CHRISTOPHER MOYO **APPLICANT**

VERSUS

OBERT CHINHAMO **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 18 AUGUST 2011 AND 25 AUGUST 2011

Mr N Mazibuko for applicant
Mr M Nzarayapenga for respondent

Opposed Application

MATHONSI J: The Applicant and the Respondent are neighbours occupying adjoining farm land being Lot 2 of Biano of Woodlands occupied by the applicant and the remainder of Biano of Woodlands occupied by the Respondent. The land was previously owned by one Africa Ncube who subdivided it and sold Lot 2 of Biano of Woodlands to one Robert Christopher Ndebele, who in turn sold it to the applicant. Africa Ncube sold the remaining extent of Biano Woodlands to the Respondent.

The parties have co-existed peacefully on the land for quite sometime. It so happens that when Africa Ncube sold the pieces of land as he did, he had not undertaken the subdivision in accordance with the provisions of the Regional Town and Country Planning Act [Chapter 29:12]. In fact the boundaries were estimated without a permit and the proper subdivision was done much later with the result that the boundaries produced by the subdivision are at variance with what the applicant and the respondent were shown by Africa Ncube.

The respondent holds his piece of land by Deed of Transfer number 684/05 which is also the Diagram Deed showing the survey boundaries registered at the Deed Registry and Surveyor General's offices. The applicant does not appear to have taken title of his own piece as yet. In pursuance of his registered title the Respondent enlisted the services of a surveyor to locate the pegs of his land and that surveyor concluded that the boundary between the 2 farms is not

as the parties had always known it and fenced but is in fact 145 metres into what had always been generally regarded as the applicant's land.

This has then created a simmering boundary dispute between the applicant and the respondent with the applicant maintaining that the boundary should remain as fenced and shown to him at the time he purchased the land. In an effort to assert his rights the respondent has, without the consent of the applicant or a court order, gone ahead to clear the 145 metre strip attempting to move the boundary into the land previously occupied by the applicant in accordance with the beacons shown to him by his surveyor.

The applicant brought an urgent application and obtained interim relief interdicting the respondent from encroaching onto his property and from cutting down trees. It is the confirmation of that provisional order which the respondent strongly opposes arguing that the disputed strip belongs to him and he has registered title to it.

Mr Mazibuko for the applicant conceded that the agreement of sale between the applicant and Robert Christopher Ndebele was in breach of the Regional Town and Country Planning Act in that it involved the sale of land which had not been surveyed. Section 39(1) of that Act provides:

> "Subject to subsection (2), no person shall-
> (a) subdivide any property; or
> (b) enter into any agreement-
> (i) for the change of ownership of any portion of a property; or
> (ii) for the lease of any portion of a property for a period of ten years or more or for the lifetime of the lessee; or
> (iii) conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
> (iv) for the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of the renewal, is ten years or more; or
> (c) consolidate two or more properties into one property except in accordance with a permit granted in terms of section forty."

In *X-trend-a-home (Pvt Ltd v Hose Law Investments (Pvt) Ltd* 2000(2) ZLR 348 at 355 B-C McNally JA stated:

> "The agreement with which we are concerned is clearly 'an agreement for the change of ownership' of the unsubdivided portion of a stand. What else could it be for? Whether

> the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited. The evil which the statute is designed to prevent is clear. Development planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say 'but I have already entered into conditional agreements, major developments have taken place; large sums of money have been spent. You cant possibly now refuse to confirm my unofficial subdivision or development'".

The law is therefore now settled on the issue of a sale or subdivision without a permit. Clearly therefore when the applicant entered into an agreement for the purchase of that land before a survey had been commissioned or a permit issued, he was engaging in an exercise in futility. That agreement remains invalid.

However, I am not sitting here to determine the lawfulness or otherwise of the subdivision nor the validity of the sale agreement. The issue before me relates to spoliation it being common cause that the applicant has been in peaceful and undisturbed possession of the disputed piece of land since 2002 to the full knowledge of the respondent.

The respondent invaded that piece of land without a court order and started felling trees. This was without the consent of the applicant. The requirements of an interlocutory interdict are;

(a) a prima facie right, even if it is open to doubt;

(b) an infringement of such right by the respondent or a well grounded apprehension of such an infringement;

(c) a well-grounded apprehension of irreparable harm to the applicant if the interlocutory interdict should not be granted and if he should ultimately succeed in establishing his right finally;

(d) the absence of any other satisfactory remedy; and

(e) that the balance of convenience favours the granting of an interlocutory interdict.

See *Setlogelo v Setlogelo* 1914 AD 221; *Bozimo Trade and Development Company (Pvt) Ltd v First Merchant Bank of Zimbabwe Ltd and Others* 2000(1) ZLR 1 (H) at 9 E-G. C*arslone Enterprises* (Pvt) Ltd v Svova HB 35/11 at page 2.

I am satisfied that those requirements have been met in the present case. I am fortified in that conclusion by the fact that the land which the respondent has been clearing and the new boundary he seeks to enforce cuts right through the applicant's homestead at the farm. There will therefore be devastating consequences should the respondent move the boundary as he intends to do before the respective rights of the parties have been determined.

In a spoliation application, the applicant has to prove possession and that he was unlawfully dispossessed. I am in total agreement with the pronouncement made by Reynolds J in *Chisveto v Minister of Local Government and Town Planning* 1984(1) ZLR 248 at 250 A –D where he said:

> "It is a well-recognised principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing – that spoliatus ante omnia restituendus est (*Beukes v Crous and Another* 1975 (4) SA 215 (NC). 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 that a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property in question does not fall for consideration at all."

Mr Nzarayapenga for the respondent conceded that the respondent committed an act of spoliation by resorting to self-help. He however argued that the remedy of spoliation was availed to the applicant at the time that he obtained interim relief. In his view at the stage of confirmation of the provisional order, the court cannot ignore the fact that respondent has proved ownership of the disputed strip. Instead the court should bring finality to litigation by protecting the right of ownership. I do not agree.

I am not sitting to determine the right of ownership. In fact there is no such application before me and I am not fully equipped to determine who has better title. That is what has to be determined when the parties institute proper proceedings for the resolution of the boundary dispute.

I agree though that the terms of the final order sought by the applicant are too vague and generalised as not to give a definitive direction the matter should follow. There is need to place the parties on terms as to the finalisation of the dispute.

In the result, the provisional order made on 17 June 2011 is confirmed in the following terms; that

1. The respondent be and is hereby directed to stop interfering with the applicant's occupation of property identified by land surveyor Ignatio Sean Maingehama as Lot 2 of Biano of Woodlands Umzingwane including the disputed strip pending the proper determination of the boundaries.
2. The applicant should institute proceedings for such determination within 14 days from the date of this order.
3. The respondent shall bear the costs of suit on an ordinary scale.

Munjanja and associates, applicant's legal practitioners
Messrs Dube-Banda, Nzarayapenga and partners, respondent's legal practitioners