

**REPORTABLE** (17)

**J.C. CONOLLY AND SONS (PRIVATE) LIMITED**  
v  
**(1) R.C. NDHLUKULA (2) THE MINISTER OF LANDS AND  
RURAL RESETTLEMENT**

**SUPREME COURT OF ZIMBABWE  
GARWE JA, HLATSHWAYO JA & GUVAVA JA  
BULAWAYO, JULY 31, 2017 & MARCH 15, 2018**

*J. Tshuma*, for the appellant

*F. Museta*, for the first respondent

**GARWE JA**

[1] This is an appeal against the order of the High Court discharging with costs a provisional order granted in favour of the appellant on 17 June 2014.

**FACTUAL BACKGROUND**

[2] The appellant was the registered owner of four pieces of land held under a consolidated Deed of Transfer in Bulilima District, Figtree. The dispute in the court *a quo* and before this Court concerns one of the pieces of land known as subdivision A of Centenary measuring 1 304,5 hectares.

[3] On 17 September 2003, the Government of Zimbabwe, in a Government Gazette Extraordinary, listed for compulsory acquisition the property in question together with many others. In terms of s 16B of the former Constitution (as read with Schedule 7 of

the same) the property became vested in the State with full title therein. With the coming into force of s 72(4) of the current Constitution, the title to the property remained vested in the State.

[4] The land in question was offered to the first respondent in 2014 by the second respondent. The first respondent duly accepted the offer.

[5] On 1 May 2014, the first respondent arrived at the farm in the company of the District Administrator and local police officers. He left a copy of the offer letter issued to him and indicated that he would be taking occupation on 1 August 2014. On 25 May 2014, a person who identified herself as the first respondent's wife also came to the farm and indicated that she would be taking occupation on 1 June 2014.

#### *PROCEEDINGS IN THE HIGH COURT*

[6] Following the visit by the first respondent's wife, the appellant formed the view that the matter had become unavoidably litigious and consequently filed an urgent application for interdictory relief, in particular prohibiting the first respondent, and other persons claiming through him, from taking occupation of or moving cattle onto the farm until the legitimacy of his offer letter had been established. The appellant averred that, in the event that no interdict was granted, it stood to suffer serious financial prejudice as there would be intermixing of herds which would result in cross breeding and, potentially, communication of diseases.

[7] The application was heard by the High Court at Bulawayo on 17 June 2014. Although the application was served at the first respondent's residence, the first respondent did

not attend the hearing. The court then granted interim interdictory relief which, *inter alia*, called upon the first respondent to show cause why the order sought should not be confirmed on the return day.

[8] The first respondent opposed the confirmation of the provisional order. He averred that the land in question had been offered to him by the Minister of Lands and Rural Resettlement. He admitted visiting the farm to notify the appellant of the need to wind up operations within a period of three months. He further stated that the land in question had been gazetted by the State and attached a copy of the Gazette of 17 September 2003. In the circumstances, he submitted that there was no lawful basis for the confirmation of the provisional order previously granted as that would be tantamount to perpetuating criminality on the part of the appellant. He therefore sought an order discharging the provisional order.

[9] In its answering affidavit, the appellant averred that, by the time the provisional order was granted, the first respondent's wife had moved three of her workers into staff quarters at the farm. Between 1 and 2 August 2014, persons acting on behalf of the first respondent also moved onto the farm, rounded up appellant's pedigree herd and removed same from the farm, evicted appellant's labour force from the farm compound and directed that the gates leading to the irrigated vegetables be left unlocked. The appellant stated further that it had not at any stage been ordered by the Government to vacate the farm nor had any eviction order been granted by a court of competent jurisdiction. In the circumstances the appellant sought an order preventing self-help by the first respondent and confirming the provisional order.

[10] In its heads of argument *a quo* the appellant conceded that the farm had indeed been listed for acquisition and gazetted in 2003. The appellant consequently sought alternative relief in terms of a draft order it filed with the court. Further the appellant submitted that the first respondent was in contempt of the order issued by the court and that consequently an application seeking an order declaring him to be in contempt had been filed. It contended that as the first respondent continued to be in contempt of court he should therefore not be heard before purging such contempt. The appellant also submitted that it had the right to remain in peaceful occupation of the property until such time as an order was made by a competent court for its eviction. In short it submitted that by resorting to self-help, the first respondent had committed an act of spoliation.

[11] In his heads of argument *a quo* the first respondent submitted that the appellant, having lost title to the property, had no *locus standi* to show the existence of a *prima facie* right and that a court of law cannot grant an order the effect of which is to authorise the appellant to remain on gazetted land.

[12] In its judgment, the court *a quo* came to the conclusion, firstly, that it could not refuse the first respondent audience because the order of contempt granted against him had been appealed against and that such appeal was pending. Secondly, it found that the appellant, being in clear breach of the law as it remains in occupation of gazetted land without lawful authority, was not able to establish the existence of a clear right necessary in proceedings where a final interdict is sought. Accordingly it discharged the provisional order. Hence the present appeal.

*GROUNDS OF APPEAL*

[13] The appellant filed a total of nine grounds of appeal. Some of them are repetitive. The grounds are cited verbatim hereunder:

1. The honourable court *a quo* declined to determine the appellant's point in *limine* on the right of audience of the respondent prior to hearing argument on the merits. The respondent was, in fact, in contempt of the provisional order, and the learned court *a quo* erred at law in hearing the respondent despite this contempt, and misdirected itself in the position that it took.
2. The appellant's argument on the respondent's contempt of court was not dependent on the contempt of court order which had been appealed against, but on the actual events, and the position at the time of the court hearing argument on the return day. The learned court *a quo* erred at law in not paying regard to those facts.
3. The Honourable Court *a quo* did not determine the question of whether or not the respondent's actions did constitute self-help, which is against the law and accordingly, in not determining whether or not the respondent himself was in contempt of the law and could not be heard. This was a fundamental error at law and a misdirection.
4. The Honourable Court *a quo* erred at law in not applying the requirements of spoliation proceedings in this matter. The relief sought on the Return Day was spoliatory relief, owing to the respondent having taken occupation of the property at issue without due process.
5. The learned court *a quo* erred at law in determining that the appellant was in unlawful occupation of the property by reason that the land at issue had been gazetted. In making this determination, the Honourable Court *a quo* paid short shrift to the representations and overt encouragements given to the appellant by responsible government officials. The learned court *a quo*, accordingly, erred in not finding that these representations, which were not disputed, and were relied upon by the appellant to its detriment, were material to the matter.
6. There was, in this matter, clearly an element of estoppel following upon reliance on representations and advices of government officials on government policy, which element affected the question of unlawfulness, which question was the main determining factor upon which the court found that the appellant was in contempt of the law. The court *a quo*, therefore, erred in the finding that the appellant was in unlawful occupation of the property against the facts placed on record.
7. Further, the learned court *a quo* erred at law in dismissing the appellant's argument on a legitimate expectation on its part to be heard before it was evicted from the land in the full circumstances of this case.
8. The learned court *a quo*, while acknowledging that government officials might have made representations, and given encouragements to the appellant found that it was duplicitous of the government officials to have given the appellant false hope without ensuring that the appellant was issued with an offer letter. The duplicitousness of government officials, just like bureaucratic inefficiency and bungling, **does not** accrue to the detriment of a citizen. The learned court *a quo* erred at law in, effectively, allowing the appellant to be penalised and adversely affected, in this matter.

9. The learned court *a quo* erred at law in omitting to determine the question of whether due process was followed in the allocation of the land at issue to the respondent.

*APPELLANT'S SUBMISSIONS BEFORE THIS COURT*

[14] In heads of argument filed with this Court, the appellant submitted that the court *a quo* had misdirected itself in opining that the appellant had failed to demonstrate a clear right – a requirement one needs to establish where a final interdict is sought - when the appellant's case was predicated on the *mandament van spolie*. The court *a quo* should not therefore have concerned itself with the rights of the parties as the live issue at the stage of confirmation of the provisional order was whether or not spoliation had been established. Since it had been established that the appellant had been in peaceful and undisturbed possession and that the first respondent had despoiled it of such possession, the court *a quo* should therefore have confirmed the order of spoliation and ordered the restoration of the *status quo ante*. Before restoration of that status, the court *a quo* had no jurisdictional ability to evaluate the appellant's rights viz-a-viz the acquired land since the cause for possession is irrelevant and it is for that reason that even possession by a thief is protected. In short it was submitted that the relief sought *a quo* was for the confirmation of spoliatory relief that had already been granted. Further, in terms of s 74 of the Constitution of Zimbabwe, the court *a quo* cannot sanction the arbitrary eviction of the appellant in the absence of a court order.

[15] In oral submissions Mr *Zhuwarara*, for the appellant, conceded that, going by the founding affidavit, no spoliation had taken place at the time of the grant of the provisional order. However, it was his submission that after the interim order had been

granted, interference had taken place and the issue both at the confirmation stage and before this Court is whether spoliation had taken place.

*FIRST RESPONDENTS' SUBMISSIONS ON APPEAL*

[16] Mr *Mpofu*, for the first respondent, submitted that the appellant's founding papers confirm that what was sought was an interdict and not spoliation. Since the appellant had lost all rights to the land in question and, in short, is an outlaw, interdictory relief could not have been available to it as the law cannot interdict what is lawful. The appellant had sought an interdict pending the determination of the validity of the acquisition of the land and the offer letter. Once the appellant conceded that its land had been acquired and that an offer letter had been issued, it could not, in those circumstances, have been entitled to final interdictory relief.

[17] In further oral submissions, Mr *Mpofu* argued that once it was accepted that no spoliation had taken place at the time of the grant of the provisional order, then that really was the end of the matter. If spoliation took place after the grant of the provisional order, such spoliation should have been the subject of a separate order of spoliation. On the question whether the first respondent was in contempt, he submitted that the matter is the subject of separate proceedings which are pending before this Court. It would therefore not have been proper to refuse audience to the first respondent in respect of events that are subject to determination separately by this Court. In the circumstances he prayed for the dismissal of the appeal.

*ISSUES FOR DETERMINATION*

[18] Although the appellant filed a total of nine grounds of appeal, it is my considered view that, from the heads of argument filed and the oral submissions made, only four issues arise for determination before this Court. The four issues are the following:-

- (a) whether the court *a quo* erred in giving audience to the first respondent despite the allegation of contempt of court having been made against him.
- (b) whether the court *a quo* erred in dealing with the matter as a final interdict as opposed to spoliation.
- (c) whether the conduct of certain Ministry of Agriculture officials who encouraged the appellant to continue farming constituted an estoppel.
- (d) the effect, if any, of s 74 of the current Constitution.

I relate to each of these issues in turn.

*WHETHER THE COURT A QUO SHOULD HAVE REFUSED AUDIENCE TO THE FIRST RESPONDENT*

[19] It is common cause that, following the issue of the provisional order, the first respondent opposed the confirmation of that order. He denied having taken occupation of the farm. He also denied having interfered with any farming activities or having moved his cattle onto the land.

[20] In its answering affidavit the appellant averred that by the time the provisional order had been granted, the first respondent's wife had moved three people into one of the rooms at the staff quarters. Between 1 August and 8 August 2014, notwithstanding the existence of the provisional order, the first respondent or his wife or other persons



claiming through him had moved onto the farm, rounded up appellants' pedigree Hereford herd and removed the same from the farm; had evicted the appellant's labour from the farm compound and occupied the compound; had removed the Senepol pedigree herd and instructed the appellant's labour force not to lock the gate leading to the vegetable garden.

[21] Following what the appellant considered was the unlawful taking over of the farm by the first respondent, the appellant filed an application seeking an order, in HC 1856/14, that the first respondent be found to be in contempt of the order of the court *a quo*. Although the first respondent opposed that application, the High Court granted the order declaring the first respondent to be in contempt of court and further ordered that he complies with the provisional order. The first respondent appealed to this Court against that order. A further application seeking execution pending determination of the appeal was also filed by the appellant. Both matters had not been determined at the time of the disposition made by the court *a quo* which forms the basis of the present appeal.

[22] Whether the first respondent had a right of audience was an issue that was considered by the court *a quo*. At page 3 of the cyclostyled judgment, the trial judge remarked:-

“Ms Dube sought as a preliminary point the barring of the first respondent from being heard on the basis that he has not complied with the contempt order. It is common cause that the first respondent noted an appeal against the contempt order. Whilst acknowledging the appeal that was noted, Ms Dube persisted with the preliminary point on the basis that despite the noting of the appeal, the first respondent had still not complied with the provisional order. ...

[23] At page 5 of the judgment, the court *a quo* further remarked:-

“In light of the above case authorities, and relevant legislation, I found applicant counsel's preliminary point of seeking that the first respondent be denied audience to be untenable. The applicant has no legal right to the land in question ...”

- [24] The above remark that the first respondent could not be denied audience because the appellant had no right to the land was clearly erroneous. Whether the first respondent had a right of audience before that court had nothing to do with the question whether the appellant had any legal rights to the land. The appellant had submitted in its heads of argument that, despite the clear interdictory relief granted, the first respondent had nevertheless taken occupation of the farm and had disrupted farming activities thereon. On that basis, appellant had urged the court not to hear the first respondent until such time as he purged his contempt.
- [25] Notwithstanding the above error on the part of the court *a quo*, it is clear that, for the reason that follows, the decision by the court giving audience to the first respondent was, at the end of the day, the correct one. The appellant had instituted separate proceedings in HC 1856/14 for an order declaring the first respondent to be in contempt of court. The High Court did, in fact, find the first respondent guilty of contempt of court but this order was immediately appealed against and, at the time of the confirmation proceedings in that Court, the matter was pending before this Court. Also pending before the High Court was an application to execute the order that the first respondent was in contempt pending determination of the appeal.
- [25] The position is now settled in our law that the noting of an appeal suspends the execution of the judgment appealed against unless the court otherwise directs. See *Longman Zimbabwe (Pvt) Ltd v Midzi & Ors* 2008 (1) ZLR 198(S), 204 E-F. The general effect of the noting of an appeal is that no results can flow from the judgment appealed against which would place the parties in a position different from that which they enjoyed immediately before judgment was given. I therefore accept Mr *Mpofu's*

submission that the issue of contempt cannot properly arise on the papers. Whether or not the first respondent had conducted himself contrary to the order of the High Court was not common cause. That issue is the subject of an appeal that is pending before this Court. The suggestion that this Court should decline audience to the first respondent on the basis of a disputed contempt that is still to be determined by this Court cannot have been honestly made. On the facts before it, the court *a quo* had no basis for refusing to hear the first respondent and therefore correctly dismissed that preliminary point.

*WHETHER ESTOPPEL APPLIES*

[26] Both in its founding and answering affidavits in the court *a quo*, the appellant averred that between January and February 2014, two deputy Ministers of Agriculture had visited the farm to see first-hand the operations of the appellant and how its officials were working with the local community and resettled farmers. They expressed encouragement and support for the appellant's operations in the dairy industry and pedigree breeding project. This gave the appellant confidence that it was indeed permitted to continue its farming enterprise on the land. As government is composed of various Ministries, the appellant was led to believe that it had the tacit consent and permission of the government to continue with its farming activities. The appellant therefore believed it had a valid reason in terms of the law for its continued occupation of the farm.

[27] I do not believe that this submission need detain this Court. The visit by the two Deputy Ministers of Agriculture was intended to ascertain the operations of the appellant. There is no suggestion that they knew the legal status of the land that the appellant was

occupying. Indeed it is common cause that title to the land now vested in the Government and, as senior government officials in charge of the Agriculture Ministry, the two Deputy Ministers would have been aware that they had no jurisdiction to take over the functions of the Ministry responsible for land allocation and clothe the appellant with the necessary authority to continue farming.

[28] This Court has made it clear that in terms of the law, only persons with lawful authority can continue to possess or work agricultural land. What constitutes lawful authority, is now settled in this jurisdiction – *Commercial Farmers' Union and Others v The Minister of Lands and Rural Resettlement and Others* 2010(2) ZLR 576(S), 591C, 596C.

[29] In the circumstances, there can be no question of the State being estopped from denying that the appellant had the lawful authority to occupy the land. The visits by the Deputy Ministers of Agriculture had nothing to do with the legal status of the appellant's operations. They would not, in any event, have had the jurisdiction in terms of the law, to authorise the appellant to continue operations in the face of the fact that title now vested in the State.

*RELIEF SOUGHT A QUO – SPOLIATORY OR INTERDICTORY?*

[30] The real dispute between the appellant and the first respondent is whether the relief that the appellant sought in the court *a quo* was interdictory or spoliatory. The appellant says it sought an order of spoliation. The first respondent disagrees and submits that the relief the appellant sought was an interdict. In order to determine what relief exactly the appellant sought, one must go to the founding papers.

*THE CERTIFICATE OF URGENCY*

[31] The certificate of urgency was filed by one Jacobus Petrus Obelholzer, a legal practitioner. In that certificate he stated that the matter involved an offer letter which, as far as appellant was aware, had been issued in respect of land that had not been acquired by the State. He further stated:-

“The applicant stands to suffer serious prejudice of a financial nature should no interdict be granted urgently. In the event that the first respondent and/or his wife and /or persons claiming through him move onto the farm with their cattle, there will be intermixing of herds, which can barely be avoided on a farm of the size of Centenary. Intermixing leads to uncontrolled cross breeding and potentially to communication of diseases, which are both fatal to a business of pedigree rearing ...”

*APPELLANT’S FOUNDING AFFIDAVIT*

[32] In its founding affidavit, the appellant stated:

- “27. I now bring this urgent application for an order interdicting the 1<sup>st</sup> respondent from taking occupation of the farm and/or moving cattle onto the farm until the legitimacy of the offer letter is established by this Honourable Court.
28. In other words, because of the potentiality for grave prejudice to the applicant, and to the 1<sup>st</sup> respondent himself, as well as third parties who have financed the applicant which prejudice will follow if the 1<sup>st</sup> respondent is allowed to occupy on the basis of an offer letter which turns out to be improperly issued, there is need for this Honourable Court to issue a temporary interdict until the legitimacy of the offer letter is ascertained.
29. ...
30. ...
31. Therefore, from all appearances that farm has not been gazetted and the offer letter cannot, therefore, be valid.
32. The applicant, therefore, prays for an interdict to be issued pending disclosure of the full circumstances of the authority of the offer letter ...”

*ORDER OF THE COURT A QUO*

[33] The High Court issued the following provisional order:-

“TERMS OF FINAL ORDER SOUGHT

1. The offer letter issued by the 2<sup>nd</sup> respondent herein on the 13<sup>th</sup> February 2014 be and is hereby declared invalid and set aside.
2. The 1<sup>st</sup> respondent and all persons claiming occupation through him be and are hereby permanently interdicted from taking occupation of, or bringing cattle onto

the piece of land, namely a farm known as **Subdivision A of Centenary, measuring 1 304, 5441 hectares** situate in the Bulilima District until such a time as the applicant and all claiming occupation through it have been removed by order of a court of competent jurisdiction,

3. The 1<sup>st</sup> respondent and all persons claiming occupation through him be and are hereby directed to remove all cattle and belongings that may have been brought onto, or may remain on, the said farm forthwith.
4. The 1<sup>st</sup> respondent and all persons claiming occupation through him be and are hereby interdicted from interfering with the applicant's business operations on the said farm.
5. The respondents shall pay the costs.

#### INTERIM RELIEF GRANTED

Pending the return day, the following relief is granted:

1. The 1<sup>st</sup> respondent be and is hereby interdicted and barred from taking occupation of, or bringing cattle onto the piece of land, namely a farm known as **Subdivision A of Centenary, measuring 1 304, 5 441 hectares** situate in the Bulilima District.
2. The 2<sup>nd</sup> respondent is interdicted from taking any steps to evict the applicant from the farm described above.
3. It is hereby declared that until this application is determined on the Return Day, the applicant and all claiming occupation through it are entitled to remain in peaceful occupation of the farm, and to continue operations on the farm undisturbed.
4. In the event that the 1<sup>st</sup> respondent or any party claiming occupation through him has, by the time of service of this order, taken occupation of the farm, it is ordered that the 1<sup>st</sup> respondent or any such person shall vacate the farm immediately and restore occupation and possession to the applicant.
5. In the event of a party referred to in paragraph 4 above failing to vacate the farm in accordance with this order, the Deputy Sheriff is authorised and directed to evict such party from the farm."

[34] As already noted, following the issuance of the provisional order, the first respondent filed an opposing affidavit. In that affidavit, he denied interfering with the appellant's farming operations. He stated that the land in question had in fact been acquired by the State and attached a copy of the Government Gazette of 17 September 2003. He therefore opposed the confirmation of the provisional order.

[35] In its answering affidavit the appellant then averred that by the time the provisional order was granted, the first respondent's wife had taken occupation of the farm and evicted appellant's labour force from the farm compound. It further alleged that in the

absence of an order for the eviction of the appellant, the act of moving onto the farm was unlawful and in contempt of court. The appellant then prayed for confirmation of the provisional order and specifically stated that “an order of this Honourable Court is necessary in order to prevent self-help.”

[36] In its heads of argument, the appellant conceded that the farm had indeed been acquired by the Government. It then sought alternative relief. It also argued that it had established the clear right to remain in peaceful occupation of the property until such time as an order of court was issued for its eviction. The appellant then proceeded to cite a number of authorities in which it sought to argue that it had the right to remain in occupation and that the first respondent had in fact despoiled it of its possession of the farm.

*REQUIREMENTS OF AN INTERDICT NOT ESTABLISHED*

[37] Once it had been accepted that the farm had been lawfully acquired by the State and that full title in the property now vested in the Government, interdictory relief could not have been granted.

[38] In *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture and Rural Resettlement & Others* 2004 (1) ZLR 511(S) 518 A-B, MALABA JA, as he then was, stated:

“The appellant was not in a position to show the existence of a *prima facie* right of ownership in the land ... because at the time it applied for interim relief all the rights of ownership it had in the land had been taken by means of an order of acquisition and vested in the acquiring authority. When the appellant lodged the application for the interim relief before the court *a quo* the acquisition of the land by the State was a *fait accompli*, all rights of ownership having been extinguished on its part ...”

- [39] A party who has possession of agricultural land must show that he/she has lawful authority for such possession. In *CFU and Ors vs the Minister of Lands and Rural Resettlement & Ors, supra*, this Court made it clear that for one to have lawful authority, one must be in a possession of an offer letter, permit or land settlement lease.
- [40] The law is now established that an interim interdict will not be granted to a person whose rights in a thing have already been taken by operation of law at the time he or she makes an application for interim relief - *Airfield Investments (Pvt) Ltd vs Min of Lands, Agriculture and Rural Resettlement & Others* 2004 (*supra*). Indeed once a farm has been acquired, the rights over such farm vest in the State. That being the position the former owner and title holder has no *locus standi* to approach the court for an interdict because he or she cannot establish a clear right – *Cedor Park Farm (Pvt) Ltd v Minister of State for National Security and Ors* 2010 (2) ZLR 158 (H), 164 B-C.
- [41] Having regard to the above authorities, the appellant was therefore not in a position to establish a clear right. In the circumstances interdictory relief – even on an interim basis – could not and should not have been granted.

*SPOLIATION PLEADED FOR THE FIRST TIME IN ANSWERING PAPERS*

- [42] It is clear that the issue of spoliation only surfaced for the first time in the answering affidavit and heads of argument filed on behalf of the appellant. In that affidavit the appellant conceded that the farm had been lawfully acquired by the State.
- [43] In its heads of argument before this Court, the appellant exerted much energy on the issue of spoliation. It argued that its petition “was merely for confirmation of an order



of spoliation that the very same court had already determined to be deserving and granted.” It further argued that the proceedings, having been spoliatory, “consideration of the factors relevant in an application for an interdict were irrelevant.” The illegality or otherwise of the possession was not an issue as the aim of spoliation is to prevent the kind of self-help that the first respondent resorted to in this case.

*AN APPLICANT STANDS OR FALLS ON ITS FOUNDING PAPERS*

[44] The position is now settled in this jurisdiction that an applicant stands or falls by his founding affidavit and the facts alleged in it. Although it is sometimes permissible to supplement the allegations contained in the founding affidavit, the main basis of the application is the allegation of facts stated therein. A number of decisions of the courts in this country have stressed this position – see *Moven Kufa & Anor v The President of The Republic of Zimbabwe & Nine Ors*, CCZ 22/17 and the authorities cited on pages 14-15 of the cyclostyled judgment.

[45] More to the point are the remarks of MCNALLY JA in *Keavney & Anor v Msabaeka Bus Services (Pvt) Ltd* 1996 (1) ZLR 605 (S). At page 608 C, the learned judge cited with approval the remarks by MULLINS J in *Nieuwoudt v Joubert* 1988(3) SA 84c that:-

“The purpose of pleadings is to define the issues, and to enable the other party to know what case he has to meet.”

The learned judge further cited with approval the remarks of MILNE J in *Kali v Incorporated General Insurance Ltd* 1976 (2) SA 179(D) at 182A that:

“A pleader cannot be allowed to direct the attention of the other party to one issue; and then at the trial attempt to canvass another.” (at 608 B).

Indeed the learned judge went further to suggest that the failure to plead the real defence or cause of action may suggest sheer idleness or incompetence on the part of the legal practitioner, or a deliberate and unconscionable attempt to avoid attracting an onus or burden of adducing evidence or, lastly, that the defence was an afterthought.

[46] The above sentiments apply with equal force to this matter. The appellant approached the court applying for interdictory relief. Indeed at that stage there was a mere threat of occupation by the first respondent. No spoliation had taken place. This is common cause. The provisional order was granted on that basis. What therefore fell for determination on the return day was whether the provisional order should be confirmed. As already noted, it could not have been confirmed, once the appellant had accepted that the land had indeed been lawfully acquired. It was not permissible, on the part of the appellant and on the same papers, to introduce the issue of spoliation later in the proceedings and seek to obtain that relief in place of the interdictory relief initially prayed for.

*IN ANY EVENT SPOLIATORY RELIEF IS FINAL*

[47] The law is settled that an order of spoliation is final in nature and that it determines the immediate right of possession of a particular *res*. It is frequently followed by further proceedings between the parties concerning their rights to the property in question – *Nienaber v Stuckey* 1946 AD 1049, 1053; *Malan & Another v Green Valley Farm Portion 7 Holt Hill 434 CC and Others* 2007 (5) SA 114 (ECD), 124 A-B; Moreover a spoliation order cannot be granted on the evidence of a *prima facie* right - *Blue Range Estates P/L v Muduvisi* 2009 (1) ZLR 368, 377D.

[48] The appellant's argument is that the issue that fell for determination on the return day was whether or not spoliation had occurred. The inevitable corollary of that argument is that an interim order of spoliation was granted in terms of the provisional order issued by TAKUVA J and that before MUSAKWA J the issue that fell for determination was its confirmation. Clearly this does not accord with the law. In any event Mr *Zhuwarara* did concede, before this Court, that at the time the founding papers were drawn and commissioned, the act of spoliation had not taken place.

#### *ALLEGATION OF SPOLIATION AROSE AFTER GRANT OF PROVISIONAL ORDER*

[48] The allegation that spoliation had taken place only arose after the grant of the provisional order. It is common cause that the first respondent in his opposing papers disputed having taken occupation and that the alleged act of spoliation formed the subject of separate proceedings for contempt of court which remain pending before this Court. I agree with Mr *Mpofu* that the course open to the appellant after the alleged spoliation had taken place was to launch a new application for spoliation and not seek to substitute spoliation in place of the interim interdict that had been granted on the faulty basis that the offer letter issued to the first respondent was not a legally binding document.

#### *SECTION 74 OF THE CONSTITUTION*

[49] The appellant argued, for the first time in heads of argument, that in terms of s 74 of the current Constitution, it had the right not to be arbitrarily evicted in the absence of a court order. It is unclear where this submission comes from. The issue is not part of the appellant's grounds of appeal. It was not argued before the court *a quo* and indeed that court made no finding on it. The provision cited deals with arbitrary evictions.

That was not an issue before the court *a quo* which was seized with the question whether or not to confirm the provisional order. Equally it is not an issue before this Court. This submission must therefore fail.

*DISPOSITION*

[50] There being no merit to this appeal, it is dismissed with costs.

**HLATSHWAYO JA**

I Agree

**GUVAVA JA**

I Agree

*Webb, Lowe & Barry*, appellant's legal practitioners

*G.N. Mlotshwa & Company*, respondents' legal practitioners