands subdivided the farm into various plots which were offered to various persons including the respondents.

The respondents were given an offer letter for what is now subdivision of 15 Robbsdale Farm measuring 68.438 hectares. Armed with the offer letter the respondents moved onto the farm which is still occupied by the applicants and forcibly took occupation. The respondents took occupation of the plot without the applicant's consent. There is also an order of this court authorising the applicants to remain on the farm pending finalisation of application under C.A. 1475-6/09 (CA 462/09). The applicants believe they have been despoiled and claim for a spoliation order against the respondents.

The respondents raised various points *in limine*. They abandoned the rest of the points on the day of hearing save for two that is:

'(a) that the deponent of the founding affidavit had no authority and

(b) that the second applicant has no *locus standi* to bring this application.

The respondents challenged the authority of the second applicant in deposing to the founding affidavit. The respondents averred that the second applicant was not a party to the criminal proceedings. The first applicant was then represented by Wouter Nienaber who is now deceased. The respondents cited the case of *Air Zimbabwe Corporation v Zimbabwe Revenue Authority* HH 96/03 which stated that where the history of the matter showed that deponent had no authority then there was need to provide such authority. In response it was argued on behalf of the second applicant that he was a director of the applicant and as such authorised to depose to the affidavit. In his founding affidavit the second applicant stated that:

“I am a director of 1st applicant and it is in that capacity that I have been duly authorised to depose to this affidavit on behalf of 1st applicant.”

In my view the second the applicant has stated his position in the plaintiff and that he is duly authorised. See *Firststrand Bank Limited v Carl Beck Estates (Pvt) Ltd and Anor* 2009 (3) SA 384. Besides the plaintiff is not a trading company but a holding company for the farm. The applicant has said he is a director of such company and that suffices in the instant case to prove authority. This is a family company. As was enunciated in the case of *Mall (Cape) (Pty) Ltd v Merion Ko-Operative Bpk* 1957 (2) SA 347 (C):

“The best evidence that the proceedings have been properly authorised would be provided by on affidavit made by an official of the company annexing a copy of the resolution, but I do not consider that form of proof is necessary in every case. Each case must be considered on its own merits and the court must decide whether enough evidence has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf”.

The first applicant is a company registered for purposes of owning the farm in question. The second applicant is a director in such company. I am satisfied it is first applicant which is litigating and that point fails.

The respondents also challenged second applicant’s *locus standi* to bring this application. Again this point is misplaced considering that this is an application for a spoliation order. Even a thief is entitled to bring such an application if it can prove that it was peaceful and undisturbed possession of a thing and that such a thing was unlawfully taken from it. I shall therefore not be labour on this point but dismiss it.

The requirements for granting of a spoliation order are settled;

1. The applicant must have been in possession of the property.

2. The respondent must have deprived the applicant of that property forcibly and wrongfully.
3. For the respondent to successfully challenge such an application there must;
 - a) Be a denial that the respondent has dispossessed the applicant.
 - b) Be proved that the applicant was not in possession of that thing or if he was in possession,
 - c) That the deprivation was not unlawful.

The *mandament van spolie* is a final order and an extraordinary quick and robust remedy for the restoration of possession. It is based on the principle that no man should take the law into his own hands. Since its object is only restoration the courts do not normally concern themselves with rights of ownership. Applicant's possession of that thing need not be lawful. See *White v Ntuliki and others* HC 1072/15, *Mandandi v Mandandi* 2003 (2) BLR 88 *Shiriyekutaranga Bus Services (Pvt) Ltd v Total Zimbabwe (Pvt) Ltd* 2008 (2) 37 (41).

Applicants are simply saying they are in occupation of the land. They have not yet been evicted from the land as this court stayed their eviction pending determination of their appeal. No serious challenge has been made to the fact that applicants are the occupiers of the land in question. There is also no challenge that the respondents unlawfully occupied the land.

The respondents are laboring under the mistaken view that, because they are in possession of an offer letter for a subdivision within the farm then it is their right to occupy the portion of the farm regardless of someone else being in occupation. It has been held time and time again in this court that a person claiming right to land is still entitled to follow the law in occupying that land. If someone is in occupation, that person is not entitled to evict such occupier without following due process. A holder of an offer letter still requires to get an eviction order and to lawfully evict an occupier from land. See *Dodhill (Pvt) Ltd and Anor v Min of Lands and another* 2009 (1) ZLR 182 (H) and *Bok Estates (Pvt) Ltd v Masara and Others* 2009 (2) ZLR 466 (H). This matter has a court order staying eviction until the appeal is heard.

I am satisfied that the applicants have shown that they were in peaceful and undisturbed possession of the land and that the respondents have unlawfully deprived them of the possession. The respondents on the other hand had failed to discharge the onus on them of disproving possession or unlawful dispossession.

According the application succeeds and I order as follows;

That pending the hearing of the final order

1. Respondents and all those people acting on their instructions be and are hereby directed to restore the status *a quo* once prevailing at Plot no. 1 Robbsdale Farm Mhangura as at 17 June 2017.
2. In the event that the respondents do not comply with clause (1) above. The Sheriff of the High Court of Zimbabwe with the assistance of the members of the Zimbabwe Republic Police at Mhangura be and are hereby authorised to remove the respondents from the above property and to restore the status-*a-quo ante* as at 17 June 2017.

Gill, Godlton & Gerrans, applicants' legal practitioners
Messrs Mwere & Sibanda, respondents' legal practitioners