

JOHN CAMERON ASHER

versus

MINISTER OF STATE RESPONSIBLE FOR
NATIONAL SECURITY, LANDS, LAND REFORM
AND RESETTLEMENT IN THE PRESIDENT'S OFFICE

and

T. NYIKADZINO

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE, 18 & 26 February 2009

Urgent chamber application

Mr. Nyandoro, for the applicant

Mr Parenye, for the 1st respondent

Mr Mlotshwa, for the 2nd respondents

CHATUKUTA J: The applicant seeks a spoliation order. He claims to have been in peaceful and undisturbed possession of 8 Welston Farm in the district of Mashonaland East Province (the farm). He alleges that the possession was disturbed by the 2nd respondent on 5 February 2009 when a group of 10 youths drove to the farm when he was away for the day. The group, acting under the instruction of the 2nd respondent, took occupation of the farm and the main homestead and locked the applicant out. The applicant submits that the 2nd respondent did not have any lawful authority to despoil him.

Mr Parenye, for the 1st respondent, submits that the 1st respondent would abide by the court's decision. The 2nd respondent submits that he does not dispute that he has taken occupation of the farm. He however raises two issues *in limine*, that, by operation of law, the applicant does not have the *locus standi* to seek spoilatory relief and the court does not have the jurisdiction to grant the relief sought. The 2nd respondent contents that

the applicant is occupying the farm in contravention of section 3(1) of the Gazetted Lands (Consquential Provisions) Act [*Chapter 20:28*] (Gazetted Lands Act). It has been submitted that any finding that the applicant has the *locus standi* would be tantamount to sanctioning and facilitating an illegal act. *Mr. Mlotshwa*, for the 2nd respondent, has referred me, in support of this contention, to a number of cases such as *Airfield Investments P/L v Minister of Lands & Ors* SC 36/04, *Zakeyo Mereki v Bell In Pvt*) HH 113/05, *Airport Gamepark P/L & Anor v Kenny Karidza & Anor* SC 14/04 .

Mr. Nyandoro, for the applicant, submits that in determining an application for a spoliation order, the court is not concerned with the ownership of the farm or the lawfulness of the possession. He concedes that the farm was acquired by the State. He however contends that the applicant should only be dispossessed by due process of the law.

Spoliation has been described as a wrongful deprivation of possession. The essential requirements for spoliation are set out in *Botha & Anor v Barret* 1996 (2) ZLR 73 where at 79D-E, GUBBAY CJ (as he then was) stated that:

“It is clear that in order to obtain spoliation order, two allegations must be made and proved. These are:

- (a) that the applicant was in peaceful and undisturbed possession of the farm; and*
- (b) that the respondent deprived him of the possession forcibly or wrongfully **against his consent.**”*

(also see *van t’Hoff v van t’Hoff & Ors* (1)1988 (1) ZLR 294 (HC), *Chisveto v Minister of Loal Government and Town Planning* 1984 (1) ZLR 248 (H), *Davis v Davis* 1990 (2) ZLR 136 (HC), *Matimbura v Matimbura* SC 173/1998, *Magadzire v Magadzire* SC 196/1998, and *Karori (Pvt) Ltd & Anor v Brigadier Mujaji* HH 23-07.)

I am in agreement with *Mr Nyandoro’s* contention that it is not for this court to determine the ownership of the farm. It appears to me that the fact that the 1st respondent acquired the land and would therefore deal with it as it wishes is not in issue. However, it is not relevant in determining the applicant’s *locus standi*. The fact that the applicant is in occupation unlawfully is also not the issue. The issue is whether or not the applicant can prove, on a balance of probability, that he was in peaceful possession of the farm and

the possession was unlawfully or wrongfully interrupted by the 2nd respondent. I do not believe that to do so would be to facilitate a perpetuation of an unlawful act. Section 3 of the Gazetted Lands Act provides what is required to be done in order to evict the applicant from the farm. The provision does not, in my view relate to the main homestead only. It appears it relates to the entire farm that has been gazetted. Section 3(3) reads:

“ If a former owner or occupier of Gazetted land who is not lawfully authorised to occupy, hold or use that land does not cease to occupy, hold or use that land after the expiry of the appropriate period referred to in subsection (2)(a) or (b), or, in the case of a former owner or occupier referred to in section 2(b), does not cease to occupy his or her main homestead in contravention of proviso (ii) to section 2(b), he or she shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.”

My understanding of the section is that a former owner or occupier of Gazetted land, be it the entire land or the main homestead, who continues to occupy, hold and use such land without lawful authority shall be guilty of an offence. Section 3(3) captures two scenarios, (1) where a former owner or occupier may continue to occupy, hold and use the entire Gazetted land (including the main homestead) and (2) where a former owner or occupier has ceased to occupy, hold and use the rest of the land and has confined himself or herself to the main homestead. In the first case, the owner or occupier would be in possession of the entire farm. In the second case the owner or occupier would be in possession of the main homestead only after having voluntarily relinquished possession of the rest of the farm. In either case, the owner or occupier can only lose possession upon conviction and the issuance of an eviction order by the magistrates court.

It is my view that the cases referred to by *Mr Mlotshwa* do not assist the 2nd respondent. It appears to me that *Airfield Investments P/L v Minister of Lands & Ors (supra)* and *Airport Gamepark P/L & Anor v Kenny Karidza & Anor (supra)* are distinguishable from the present case. In the first case, the appellant had sought an interim interdict against the State from proceeding with the compulsory acquisition of the appellant's land. In the second case the appellant sought an order for the ejectment of the 1st respondent from a farm that had been acquired by the State. In both cases, the appellants were required to establish the existence of some right. In the case of

spoliation, as indicated earlier, the applicant need only establish peaceful and undisturbed possession.

It is therefore my considered view that the applicant has the *locus standi* to bring this action. The second preliminary issue is premised on more or less the arguments advanced in support of the first issue. I find that I have jurisdiction to hear the matter for the same reasons advanced above.

Turning to the merits, the definition of spoliation and the requirements for an order for spoliation have already been discussed above. The parties are agreed that the applicant was in peaceful and undisturbed possession of the farm. It is not in issue that the 2nd respondent is in occupation of the farm. *Mr. Mlotshwa* has attempted to discredit the application. He submits that the applicant has not placed before the court proof that there had been some disturbances on the farm. He suggested that this would have been achieved by way of an affidavit by the person who witnessed the disturbances as the applicant was not at the farm at the relevant time. I am of the view that this is a red herring as the 2nd respondent has conceded in the opposing affidavit and Heads of Argument that the applicant was in peaceful and undisturbed possession of the farm and was dispossessed by operation of law. The import of this concession is that the applicant's possession was disturbed. It is irrelevant whether or not the disturbance was peaceful or as a result of the youths who applicant alleges locked him out of the property.

What in my view is in issue is whether or not the 2nd respondent deprived the applicant of the possession wrongfully. *Mr. Nyandoro*, for the applicant, submits that respondent deprived the applicant of his possession wrongfully in that the due process prescribed in the Gazetted Land Act was not followed. The applicant does not dispute that the offer letter is lawful authority for the 2nd respondent to take occupation. It is contended that it must however be implemented lawfully.

Mr. Mlotshwa contends that the 2nd respondent is in lawful possession by operation of law. He submits that the 2nd respondent was at all times acting lawfully in terms of the offer letter lawfully issued to him by the 1st respondent. It was further contended that the Gazetted Lands Act permits only those persons with lawful authority to occupy, hold and use Gazetted land. The applicant did not have the authority prescribed in the Gazetted Lands Act to occupy, hold or use the farm. The 2nd respondent

is a holder of an offer letter. His attempt to occupy and use the land cannot therefore be said to be unlawful. *Mr. Mlotshwa* submitted that the offer letter was therefore a valid defence to spoliation.

It is my considered view that an offer letter cannot be a defence because of the requirements of section 3(5) of the Gazetted Lands Act. As rightly conceded by both parties section 3(1) of the Act precludes any person to hold, occupy or use Gazetted land without lawful authority. An offer letter is such authority. It appears to me that in order for the recipient of the offer letter to enjoy occupation and use of that land s/he must have vacant possession. Vacant possession can only be achieved where the due process of law set out in section 3(5) of the Act is followed. Section 3(5) clearly provides that upon conviction of a person who has violated the provisions of the Gazetted Lands Act, the court shall issue an order to evict the person convicted from the land to which the offence relates. It appears to me that until that is done a former owner or occupier of Gazetted land can not be dispossessed whether or not his or her possession of the land is lawful.

Earlier on I alluded to *Mr. Mlosthwa's* submissions that the applicant is entitled to protection only in so far as the protection relates to the main homestead. It is my view that the main homestead cannot be separated from the entire farm by an order of this court. It is an integral part of the farm. The Gazetted land is 8 Welston Farm in the district of Mashonaland. There has not been any subdivision such that the main homestead is a stand alone. The homestead still constitutes Subdivision 8 of Welston. The 2nd respondent's proposed draft order seems to acknowledge this fact. The draft order reads:

“Pending Applicant's eviction, by a competent Court, from Subdivision 8 of Welston, it is hereby declared that Applicant and/or his invitees is (*sic*) entitled to confine his and /or their presence on the said farm to the main homestead.....”

The draft order does not state that the applicant will be evicted from the main homestead. Had the position been that the applicant was dispossessed of the rest of the farm, excluding the main homestead, by operation of law, then the 2nd respondent would have been seeking an order for the eviction of the applicant only from the homestead. The

effect of the 2nd respondent's contention is that the applicant was evicted from the rest of the farm (excluding the main homestead) by operation of law. Had this been the intention of the legislator, it appears to me that the Gazetted Lands Act would have specifically stated so.

I am of the view that the applicant has established his case on a balance of probability that the *status quo ante* should be restored. The restoration of the *status quo ante* in my view entails the removal of the 2nd respondent from the farm. In this respect, the decision in *Airport Gamepark P/L & Anor v Kenny Karidza & Anor (supra)* would not apply. I however believe that as the Zimbabwe Republic Police is not before me, it is not proper to order their involvement in the eviction of the 2nd respondent.

In the result, it is ordered that:

Pending the determination of this matter, the applicant is granted the following relief, that:

1. The applicant's possession, use and occupation of 8 Welston Farm in the district of Mashonaland East Province be and is hereby restored, so that the *status quo ante* is achieved.
2. The 2nd respondent and all persons claiming occupation and possession through him be and are hereby ejected from 8 Welston Farm in the district of Mashonaland East Province.

Musunga & Associates, applicant's legal practitioners

Civil Division, Attorney General's Office, 1st respondent's legal practitioners

Messrs Antonio, Mlotshwa & Co, 2nd respondent's legal practitioners