ALOIS CHIMERI
versus
NHLANHLA NGULUVE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 21 December 2016 & 5 January 2017.

Urgent Chamber application

I Mabulala, for the applicant
J Ndomene, for the respondent

TSANGA J: This is an application for a spoliation order. The applicant's averment is that he was in peaceful and undisturbed possession of a farm known as Turner farm in Zvimba. He said he has been renting this farm from the Ministry of Lands and Rural Settlement since 17 February 2011 until he was unlawfully dispossessed of the same by the respondents on 8 December 2016. He averred that the respondent has gone on to plant crops on the said farm and has forcibly taken keys from his farm manager who stays on the farm without any court order. He averred that he has been deprived of farming as his only source of livelihood as a result of the respondent's interference.

The application was vehemently opposed at the hearing on several grounds by the respondent's counsel, Mr *Ndomene*. The first ground for opposition was the non-citation of the relevant Minister. Secondly, he also argued that under the new constitution[1] the court's role in disputes involving land has been curtailed by s 72 (3). Thirdly, he stressed that contrary to the assertion by the applicant that he has been in undisturbed possession, his lease was cancelled by the relevant Ministry in 2014 and the respondent took occupation of the farm with effect from 28th of November 2014. He produced copies of documents showing that the lease had been cancelled and confirmation of him as the new lessee. He stated that at the time of cancellation of the lease the applicant had been in arrears to the tune of $18

[1] Constitution of Zimbabwe Amendment Act (No.20) Act 2013

000.00. Rental at the time was $6000.00 per year and he had never paid. He said that when the respondent took over the farm his rentals were reduced to US$2 213.00 a year for the farm because the applicant had vandalised equipment on the farm. He added that the respondent had to fork out a lot of money to replace the equipment hence the rent deduction. Mr *Ndomene* therefore argued that the relevant Minister should therefore have been cited to give an impartial analysis of the true position regarding the farm in question. He maintained that the matter should fail on urgency given that the respondent has been in occupation since 2014 and that he is the one recognised by the relevant Ministry.

On the merits, he argued overall that there was no basis for the claim of peaceful and undisturbed possession and the applicant had only been in peaceful possession prior to cancellation of his lease. He further emphasised that the continued occupation of the land was unlawful when the basis for the occupation had long since been cancelled. He argued that the application for a spoliation order had simply been brought to legalise an unlawful occupation as applicant has not had vacant and undisturbed possession since 2014.

The applicant's counsel Mr *Mabulala*, argued that as the application was about spoliation there was no need to join the Minister as it was not the Minister who had despoiled the applicant but the a respondent. He also argued that in any event, r 87 of the High Court Rules 1971 makes it clear that a court is not prevented from dealing with the merits whether or not there has been joinder or misjoinder. He further argued that both the respondent and the Minister had lodged applications to evict him. He said the respondent's application for eviction had been filed in the wrong province and therefore could not be dealt with whilst the Minister's application for eviction under HC 7599/16 was still pending in the High Court. He further argued that the fact that applications to evict him had been brought, in fact showed that he was still in possession. His point was that it was the respondent's self-help which he was seeking to challenge. He asserted that if this application for spoliation is dismissed, it would render the pending application by the Minister irrelevant. Additionally, he argued that the constitutional argument was not relevant in this case as the provision in question related mainly to the issue of compensation.

All that is required from an applicant in spoliation proceedings is to establish that he or she was in peaceful and undisturbed possession of the thing in question at the time they were deprived of possession. Such applicant must also prove that they were forcibly and

against their consent deprived of the possession. See *Gondo NO* v *Gondo.*[2] Key to remedy is the need to stop and reverse self- help in the resolution of disputes between parties. The purpose of spoliation order is:

> "not the protection and vindication of rights in general, but rather the restoration of the status quo ante where the spoliatus has been unlawfully deprived of a thing, a movable or immovable, that he had been in possession or quasi-possession of" See Zulu v Minister of Works, KwaZulu and Others [3].

Given that an applicant for a *mandament van spolie* must prove peaceful and undisturbed possession at time of deprivation of possession which has been taken to been sufficiently stable or durable possession for the law to take cognizance of it[4], I found it surprising that the full facts surrounding the claim were not disclosed in the application. The court has a right to be given the full facts of a matter in order to make an informed decision regarding the claim for peaceful and undisturbed possession as well as the urgency of the matter. As stated in the *Gondo* case physical control of a farm or residential premises requires actual possession and exploitation of the land by the possessor for their benefit.[5] The gist of respondent's opposition is that the applicant's lease was cancelled and that respondent took occupation in 2014. Yet in this application, neither the applicant claiming dispossession nor the respondent challenging it on the basis of denial of the *facta propanda* provided this court with evidence that they are the ones that have been fully exploiting the land. What was manifestly clear from hearing the parties is that there is a dispute between the parties emanating from the re-leasing of this land. If respondent has been in full and undisturbed occupation since 2014, then the quest for applicant's eviction by respondent himself and by the Minister remains unexplained.

Having made this observation, the balance of equities in view of the surrounding factual circumstances at this point, favours a granting of the spoliation order in favour of the applicant. I say because the case of *Chisveto* v *Minister of Local Government & Town Planning,* [6] makes it clear that an act of termination, (such as where there is a tenant/ landlord relationship) does not mean that there is no spoliation. As was stated therein:

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[2] *Gondo NO v Gondo* 2001 (1) ZLR 376 at p 378E-F.
[3] *Zulu v Minister of Works, KwaZulu and Others, 1992 (1) SA 181 (T)*
[4] *Ness and Another v Greef* 1985 (4) SA 641 (C) at 647
[5] *Gondo v Gondo at p 379 B citing van der Merwe and deWaal* The law of things and Servitudes (Butterworths, 1993) at para 58
[6] *Chisveto v Minister of Local Government & Town Planning* 1984 (1*) ZLR 248* at 250 A-D

> *"*it is a well-recognized 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*" (Beckus v Crous and Another *1975 (4) SA215 (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 as 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 does not fall for consideration at all. In fact the classic generalization is sometimes made that in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property."

Also as emphasised in the case of *Karori (Pvt) Ltd & Anor* v *Mujaji*[7] which applied the principles above mentioned, where a respondent believes that he has better rights to the farm than an applicant he would have to follow the necessary process to get vacant possession and cannot resort to self-help. The case of *Commercial Farmer's Union* v *Minister of Lands & Rural Resettlement* 2010 (2) ZLR 576 (S) at 596 also makes it clear that holders of offer letters, permits, and leases are not entitled to resort to self-help but must seek to enforce their right of occupation through the courts.

On the issue of joinder, the Minister of Lands clearly has a direct and substantial interest in the wider dispute that informs this matter and has indeed lodged an application for eviction of the applicant from the farm in question under HC 7559/16. The issue of the wrongfulness or illegality of the applicant's continued occupancy which respondent has sought to rely on goes to the merits of that matter. I am in agreement with Mr *Mabulala* that the applicant in this specific instance applicant has not been despoiled by the Minister of lands. Joinder was not necessary. Their case for eviction remains pending. Depending on the outcome, the applicant may or may not be evicted. The Minister is following the law in seeking a court order for eviction. There is no reason why respondent should seek to bypass lawful processes.

I also agree with Mr *Mabulala* him that s 72 (3) of the Constitution which the respondent relies on is not relevant *in casu*. This is not a dispute on compulsory acquisition of land by the state for agricultural purposes. It is also not a question about compensation. The nature of the dispute is clearly not one where it can be said that judicial review has been ousted as claimed by Mr *Ndomene*. The constitutional argument as so framed by the respondent's counsel is misplaced in this instance. What is

[7] *Karori (Pvt) Ltd & Another v Mujaji 2007 (1) ZLR 105 at 110 D-E*

specifically before me in cause is the issue of spoliation by the respondent whereby case law makes it clear that there is a need for a court order to evict the applicant even where a person has an offer letter or a lease.

Whilst the applicant seeks a spoliation the order, he has couched the order he seeks in the form of an interim interdict. An interdict is a different form of order altogether to a spoliation order as the latter is designed to restore the *status quo ante* as a result of unlawful possession arising from a party having taken the law into their own hands. In this instance, the unlawful possession arises from the act of dispossessing the applicant without a court order.

Cognisant of the fact that restoration of vacant possession may or may not ultimately be affected by the final outcome in HC 7559/16 or any other application for eviction which the respondent himself may lawfully bring, I accordingly grant the following spoliation order:

1. The respondent be and is hereby ordered to restore vacant possession of Turner Farm in Zvimba to the applicant upon service of this order, failing which the Sheriff be and hereby authorized to assist applicant to recover vacant possession thereof.
2. There shall be no order as to costs.

Mabulala & Dembure, applicant's legal practitioners
Maposa, Ndomene Maramba Legal Practitioners, respondent's legal practitioners