REPORTABLE (11)

Judgment No. SC 28/09
Civil Application No. 80/09

NYASHA CHIKAFU v

(1) DODHILL (PRIVATE) LIMITED (2) SIMON DONALD KEEVIL (3) THE MINISTER OF LANDS AND RURAL RESETTLEMENT

SUPREME COURT OF ZIMBABWE
HARARE, MAY 7, 2009

W Bherebende, for the applicant

Ms F Mahere, for the first and second respondents

No appearance for the third respondent

Before: CHIDYAUSIKU CJ, In Chambers

This is an application for leave to appeal against a provisional order granted by BERE J against the applicant in the High Court, such application for leave to appeal against the provisional order having first been made to and refused by BERE J.

The facts of this matter are briefly as follows.

Dodhill (Pvt) Ltd (hereinafter referred to as "Dodhill") owns Dodhill Farm ("the farm"). Dodhill and the Minister of Lands and Rural Resettlement ("the Minister") were involved in litigation concerning the compulsory acquisition of the farm by the

Minister. The litigation culminated with an agreement between Dodhill and the Minister. In terms of that agreement the farm was divided into two portions. The one portion of the farm was acquired by the Minister for agricultural purposes and the other portion was left in the ownership of Dodhill. This agreement was made part of the court order by consent of the Administrative Court. Notwithstanding the agreement and court order, the Minister subsequently acquired or purported to acquire that portion of the farm which the Minister had agreed to leave in the hands of Dodhill. The Minister acquired the farm in terms of s 16B(2)(a)(i) of the Constitution of Zimbabwe ("the Constitution"). Having acquired the farm, the Minister, in terms of an offer letter allocated the farm to the applicant (hereinafter referred to as "Chikafu").

Upon acquisition, Dodhill was required to terminate farming operations within forty days of the notice and vacate the farm within ninety days. It is common cause that both periods have expired, but Dodhill continues to occupy the farm contrary to the provisions of the Land Acquisition Act [*Cap 20:10*] ("the Act") and therefore unlawfully. Chikafu moved onto the farm and Dodhill sought to have him removed from the farm and launched an urgent Chamber application in the High Court. The learned Judge in the court *a quo* concluded –

1. That the farm had been legally acquired by the Minister and legally offered to Chikafu; and

2. That although Chikafu had been legally offered the farm, he could not move onto the farm without due process in terms of the Act.

Chikafu was dissatisfied with the judgment and applied for leave to appeal to this Court. The application for leave to appeal was refused on the ground that Chikafu had no prospects of success on appeal. Chikafu now appeals against the refusal to grant him leave to appeal. The issue that falls for determination in this application is whether Chikafu has prospects of success in an appeal against the judgment of BERE J.

I concluded that Chikafu had prospects of success on appeal. I accordingly granted leave to appeal.

I granted Chikafu leave to appeal for two reasons. Firstly, it is common cause that decided cases in this and other jurisdictions support both Dodhill and Chikafu. In other words, there was a divergence of authorities on the issue that fell for determination by the court *a quo*. Given this divergence of decided cases, whichever party lost had prospects of success on appeal. Secondly, a proper reading of the judgment of the court *a quo* reveals that it interdicted Chikafu from occupying the farm until Dodhill had been removed from the farm in terms of the Act. The judgment is not interlocutory it is definitive, in which case Chikafu is entitled to appeal as of right.

The learned Judge in the court *a quo* analysed the factual dispute between the parties and concluded that the farm belonged to the Minister. Dodhill does not, according to its counsel, accept that conclusion. There is, however, no cross-appeal against that conclusion. The probabilities are that Dodhill, having succeeded in keeping Chikafu out of the farm, did not see much point in taking up this issue.

After reaching a conclusion on the facts, the learned Judge in the court *a quo* analysed the legal position. The learned Judge's analysis of the legal position was thorough and detailed. This is what he had to say at pp 5-7 of his judgment (judgment No. HC 40/2009):

"THE LEGAL POSITION

There can be no doubt that spoliation as a remedy has (as) its core value or objective protection to possession of property against unlawful dispossession.

This is a remedy that has been recognised in our jurisdiction and beyond for over decades.

In dealing with the principles of spoliation I find the views of HERBSTEIN J quite apposite when the learned judge stated:

> '… two allegations must be made and proved, namely, (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.' (*Bennet Pringle (Pty) Ltd v Adelaide Municipality* 1977 (1) SA 230 (E) at 233)

In Amler's *Precedents of Pleadings* (3 ed LTC Harm and J H Hugo, Butterworths at pp 276-277) it is stated 'Unlawfulness in this context means a dispossession without (the) plaintiff's consent or due legal process'.

This time honoured principle of our law has been enunciated in a plethora of cases in our jurisdiction and beyond. See, for example, *Nino Bonino v De Lange* (1906 TS 120 at 122), *Silo v Naude* (1929 AD 21), *Mutsotso and Ors v Commissioner of Police and Anor* (1993 (2) ZLR 329 (H)), (and) *Chisveto v Minister of Local Government and Town Planning* (1984 (1) ZLR 248 (H)).

In the classic and leading case of *Nino Bonino supra* INNES CJ (as he then was) had this to say:

> '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 enquiry or investigation into the merits of the dispute.'

In *Chisveto's* case *supra* REYNOLDS J remarked as follows:

'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. … The 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 thief is entitled to be restored possession of the stolen property.' (Page 250 A-D)

Counsel for the second respondent (Chikafu) passionately argued that the applicants (now the first and second respondents) had no *locus standi* to bring an application for spoliation. The main thrust of his argument was that because the applicants had exceeded the 45 and 90 day statutory maximum periods which (allow) them to remain on the farm and the homestead respectively (s 3 of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*]), therefore the applicants must not be protected by this court.

In counsel's view, which borrowed heavily from the position adopted by my learned brother UCHENA J in the case of *Andrew Roy Ferrera and Katambora Estates (Pvt) Ltd v Bessie Nhandara* (HC 3995/08), if this court accepted *locus standi* on the part of the applicants, then the court would be sanctioning an illegal stay on Dodhill Farm by the applicants since the applicants are occupying that farm in complete violation of the law.

There was also an attempt by the second respondent's (Chikafu's) counsel to seek to rely on the decision by Their Lordships in one of the much celebrated land cases in this country, *viz* A*irfield Investments (Pvt) Ltd v (1) The Minister of Lands, Agriculture and Rural Resettlement (2) The Minister of Justice, Legal and Parliamentary Affairs (3) The Member-in-Charge, Chegutu Police Station (4) The Attorney-General of Zimbabwe and (5) R Sango* (SC 36/04).

Simplified, the argument as put forward by the second respondent's counsel was that because the applicants' hands are tainted with their illegal occupation of Dodhill Farm, the court could not entertain them let alone grant them an order that would perpetuate their continued stay on the farm."

Dodhill argued that once its possession was established and there is proof of dispossession without reference to due process, Dodhill's *locus standi* was established. The learned Judge was persuaded by Dodhill's argument. He rejected Chikafu's contention. In doing so he reasoned as follows:

> "Firstly, his (Chikafu's) approach would be an attempt to re-define the very basic requirements of a *mandament van spolie* which is not concerned with the legality or otherwise of the possession itself. See the remarks of REYNOLDS J in *Chisveto's* case *supra*.
>
> I am fully cognisant of other decisions from South Africa which have attempted to shift from the orthodox approach in dealing with spoliation matters. One such matter is the case of *Parker v Mobil Oil Southern Africa (Pvt) Ltd* (1979 (4) SA 250 at 255), where VAN DEN HEEVER J stated as follows:
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> > 'Moreover, the rule that goods dispossessed against the will (of) the possessor must be restored forthwith, is not an absolute one. The reason for the rule is, according to the authorities, certainly not because the fact of possession is elevated to a right stronger than *plenum dominium*, but to discourage breaches of the peace by self help in the case of disputes. Despite generalisations that even the thief or robber (is) entitled to be restored to possession, I know of no instance where our courts, which disapprove of metaphorical grubby hands, have come to the assistance of an applicant who admits that he has no right *vis-à-vis* the respondent to the possession he seeks to have restored to him.' (my emphasis)
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> Commenting on *Parker's* case *supra* and another similarly decided case of *Coetzee v Coetzee* (1982 (1) SA 933) the learned (JUDGE PRESIDENT) MAKARAU (JP) in the recent case of *Shiriyekutanga Bus Services P/L v Total Zimbabwe* remarked as follows:
>
> > 'With respect, the weight of authority appears to be against the learned judge. It has not been established as part of our law in any other decided case that an (applicant) for (a) spoliation order has to show some reasonable or plausible claim to the property despoiled.
> >
> > The learned judge seems to suggest that the court determining an application for a spoliation order will look into but not closely, the juridical nature of the possession of the applicant. (See *Coetzee v Coetzee supra*). I hold a different opinion and do so with the greatest of respect and due deference to the learned judge. The decided cases referred to by GUBBAY CJ in *Botha and Anor v Bennet supra* (1996 (2) ZLR 73 (S))

> are quite clear that the court does not at all look into the juridical nature of the possession claimed.
>
> The doctrine of *stare decisis* binds me to follow the decision in *Botha and Anor v Bennet supra* and not to follow *Mobil v Parker supra* and *Coetzee v Coetzee supra*. (HH 64-2008) (my emphasis)

I entirely associate myself with the position adopted by the learned (JUDGE PRESIDENT) MAKARAU (JP) that in an application for (a) spoliation order an applicant does not have to prove some reasonable or plausible claim to the property, let alone the legality or otherwise of his possession of the property in question.

With extreme due deference to the learned judge UCHENA J, I do not agree with the approach he seems to have adopted in the *Andrew Roy Ferrera* case *supra* when he made a finding that because the applicant in that case had defiantly continued to be on the farm in question, therefore he could not be granted spoliation."

Can unlawful occupation constitute a defence to a claim for *mandament van spolie*? It is quite clear that the authorities are divergent on this issue. One line of authorities, which includes judgments of the High Court of Zimbabwe, supports the contention that unlawful occupation can be a defence; while other authorities that include High Court of Zimbabwe judgments as well, are to the effect that unlawful occupation is irrelevant. Given this situation, whichever party lost in the High Court had prospects of success as its contention is supported by a line of decided cases.

Apart from this, the fact that different Judges of the High Court have come to different conclusions on the same issue creates uncertainty in the law, a situation that is totally undesirable. A Judge faced with this situation should facilitate the resolution of the issue by the highest court in the land.

Although the learned Judge has labelled his order as a provisional order, the judgment has all the hallmarks of a final judgment. I have some difficulty envisaging that which would happen on the return day of the so-called provisional order. A proper reading of the judgment reveals that the learned Judge has interdicted or barred Chikafu from the farm until such time as Dodhill has been removed from the farm in terms of the Act. There is nothing interlocutory about the judgment apart from the label. If my understanding of the judgment is correct, then Chikafu can appeal as of right and does not need the leave of the Judge.

When I granted the leave to appeal, I overlooked setting the period within which the appeal has to be filed. I hereby rectify that oversight. The notice of appeal has to be filed within fifteen days of the handing down of these reasons for judgment.

Mavhunga & Sigauke, applicant's legal practitioners

Gollop & Blank, first and second respondents' legal practitioners