PHINIAS NGARAVA
versus
MRS MURINGAI
and
ISAAC KANYIMO
and
MR TICHAONA CHIDARO
and
MR FRANK
and
MR RICE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 5 August 2015

Urgent Application

K. Gama, for the applicant
T.C. Sengwe, for the 1st, 2nd & 3rd respondents
4th & 5th respondents in default

MATHONSI J: The applicant is a lawyer-cum new farmer who is a beneficiary of the government's land reform programme he having been allocated, under the A1 resettlement scheme, plots number 92 and 93 of Selby Farm resettlement area in Mazowe District. It is a self-contained piece of land measuring 30 hectares on which the applicant has, for 8 years been involved in crop production and the rearing of cattle. The applicant holds the land by virtue of a certificate of occupation issued by Mazowe Rural District Council in September 2009.

Despite lawful allocation of the land to him, the applicant has been the target of land invaders on 2 previous occasions which resulted in this court issuing court orders in his favour on 14 December 2009, per Guvava J (as she then was), and on 1 December 2011, per Bhunu J, in terms of which the illegal occupants were ordered off the land and directed not to disturb the applicant's farming activities. He says he has also been a victim of arson wherein his home and property including a motor vehicle were gutted by fire started by those fighting against his occupation of the land.

The plight of the applicant reminds one of the words of Holmes JA in *Oakland Nominees Ltd* v *Gelria Mining & Investments Co Ltd* 1976 (1) SA 441 (A) 452A that our law jealously protects the right of ownership and the correlative right of the owner in regard to his property. The learned Judge of Appeal proclaimed that:

> "The legal principle enunciated above is solidly noble because since time immemorial, at every stage of human evolution, societies have suffered the inevitable unfortunate phenomenon of having in their midst, an array of thieves, fraudsters, robbers, cutthroats, the throwbacks in evolution etc with no qualms whatsoever in employing force or chicanery to dispossess fellow humans of ownership of their property. If the law did not jealously guard and protect the right of ownership and the corrective right of the owner to his/her property, then ownership would be meaningless and the jungle law would prevail to the detriment of legality and good order".

Allied to that are legal principles that have evolved, in particular spoliatory relief, designed to reign in the rogue element in society with an affinity for taking the law into their own hands. It is fundamental to the basic precepts of any civilised society that people should not take the law into their own hands. Spoliatory relief is a pillar of civil justice, it chimes to a certain degree with the concept that public confidence in the administration of the law must, at all times, be maintained.

In spoliation proceedings all that has to be proved is that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing. As succinctly pronounced by Reynolds J in *Chesveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 240 (H) 250 A-D:

> "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".
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> See also *Mukuvisi Tashinga Housing Co-operative* v *Musukuma & Ors* HH 478/15.

The applicant complains that his occupation and use of the land allocated to him by the authorities has been repeatedly interfered with by different people the latest of which are the respondents herein. Although he takes quite some time indulging us about his son and his academic exploits and qualifications which is spectacularly irrelevant, the applicant complains that the 5 respondents recently invaded his plots led by the second respondent. Without a court order or other lawful authority they started allocating portions of that land to each other.

When their attention was drawn to the 2 previous court orders I have referred to they were unperturbed boasting that the land belonged to them, they had come to take it and that the applicant must go back to where he came from. In the process the applicant lost 2 head of cattle. On 28 June 2015 the respondents brought a lorry full of bricks which they off loaded. They chased away Daniel Madzitire who had been contracted by the applicant to plough, disk and plant maize on 14 hectares of the land. They brought more bricks on 29 June 2015 and started constructing illegal structures on agricultural and grazing land including land which had already been prepared for planting.

The applicant states that although he made a report to Marlborough Police station nothing has been done to stop the havoc and mayhem being perpetrated by the respondents who have even refused to divulge their full names. The applicant is sure their actions are meant to stop him from planting as the planting season is fast approaching. In the latest disturbances, the applicant lost 5 bags of fertiliser and 2 drums of diesel on 17 July 2015. The respondents are preventing the applicant from tilling the land while illegally putting up structures on his land. They are always armed to the teeth with knobkerries and catapults and are extremely violent.

The applicant therefore seeks an order, the interim relief of which is to interdict the respondents and their hanger lings from disturbing or interfering with his occupation and farming activities on the land in question. He also seeks the removal of the respondents and their illegal structures from the land.

Mr *Sengwe* who appeared on behalf of the first, second and third respondents took a point *in limine* that the matter is not urgent in light of the fact that it has taken the applicant more than 5 months to approach the court seeking relief. This is because the first alleged interference occurred on 2 December 2014 and the second on 16 December 2014. For that reason I should refuse to entertain the matter as urgent. The point *in limine* was not taken in good faith because Mr *Sengwe* deliberately ignored the main events, namely that on 28 June 2015 the respondents allegedly started delivering bricks onto the land. On 29 June 2015 they allegedly commenced construction of illegal structures on agricultural and grazing land which construction is said to be ongoing.

Surely the urgency or otherwise of the matter cannot be determined on the basis of events of 2 and 16 December 2014 set out to give chronology to the activities of the respondents at the plots. In my view the need to act arose from the construction of structures and the disruption of farming activities which occurred starting from 28 June 2015 when

Daniel Madzitire says he and his son were chased away from the plots by the respondents as they tried to prepare the land using a tractor.

I therefore find no merit in the point taken *in limine* which appears to have been raised as a matter of routine and not with any degree of seriousness as would determine the outcome of the application. It is accordingly dismissed.

Mr *Sengwe* submitted that indeed there is construction work which has been initiated at Plot 92 but that it is being undertaken by the first respondent who "is in the process of being allocated" that piece of land. She has not yet been allocated the land but has already taken occupation and commenced building structures. He challenged the applicant to produce proof of his right of occupation in respect of Plot 92 asserting that the respondents undertake not to interfere with his occupation and use of Plot 93 but certainly not Plot 92. In response Mr *Gama* for the applicant referred to annexure "E" to the founding affidavit which is a "Farmer Information Form A1/A2" issued by the Ministry of Lands and Rural Settlement in which the applicant is shown to occupy Plots 93 and 92 as well the court order granted by this court, per Bhunu J, on 1 December 2011 in terms of which the applicant's right of occupation of Plot 92 was not only recognised but protected as well. There is also a receipt showing that the applicant paid land levy for Plot 92 on 3 September 2012.

Mr *Gama* submitted that the documents clearly show that the government is aware of the applicant's occupation of Plot 92 and recognises it. The local authority has also accepted payment of levy for it in recognition of that right. If that occupation has to be terminated it is the government which should do so and not the respondents acting unlawfully. I agree.

What is apparent from Mr *Sengwe*'s submissions is that the first respondent has no lawful authority to occupy Plot 92. She does not have a certificate of occupation or any other authority for that matter. She has however occupied the land and commenced construction which interferes with the applicant's activities on that plot. Hers is resort to self-help in complete disregard of whatever activities the applicant is conducting at that piece of land, a very dangerous trait indeed which continues to manifest itself at the farms.

In seeking an interim interdict, the applicant must establish the essentials of that interdict namely:

(a) a right, which though *prima facie* established is open to some doubt;

(b) a well-grounded apprehension of irreparable injury;

(c) the absence of any other ordinary remedy; and

(d) a balance of convenience favouring the grant of the interdict.

See *Setlogelo* v *Setlogelo* 1914 AD 221 at 227; *Boadi* v *Boadi & Anor* 1992 (2) ZLR 378; *Tribac (Pvt) Ltd* v *Tobacco Marketing Board* 1996 (2) ZLR 52 (S) at 56; *Bozimo Trade and Development Co (Pvt) Ltd* v *First Merchant Bank of Zimbabwe Ltd & Ors* 2000 (1) ZLR 1 (H) 9 F-G.

The applicant has produced the certificate of occupation issued by the local authority. It would be recalled that when land is allocated under the A1 Settlement Scheme certificates of occupation are issued as opposed to offer letters which are issued under the A2 Settlement Scheme: *Sjambok & Anor* v *Chinyama & Anor* HH 118/15. Therefore a *prima facie* right has been shown. The complaint is that the respondents are disrupting farming activities and building structures on land being prepared for planting. The respondents have no regard for the law leaving the applicant with no other remedy but an interdict. For people who cannot possibly produce any lawful authority for their conduct, the balance would seem to favour the grant of an interdict.

In any event, there can be no doubt that the respondents have resorted to self-help thereby committing an act of spoliation. The applicant is therefore entitled to spoliatory relief which is a restoration of the *status quo ante* until the respective rights of the parties have been determined.

In the result, the provisional orders hereby granted in terms of the amended draft order.

Ngarava Moyo and Chikono, applicant's legal practitioners
Sengwe Law Chambers. 1st, 2nd & 3rd respondents' legal practitioners