HC 5562/2000
Ref: HC 7118/98

BEST OF ZIMBABWE LODGES (PRIVATE) LIMITED
and
PAMUZINDA SAFARI LODGE (PRIVATE) LIMITED
Versus
CROC OSTRICH BREEDERS OF ZIMBABWE (PRIVATE) LIMITED
and
LE RHONE SAFARI (PRIVATE) LIMITED
and
VIVIAN BRISTOW

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE, 6 November 2002 and 15 January 2003

OPPOSED APPLICATION

Advocate E Morris for the applicants
Advocate A P de Bourbon for the respondents

MAKARAU J: "*Croc-Ostrich Breeders of Zimbabwe (Private) Limited owns some land. On this land is built a safari lodge. It was built and operated as a joint venture between Croc-Ostrich and TA Trading Corporation (Private) limited. TA ceded its rights, and assigned its obligations under the agreement to Best of Zimbabwe (Private) Limited. The joint venture agreement is such that Croc-Ostrich must stock and maintain a game park on the land, Best of Zimbabwe must operate and maintain an hotel on the land. A third party was involved, the obligations of which was to take hotel guests on safari in the game park, ... The facility thus described is known as Pamuzinda Safari Lodge.*"[1]

This is an application for a spoliation order in respect of the facility known as Pamuzinda Safari Lodge. The facts giving rise to this

1 Per Gillespie J in a matter between the parties and reported under judgment no HH239/99.

application are largely common cause and are as follows:

In November 1998, the first applicant was placed under provisional liquidation by an order of this court. A provisional liquidator was duly appointed and took over the control and custody of the assets of the company, including the facility. The provisional liquidator decided not to continue with the business of running the Safari Lodge which, he proceeded to close down. He posted security guards to protect the facility and the assets of the company in liquidation.

The respondents moved onto the property. The actual date on which the respondents took possession of the facility is in dispute. The applicants allege that this was immediately after the provisional liquidation order had been granted in November 1998. The respondents deny this and allege that they moved onto the property in August 1998, before the provisional order was granted, but after the application for the compulsory winding up of the first applicant had been filed.

The dispute of fact arising regarding the date when the respondents moved onto the property is not, in my view, material to the real dispute between the parties. It is my further view that the dispute is capable of resolution on the basis of the papers before me without doing injustice to any of the parties, as I shall show.

It is common cause that after the respondents moved onto the property, they commenced to effect much needed renovations to the property. After the renovations, they began to run the business of operating the safari lodge through the third respondent. They put into storage the other assets of the first applicant.

In December 1999, the provisional liquidation order was discharged. This displeased the respondents. A notice of appeal was filed against the High Court order discharging the provisional order.

After the discharge of the provisional order, the provisional liquidator removed from the scene. The applicants then indicated to the

respondents that they wished to deploy certain of their workers at the facility to continue with the running of the business. The respondents barred them entry.

The appeal by the respondents was dismissed with costs in December 2000 upholding the High Court's decision that the liquidation of the applicant was highly suggestive of "an abuse of process" and that the respondent's persistence in the proceedings was "but to harass or oppress the applicant or fraudulently deprive it of its rights."

The issue that I have to determine is whether or not against the backdrop of the facts I have outlined above, the applicants are entitled to a *mandament van spolie.*

To succeed in an application of this nature, the applicant only has to show that he was in possession of the property and was unlawfully ousted from such possession. This is trite.

To resolve the issue before me, I first have to determine whether or not the applicants were in possession of the facility at the time the respondents first moved onto the property. Without making a specific finding on the issue, I will at this stage accept the respondents' averment that they started to enter "*more regularly and frequently upon the premises in view of the cancellation of the lease agreement and having regard to the general deterioration in the maintenance and upkeep of the premises and the obvious need to rectify this untenable state of the premises"* in August 1998. This in my view will then mark the earliest time the respondents started dispossessing the applicants.

It has been argued for the respondents that the fact that they started making entries onto the property in August 1998 took away the right of the applicants to allege peaceful and undisturbed possession of the property in the proceedings before me. I am at a loss as to how the very act of dispossessing the applicants can be construed as taking away their right to allege that prior to that date, they were in peaceful

and undisturbed possession of the property. The fact that the applicants did not resort to litigation at this stage is irrelevant for the purposes of determining whether or not hay were in peaceful and undisturbed possession of the property. It may be relevant to the question of whether or not they consented to the dispossession.

In my view, possession is the physical relationship one has to property. One either has it or they do not. It lies in having control over the property with the intention of deriving some gain from that possession. Prior to August 1998, it has not been disputed that the applicants were in control of the facility. It is further not capable of dispute that they exercised that control in terms of the lease agreement between them and the respondents with the intention of conducting business for themselves. On the basis of this reasoning, I would find that the applicants had peaceful and undisturbed possession of the facility in August 1998.

The next issue I have to determine is whether or not the moving of the respondents onto the property in August 1998 dispossessed the applicants.

Spoliation has been described as any wrongful deprivation of possession. In the case of *Nino Bonino v De Lange* [2], a case that has since been followed in this jurisdiction, INNES CJ had this to say at page 122 about what constitutes spoliation:

> "*And the spoliation which the court would in this way set aside need not necessarily consists of acts of violence..... The best definition I have been able to find is the one given by Leyser who states that spoliation is any illicit deprivation of another of the right of possession which he has,.....*"

In *Ntshwaqela v Chairman,Western Cape Regional Services Council*,[3] HOWIE J held that squatters who had been made to leave a

2 1906 TS 120.
3 1988 (3) SA 218 (CPD).

certain farm, part of which they had occupied, by means of a threat of arrest by the police, had been dispossessed by means of duress and that such dispossession was unlawful. In so holding, the judge had this to say at p 225G of the report:

> "*In the present matter, applicants were dispossessed against heir will and without the authority of any order of this court, or any order of a magistrate's court ……. In acting as they did, whether as principles or agents, all respondents took the law into their own hands. They were guilty of what is called self-help. This Court must insist on observance of the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by due process of law. If he is interfered with unlawfully the court will not condone such interference. It will redress the situation pending the taking of lawful action for ejectment.*"

It appears to me from the foregoing that any action that results in a party parting with possession without his consent and outside the legal process can found an application for spoliation.

In the matter before me, there is no evidence that the applicants agreed to the "frequent" and "regular" entries of the respondents onto the property in August 1998. The respondents allege that they moved onto the property as they had advised the applicants that they were canceling the lease agreement. In fact, on 8 September 1998, the first applicant's legal practitioners wrote a letter to the respondents' legal practitioners challenging the cancellation of the lease. In that letter, the point that the applicants considered themselves to be in peaceful and undisturbed possession of the property is made.

At this stage it may be pertinent to deal with the issue raised by the respondents that the remedy *mandament van spolie* is not a remedy for settling contractual disputes. That this is the correct position as law appears from the case of *Parker v Mobil Oil of Southern Africa P/L*[4]. In

4 1979 (4) SA 250 (NCP).

that case, it was held that the remedy was not competent as Parker had conceded that the possession of the equipment would be of no use to him and had merely sought its possession as a way of enforcing the contract between him and the respondent.

I would distinguish the *Parker* case from the matter before me. In casu, the applicants never accepted the cancellation of the lease agreement. The litigation commenced by the respondents to cancel the lease was not prosecuted and is still pending between the parties. The relief sought before me for the restoration of possession of the facility is not being sought as ancillary to any other relief. Further, there is no indication that the applicants are seeking possession of the facility other than for the sake of regaining lost possession. For these reasons, I would hold that the *ratio decidendi* in *Parker*'s case is not of application to the facts before me.

While I have no doubts that the movement of the respondents onto the property in August 1998 was outside the legal process, the issue whether this on its own constitutes deprivation of possession for the purposes of a spoliation order has exercised my mind. I have posed this question because when the respondents moved onto the property, they did so in the presence of the applicant. Thus at one stage, both parties were on the property with one party exercising custody and control over the property greater than the other. A stage was eventually reached when the respondents were in full control of the facility even though the applicants maintained a presence at the facility.

In my view, August 1998 marked the beginning of the dispossession of the applicants. The dispossession continued even after the appointment of a provisional liquidator in November 1998. It was completed at some point when the guards posted on the property by the provisional liquidator were reduced in role to mere spectators and were no longer in control of the facility.

The issue that may arise at this stage is whether or not the provisional liquidator acquiesced on behalf of the company to this gradual dispossession. I have no evidence before me that he did. Indeed the respondents concede that the applicants protested by way of letters at the intrusion by the respondents onto the property. Some of the letters were directed to the provisional liquidator, prodding him into taking action against the respondents. Thus while the provisional liquidator did not take any positive steps to have the dispossession of the applicants declared wrongful and unlawful, the managers of the applicants, whose capacity to act on behalf of the applicants had been suspended during the period of provisional liquidation, protested at the dispossession on behalf of the applicants. I therefore find that the applicants cannot be held to have acquiesced to the dispossession at any stage.

One issue remains for my determination. It has been argued on behalf of the respondents that I must deny the applicants relief on account of the period of time that has lapsed from the time the applicants lost possession to the time the application for a spoliation order was made. In this regard, it has been highlighted before me that a period in excess of one year lapsed between the two dates.

In determining whether or not I should deny the applicant the relief they seek on account of the alleged delay, I have been guided by the decision in *Manga v Manga* [5] where GUBBAY CJ had this to say:

> *"I am satisfied that in casu a delay of five months cannot be regarded as consistent only with acquiescence on the part of the applicant in the dispossession. Nor was the delay so extensive as to disable the court a quo from granting any practical relief."*

In arriving at this decision the Supreme Court followed the decision in *Jivan v National Housing Commission* [6] where the unqualified

5 1991 (2) ZLR 251 (SC).
6 1977 (3) SA 251 (W)

proposition that the remedy *mandament van spolie* will be denied to an applicant who fails to take immediate action to have possession restored to him was rejected. The judge proceeded to qualify the proposition as detailed by the then Chief Justice in the *Manga* case.

My understanding of the legal position is that for any delay to operate to disable the court from granting relief to the applicant, it must be consistent only with a finding that the applicant acquiesced in the dispossession and further, must be so extensive as to disable the court from granting practical relief. As was stated at page 893 in the *Jivan* case:

> "*It is conceivable that the delay of an applicant to bring the petition either confirms or displays a state of mind in which the applicant acquiesced in the alleged disturbance of his possession, and, in such an event, I am satisfied that he would not be entitled to a mandament of spolie.*"

I am satisfied that the delay by the applicants in *casu* is not consistent only with a state of mind confirming or displaying that they acquiesced in the disturbance of their possession. The delay is clearly related to the provisional liquidation of the first applicant, put in motion by the respondents, for the reasons elaborated by Gillespie J in his judgment. [7]Further, in my view, the delay is not so gross that practical relief cannot be afforded the applicants.

On the basis of the foregoing, I would grant the application. I now make the following order:

1. The respondents are hereby ordered to forthwith restore possession of certain piece of land in the district of Hartley known as Strathmore, measuring 919,8006 hectares and held under Deed of Transfer No. 604/86 to the applicants failing which the Deputy Sheriff is hereby authorised to tale possession of the property and restore it to the applicants.
2. The respondents shall, jointly and severally, bear the applicant's costs, save for the costs of the 8th October 2002.

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7 HH 239/99

HC 5562/2000
Ref: HC 7118/98

Gollop & Blank, Applicant's legal practitioners.
Coghlan, Welsh & Guest, respondents' legal practitioners.