

GORDON CHARLES SPENCER

And

GARY ROBERT BROWN

Versus

**THE MINISTER OF LANDS, LAND RESETTLEMENT
AND RESETTLEMENT**

And

THE CHIEF LANDS OFFICER, BULILIMA

And

MS R. BHEBHE

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 25 JANUARY AND 3 AND 25 FEBRUARY 2010

Ms N. Ncube for applicants
S. S. Mazibisa for 3rd respondent
No appearance from 1st and 2nd respondents

Urgent Chamber Application

KAMOCHA J: The applicants in this matter sought and were granted a provisional order on 7 January 2010. The terms of the order were as follows:-

“Interim relief granted

Pending determination of this matter, the applicants are granted the following relief:

- (1) The respondents are interdicted from taking any steps to evict applicants from the property described herein or from carrying out any building or farming operation or from removing any stock or cattle being the property of the applicant or from introducing onto the farm any stock or cattle either owned by the third respondent or by any third party.

- (2) It is ordered that until such time as the relief set out in the final order is determined the applicants and all those who occupy the farm through them are entitled to remain in peaceful and undisturbed possession of the farm and further entitled to continue farming operations on the property and the third respondent is interdicted from taking any steps to occupy the farm either himself (*sic*) or through any agent, servant or employee or to hinder or disturb the applicant in his occupation thereof."

The third respondent has anticipated the application seeking to have the provisional order discharged. The final order being sought by the applicants was in these terms:-

"Terms of final order sought

That you show cause to this honourable court why a final order should not be made in the following terms:

- (1) That until such time as the ownership or right to occupy the property known as Orange Groove (hereinafter called "the farm") is determined by a court of competent jurisdiction and until such time as the applicants are lawfully evicted by such court and has exhausted all legal remedies available to him, the respondents are interdicted from evicting the applicants or from taking occupation of the farm. It is further ordered that the respondents are interdicted from interfering in any way with any of the farming operations carried out by the applicants. Or their employees or servants or from entering the farm or placing property or employees thereon (save as may be provided by law).
- (2) That in the event that by the time this order is granted the applicants have been evicted or the third respondent has taken occupation of the farm, then it is ordered that the third respondent or any person occupying the farm through him (*sic*), be and is hereby evicted and the applicants be restored to possession thereof.
- (3) That the respondents jointly and severally, one paying the others to be absolved pay the costs of this application."

The facts of this matter which are common cause may be summarized as follows. The applicants used to own Orange Groove Estate situate in the District of Bulilima hereinafter referred to as "the farm" which was properly acquired by Government under the Land Reform Programme in terms of section 16(B)(2)(a)(ii) of the Constitution of Zimbabwe. The Notice of Acquisition was published in the Zimbabwe Government Gazette of 19 June 2009. The applicants are now former owners of the said farm. Section 3 of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28] stipulates what a former owner of gazetted land

is entitled to while at the same time it lays down what he or she is prohibited to do. The provisions are couched in this manner and are quoted in *extenso infra*.

“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 section 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 authorized 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 section 16B(2)(a)(iii) of the Constitution, unless the owner or occupier is lawfully authorized 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 authorized 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 section 2(b) does not cease to occupy his or her living quarters in contravention of proviso (ii) to section 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 of not exceeding two years or to 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.”

It is common cause that the period of 45 days permitted by the provisions of section 3(2) above expired and so are the 90 days permitted in terms of the proviso thereof. The applicants should have ceased to occupy, hold or use that particular farm. They also should have ceased to occupy their living quarters. It, therefore, admits of no doubt that they are occupying, holding or using gazetted land unlawfully. They have no legal basis to occupy, hold or use the farm and living quarters. They are, in law, guilty of an offence for which they are liable, on conviction, to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

The applicants contend, however, that they can only be removed from the farm in terms of the law which stipulated that they should be prosecuted and on conviction the court should, in addition to the sentence imposed, issue an order to evict them from the farm and living quarters. This has not been done yet.

It is true that although the applicants are now illegally occupying, holding or using gazetted land they can only be removed therefrom through an eviction order issued by the convicting court, they may not seek an interdict from a court of law to sanction the perpetuation of an illegality. The ownership of the farm that they used to own vested in the state when it was acquired. They therefore have no *locus standi* to approach the court for an interdict because they cannot establish a clear right since upon acquisition the farm vested in the state leaving them without any rights.

In the case of *Airfield Investments (Pvt) Ltd v Minister of Land & Ors* 2004(1) ZLR 511(S) MALABA J as he then was had this to say at page 520C to D:

“Similarly, the court *a quo* was being asked by the appellant to sanction the continued illegal farming operations and occupation of the living quarters on the land despite the clear and unambiguous language of the Act to the effect that failure to cease occupation or use of the land at the end of forty-five days from the date of service of the order of acquisition and of the living quarters at the end of ninety days from the date of service of the order of acquisition constituted a criminal offence.”

The applicants farming operations are unlawful and so is their occupation of the living quarters. They should not approach the court to sanction their illegal activities on the farm.

It is quite clear that they are resisting to vacate the farm in defiance of the clear provisions of the law. The authorities should have prosecuted them so that upon conviction an eviction order is issued by the trial court in terms of section 3(5) of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28].

Evicting them without following the procedure laid down in section 3(5) of the Act would, in my view, be improper as the law protects even unlawful possessors. The legislature was alive to this that is why it laid down the procedure to be followed in order to avoid self help and anarchy. The respondents should not take the law into their own hands as such conduct cannot be countenanced or condoned. This is a well established principle. When dealing with the principle ROBINSON J in *Mutsotso & Ors v Commissioner of Police & Anor* 1993(2) ZLR 329(H) at 333B to H had this to say about the general principle as stated by INNES CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 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.”

As explained by MILLIN J in *De Jager & Ors v Farah & Nestadt* 1947(4) SA 28 (W) at 35, a case where demolition of premises was undertaken without legal process:

“What the court is doing is to insist on the principle that a person in possession of property, however, unlawful his possession may be and however exposed he may be to ejection proceedings, cannot be interfered with in his possession except by the due process of law, and if he is interfered with the court will restrain such interference pending the taking of action against him for ejection by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejection, does not mean that proceedings for ejection can be dispensed with, nor does it make any difference to the illegality of the respondent’s conduct that the occupation by the applicant carried with it penal consequences.” Emphasis added

The learned judge went on to explain that in that case the court held that the conduct of the respondents to demolish certain premises, which were dilapidated, verminous and generally unsanitary, without legal process in order to secure the ejection of the occupiers,

they had committed acts of spoliation and they were therefore interdicted from further demolishing those premises.

The applicants *in casu* are now illegal occupiers of the farm and the living quarters and it admits of no doubt that they would have no defence at all to an action for their ejection therefrom but that does not mean that respondents can interfere with their possession without due process of law. The applicants are liable to a fine equal to level seven or to imprisonment for a period not exceeding two years. The penalty is indeed a severe one but it still does not mean the respondents, in particular the third respondent, can just occupy part of the farm thereby despoiling the applicants. The respondents should not take the law into their hands. That is forbidden by law and the court cannot condone that. ROBINSON J in *Mutsotso & Ors v Commissioner of Police & Ors supra* at 33H to 334A continued thus:

“As stated by DIEMONT J in *Fredericks & Anor v Stellenbosh Divisional Council* 1977(3) SA 113(c) at 117C.

“This court is not concerned with the nature of the applicants’ occupation. What it is concerned with is that the respondent should not take the law into its own hands ... Such conduct cannot be countenanced or condoned.”

The third respondent is a holder of an offer letter in respect of a portion of the said farm now known as subdivision 1 of Orange Groove. She accepted the offer on 17 December 2008. Armed with the offer letter she moved onto the farm. Whilst there she did the following:-

- (a) She cleared a homestead site 100 metres by 100 metres and constructed a 3 metre security fence right round the homestead;
- (b) Constructed workers houses comprising of two rooms under brick galvanized iron sheets and a 1 roomed flat roof house with galvanized iron sheets;
- (c) Repaired a borehole and fitted a Lister pump engine and constructed a brick under galvanized iron sheets pump house;
- (d) Installed some steel water pipes from the borehole to the homestead measuring 150 metres and installed a 5 000 litre water tank;
- (e) Cleared a boundary line of approximately 2.5 kilometres and constructed a perimeter fence measuring 2.5 kilometers using four strand barbed wire with steel posts strainers; and
- (f) Fitted a three metre steel gate and employed 10 full time workers and some casual workers.

The third respondent did all this without due process of law. The applicants should have been prosecuted, convicted and sentenced to sentences the court saw fit plus eviction orders. The third respondent took the law into her hands – a conduct which this court cannot countenance or condone.

Similarly this court cannot grant an interdict which has the effect of perpetuating the applicants' illegal use, holding or occupation of gazetted land. In the result I would discharge the provisional order and issue the following order:

It is ordered that:

- (1) Until the applicants are lawfully evicted pursuant to an order of a court of competent jurisdiction in terms of section 3(5) of the Gazetted Land (Consequential Provisions) Act [Chapter 20:28], the respondents are interdicted from evicting the applicants or from taking occupation of the farm;
- (2) The third respondent or any person occupying the farm through her, be and is hereby evicted and the applicants be restored to their possession thereof until they are evicted through due process of law; and
- (3) The third respondent shall meet the costs of this application.

Messrs Webb, Low & Barry applicants' legal practitioners
Cheda & Partners 3rd respondent's legal practitioners