T NYIKADZINO
versus
JOHN CAMERON ASHER
and
MUSUNGA & ASSOCIATES
and
THE DEPUTY SHERIFF
and
THE MINISTER OF STATE FOR LANDS
AND RURAL RESETTLEMENT.

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 12 and 13 March 2009.

URGENT CHAMBER APPLICATION

Mr G Mlotshwa for applicant.
Mr G Nyandoro for 1st to 3rd respondents.
Mr C Parenyi for 4th respondent.

MAKARAU JP: The applicant and the first respondent were before this court on 18 February 2009. Then their roles were reversed. The first respondent was applicant in a matter in which on 26 February 2009, this court issued a provisional order in his favour, restoring occupation of certain farming land to him, occupation of which had been forcefully taken by the applicant.

The facts giving rise to the dispute between the parties are common cause. I set them out as follows.

The first respondent carries on farming on 8 Welston farm in Mashonaland East. The farm was gazetted by the government under the land acquisition programme. In due course, occupation of the farm was granted to the applicant under an offer letter. Despite the gazetting of the farm, the first respondent did not vacate the farm after the expiry of the periods set out in the law.

On 5 February 2009, the applicant approached the farm in the company of others and took occupation of the farm during the absence of the first respondent. It was on this basis that the first respondent approached this court, claiming that he was in peaceful possession of the farm prior to the applicant's occupation and had thus been despoiled. This court, having heard argument in the matter, issued an order as follows:

"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 that 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."

Unhappy with the order of the court, the applicant filed an appeal with the Supreme Court challenging the correctness of the provisional order issued on certain grounds that are not material to this decision. In noting the appeal, the applicant formed the very firm view that the provisional order issued by this court was in the nature of a final order and thus the provisions of the law requiring leave before an appeal can be noted against an interlocutory order did not apply. Notwithstanding the noting of the appeal, the first respondent instructed the deputy sheriff to enforce the provisional order restoring possession of the farm to him. He was advised that the appeal noted in the Supreme Court was a nullity as no leave of this court had been obtained prior and in view of the fact that the provisional order issued is indeed a simple interlocutory order.

Again unhappy with the turn of events, the applicant approached this court on a certificate of urgency, seeking an order staying execution of the provisional order pending determination of the appeal.

The application was opposed by the first to third respondents, with the fourth respondent maintaining a watching brief in the matter.

It is not in dispute between the parties that the order issued by this court was provisional. While the written order does not specify that the relief granted is in the interim pending confirmation or discharge of the provisional order, the parties understand it in this light. The difficulty that the applicant has in the matter is two fold. Firstly, he is of the view that the order although granted as a provisional order is final in effect. Secondly, he is also of the view that the granting of the order has the effect of assisting the first respondent to remain in occupation of the farm in violation of a specific provision of the law regulating land acquisition and reform.

It is also quite clear and not in dispute that the interim order issued by this court on 26 February 2009 was a spoliation order, simply restoring possession of the farm to the first respondent without going into the merits regarding lawfulness or otherwise of such possession.

In my view, *Mr Mlotshwa* correctly identified the issue that falls for my determination in this application. It is not whether or not there is an extant appeal before the Supreme Court but whether or not the order granted by this court was a final order thereby obviating the need on the applicant's part to apply for leave before noting an appeal in the matter.

In support of his argument, *Mr. Mlotshwa* makes one broad submission. He argues that a spoliation order, by its very nature is a final order. In reliance, he cites the cases of *Mankowitz v Lowenthal* 1982 (3) SA 758 (A) and *Van Rooyen v Burger* 1961 (1) SA 154 (O), authorities that are cited in Silberberg & Schoeman's Law of Property 4th Ed at page 270.

I am in full agreement with this view.

It is however worth noting that in *Mankowitz v Loventhal* (supra), the court was dealing with the question of costs that had been reserved for decision in an action resolving ownership of certain paintings that were the subject of the dispute between the parties, whose possession had been restored to the applicant in the spoliation proceedings. It was in that context that the court pronounced that spoliation is a final order and the question of costs in the spoliation proceedings should have been determined by the trial court as there was nothing interlocutory about the order that it had issued.

Again it is to be noted that the spoliation order that was appealed against in the *Van Rooyen v Burger* (supra) was clearly a final order granted after a full hearing in the matter.
The issue that has exercised my mind in this matter is whether a spoliation order granted as interim relief in a provisional order under the rules of this court is a final order for the purposes of section 43 (2)(d) of the High Court Act[Chapter 7.06].

It is trite that a provisional order granted under rule 246(2) of the High court Rules 1971, is granted upon the judge sitting in chambers being satisfied that the papers filed disclose a prima facie case. It is also trite that the burden of proof in al civil matters is proof on a balance of probabilities.

A provisional order granted under the rules is always subject to confirmation or discharge before it becomes final. Confirmation or discharge is in open court and is on a balance of probabilities. In a provisional order, the power of the court to vary discharge or

confirm its earlier decision is reaffirmed in that it calls upon the respondent to show cause why the provisional order may not be confirmed.

It is because of the above attributes of a provisional order that I am of the view that orders granted by this court in the form of a provisional order, can hardly be final in their effect. In my further view, a provisional order cannot be the basis of a plea of *res judicata* during the proceedings to confirm or discharge the order.

In *casu*, *Mr Mlothwa* has sought to argue that the wording of the order granted in this matter makes it final in effect in that it has already pronounced on the right to possession and the unlawfulness of the applicant's actions. Indeed it has but only on a prima facie basis. The applicant is not precluded to mount a challenge to these findings upon the matter being set down for the confirmation and discharge of the order. He may argue that the first respondent has not proved his entitlement to a spoliation order on a balance of probabilities or that the applicant has a defence to the application for a spoliation order. No issues are *res judicata* as yet in the matter and the High court in my view is still seized with the matter and may correct, vary, set aside or confirm its earlier decision.

On the basis of the foregoing, I am satisfied that the order issued by this court on 26 February 2009 is an interlocutory matter and that the High Court is still seized with the matter.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant is to bear the respondents' costs.

Antonio, Mlotshwa & Co, applicant's legal practitioners.
Musunga & Associates, 1st 2nd and 3rd respondents' legal practitioners
Attorney- General's Office, 4th respondent's legal practitioners.