JEPHAT GUTE
versus
AMOS JUMBE

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 15, 22 January 2009 and 18 March 2009

**Opposed Application**

*S Gahadzikwa*, for the applicant
*T Machinga*, for the respondent

UCHENA J: The applicant owns number 10 Ziko Township in Chitungwiza, on which he operates a butchery. On 1 November 2007 he entered into a lease agreement with the respondent, in terms of which the respondent leased the butchery together with equipment listed in the lease agreement. At the termination of the lease the equipment was to be surrendered back to the applicant together with the premises. When the lease came to an end the respondent surrendered the premises and other equipment. He however took with him, a hanging scale, digital scale and deep freezer.

It is common cause that the respondent signed the lease agreement acknowledging receipt of equipment including, the hanging scale, digital scale and deep freezer. He can not now claim that, the equipment he took from the butchery belongs to him

The applicant applied for an order directing the respondent to return the property in dispute to him. His application has aspects which tend to show that he was not only applying for a spoliation order. In para 2 of the draft order he seeks the following order:

> :
> "Failure of (sic) returning the actual assets. The respondent replaces and returns the nearest equivalent of the listed items to the satisfaction of the applicant within the aforesaid period."

This order can not be granted in an application for a spoliation order which merely seeks to restore the status *quo*. In an application for a spoliation order the court can only order the restoration of the status *quo* without determining the parties' respective rights. Mr *Gahadzikwa* applied for an amendment of the draft order by the deletion of para 2. I granted the amendment, and will now determine whether or not the applicant was despoiled.

Mr *Gahadzikwa* referred me to the cases of *Crause* v *Ryersbach* (1882) 1 SAR 50, *African Ice Co* v *Kalk Bay Fisheries* 1907 TH 263, *Burnham* v *Neumeyer* 1917 TPD 630, *S* v *Singiswa* 1981 (4) SA 403, and *Frasmus* v *Durryd Farms* 1982 (2) SA 107. He submitted that the cases prove that a lessee can despoil the landlord by refusing to return the leased property.

Mr *Machinga* on the other hand submitted that the law on this aspect is not settled as some of the authorities state that a lessee despoils the landlord if he at the end of the lease agreement refuses to return leased property. See the cases of *Dawood* v *Robb & Co* 1933 CPD 178 and *Crause* v *Reyersbac* (*supra*). He however referred the court to the case of *Boompret Investments* v *Paadekraal Concession Store* 1990 (1) SA 347 A in which the South African Supreme Court, suggested a contrary view. VAN HEERDEN JA at 353 D- F said:

> "When a lessor has given occupation of property to a lessee, there is of course, no question of an unlawful deprivation of possession. If, at the expiration of the lease, the lessee refuses to return the property to the lessor, his continued possession thereof may or may not be unlawful, depending on whether he has acquired an independent title to the property. In any event, in such a case it cannot be said that the lessee is taking the law into his own hands or that he is committing a breach of the peace. Having regard to the fundamental principle of the *mandament van spolie* there must consequently be considerable doubt whether the remedy is at all apposite when a lessee is sued for ejectment at the termination of the lease."

It is common cause that the South African Supreme Court did not deal with this issue directly but did so by way of *obita dictum*. The issue has therefore not been settled. It is however my considered view that the exposition of the law is correct in respect of an application for the ejectment of a lessee who is still in possession of the leased property, and is merely refusing to hand it back to the lessor.

Mr *Gahadzikwa* submitted that this case can be distinguished from the case of Boompret (*supra*).

It is true that the facts of this case can be distinguished from those of the Boompret case (*supra),* but the distinction is of no benefit to the applicant. The applicant's relationship with the respondent is no longer that of lessor and lessee. That relationship came to an end at the termination of the lease. In terms of the lease agreement the property was to be surrendered back to the lessor. The respondent surrendered the premises and other movable property, but did not surrender the property in question. He took it away from the butchery he was leasing from the applicant without his consent. He claims contrary to the lease he signed that the property belongs to him. If it does he would be entitled to take it away. Even if it does not he

lawfully took possession of it at the commencement of the lease agreement. He from that time became a lawful possessor of the leased property. The *mandament van spolie* is premised on the unlawful taking of property from another who should be in peaceful and undisturbed possession at the time of being despoiled. In this case the applicant had not resumed possession of the property in dispute at the time the respondent took it away from the butchery. He can not therefore be said to have unlawfully dispossessed the applicant. He simply converted the property to his own instead of surrendering it back to the applicant. The conversion though probably insufficient to bestow ownership, does not constitute an unlawful taking from the applicant who had not resumed possession of the property. A spoliation order is aimed at restoring the status *quo*. The despoiled must be allowed to regain possession. In this case the status *quo* is that the respondent was the possessor, and the applicant the owner who intended to regain possession. If the applicant's application for a spoliation order succeeds he would regain possession of the property he lawfully handed over to the respondent at the commencement of the lease. He would through the *mandament van spolie* regain possession he did not loose by an unlawful taking, but by the act of leasing it to the respondent.

The *mandament van spolie* is therefore not applicable in this case. The applicant should institute a vindicatory action. He therefore used an incorrect procedure.

In the result the applicant's application is dismissed with costs.

*Gahadzikwa & Mupunga*, applicant's legal practitioners.
*Machinga & Partners*, respondent's legal practitioners.