

RANGANAI MTETWA
and
STUART GILMOUR
and
MC MEATS (PRIVATE) LIMITED
versus
JOSEPH CHIRAU DZVAKAKUYAMBWA
and
RADI CHIRAU
and
OFFICER-IN-CHARGE, NYABIRA POLICE STATION
and
COMMISSIONER-GENERAL OF POLICE
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 12 AND 19 MAY 2016

Urgent Chamber Application

T. Mpofo, for the applicants
T. Zhuwarara, for the 1st and 2nd respondents
C. Sigoza, for the 3rd, 4th and 5th respondents

MUSAKWA J: The applicants seek a spoliation order in which the “Remainder of Carswell of Killiemore, Nyabira” is to be restored to them. They also seek an order that the third and fourth respondents assist them in regaining possession of the land. Since a spoliation order is effectively final, Mr *Mpofo* abandoned the final order that was being sought in the form of an interdict.

It is not in dispute that in 2004 Carswell Farm (Private) Limited measuring 1 329, 3160 ha was compulsorily acquired by the government. Of this farm, subdivision 1 of Carswell measuring 664, 66 ha was offered to the first respondent in 2004 under the Land Reform and Resettlement Programme (Model A2). The remainder of the farm remains unallocated. In 2005 Carswell Farm (Private) Limited instituted a chamber application in

which was sought an order interdicting the first respondent from occupying the portion of land that was allocated to him. The application was dismissed by Guvava J (as she then was).

In a founding affidavit deposed to by the first applicant, it is averred that the third applicant has been in occupation of the unallocated portion of Carswell of Killiemore for the past thirteen years. The first and second applicants are employees of the third applicant and actually stay at the farm.

It is contended that the applicants have remained in occupation of the farm with the agreement of the Minister. It is further contended that the portion of land allocated to the first respondent is distinct from the one that is occupied by the applicants. The applicants are in occupation of the portion where an abattoir is located. The Chief Lands Officer confirmed that position in writing in 2007.

The first respondent has filed an application for the eviction of Carswell Farm (Private) Limited from the disputed piece of land (HC 2910/10). The second respondent in that pending application is the Minister of Lands and Rural Resettlement. A perusal of the relevant file shows that the Minister of Lands and Rural Resettlement is not opposed to the relief sought on the basis that the land in question was allocated to the first respondent in the present application.

What has precipitated the present application is that on 4 May 2016 the first and second respondents demanded that the first applicant move out of the farm house. Despite engaging police and other officers of the third applicant the third respondent is said to have told the first applicant to surrender the keys to the first respondent. On 7 May 2016 a Police Officer acting on instructions from the third respondent instructed the first applicant to remove his belongings from the farmhouse and relocate to the staff compound. The officer was in the company of the first respondent. Thereafter the first and second respondents instructed the second applicant to also vacate the house he was occupying. It is further averred that on 9 May 2016 the first and second respondents forcibly evicted the second applicant.

Although Ms *Siqoza* submitted that it is not the business of Police to meddle in civil disputes, this is what actually happened in the present matter. Police directed the first and second applicants to move out of the houses and to surrender the keys to the first and second respondents. Mr *Zhuwarara* submitted that the applicants complied with the Police directive. He further submitted that this dispels the contention that the applicants resorted to self-help.

It seems the dispute between the parties is in respect of the structures at the farm. Mr *Zhuwarara* submitted that what is contested is not where the abattoir is located but some dwellings that had been abandoned. He contended that this is why the first applicant claims the first and second respondents demanded that he return to the compound. Thus, according to Mr *Zhuwarara* the first applicant was seeking to occupy what he had not previously occupied.

Whilst the common law requirements for spoliation as enunciated in *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) may be said to have been met in the present case, that does not dispose of the matter. That is why Mr *Mpofu* referred to s 291 of the Constitution which I will revert to later. In light of s 3 (1) of the Gazetted Lands (Consequential Provisions) Act [*Chapter 20:28*] which criminalises the occupation of land without lawful authority, in *Commercial Farmers Union and Others v Minister of Lands and Others* 2010 (2) ZLR 576 (S) Chidyausiku CJ had this to say at p.594-

“It was submitted that the orders were issued in spoliation proceedings. Spoliation proceedings cannot confer jurisdiction where none exists. A court of law has no jurisdiction to authorise the commission of a criminal offence. In any event, spoliation is a common law remedy which cannot override the will of Parliament. A common law remedy cannot render nugatory an Act of Parliament.

Apart from this, there is the principle that a litigant who is acting in open defiance of the law cannot approach a court for assistance. See *Associated Newspapers of Zimbabwe (Private) Limited v Minister of State for Information and Publicity and Others* 2005 (1) ZLR 222 (S). Indeed if this point had been raised as a preliminary point, the probabilities are that this application would have been dismissed on that point alone. A former owner who is in occupation of acquired land in open defiance of the law cannot approach the courts for assistance.”

The Gazetted Lands (Consequential Provisions) Act defines lawful authority as-

“lawful authority” means—

(a) an offer letter; or

(b) a permit; or

(c) a land settlement lease;

and “lawfully authorised” shall be construed accordingly;”

This now brings into focus s 291 of the Constitution. The provision states that-

“Subject to this Constitution, any person who, immediately before the effective date, was using or occupying, or was entitled to use or occupy, any agricultural land by virtue of a lease or other agreement with the State continues to be entitled to use or occupy that land on or after the effective date, in accordance with that lease or other agreement.”

With the above provision in mind, Mr *Mpofu* submitted that any agreement, verbal or otherwise suffices to authorise a person to occupy agricultural land. This submission is quite sound. This means that the provisions of the Gazetted Lands (Consequential Provisions) Act have to be construed in conjunction with the Constitution.

Nonetheless, the contention by Mr *Mpofu* does not appear to favour the applicants. The first and second applicants claim to be in occupation of the farm by virtue of their employment by the third applicant. Reliance on the letter by the Chief Lands Officer is of no consequence.

The letter reads as follows:

“To Whom It May Concern

This letter serves to inform you that the maps that are being produced by Mr Chirau on subdivision of Killmore (*sic*) did not originate from the Ministry of Lands in Mashonaland West. The original plan was for Mr Chirau to get the proposed subdivision one, the one that has no abattoir.

Thank you.

Ndangana F.
Resettlement Officer
For: The Chief Lands Officer.”

The applicants have not proved any lawful authority in terms of any statute. The letter they seek to rely on does not confer any authority to them. If the third applicant had an agreement with the ‘Minister’, the nature of that agreement has not been explained. It is not for the court to surmise that the agreement was verbal when no such averment has been made.

Therefore the application is hereby dismissed with costs.

Wilmot & Bennet, applicants’ legal practitioners
Charamba & Partners, 1st and 2nd respondents’ legal practitioners
Civil Division of the Attorney-General’s Office, 3rd, 4th and 5th respondents’ legal practitioners