**REPORTABLE (41)**

**(1) AUGUSTINE BANGA (2) KEVIN JAMES**
**v**
**(1) SOLOMON ZAWE (2) THE DEPUTY SHERIFF (3) THE OFFICER IN CHARGE, BORROWDALE POLICE STATION**

**SUPREME COURT OF ZIMBABWE**
**MALABA DCJ, GWAUNZA JA, GOWORA JA,**
**PATEL JA & HLATSHWAYO JA**
**HARARE, NOVEMBER 6, 2013 & SEPTEMBER 8, 2014**

*T Mpofu*, for the appellants
*T Magwaliba*, for the first respondent

**GWAUNZA JA:** This is an appeal against the entire judgment of the High Court, Harare, which was handed down on 20 March 2012. In that court, the first respondent *in casu* brought an urgent application against the present first appellant and two others for an interim spoliation order.

The brief facts of the matter are as follows:

Since 2004, the first respondent occupied and used for business related to poultry, a part of the farm known as Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm. It is not in dispute that the first respondent did not own the farm in question but occupied and used the part on which fowl runs were located, initially in terms of what he referred to as a lease agreement, and later in terms of an alleged 'caretakership' agreement with the Government. Neither of these documents was tendered into evidence. On 11 November 2011, the Provincial Administrator for Harare Metropolitan Province addressed a letter to the first

respondent, directing that he vacates the premises in question to allow full use of the farm by the legal owner thereof. On 28 February 2012, the present appellant, purporting to act in terms of a power of attorney granted in his favour by the registered owner of the farm, who is the second appellant in this case, put chains and new locks on to the gate leading to the farm in question, thereby effectively locking the respondent out and barring him from entering the premises. The first appellant also placed security guards by the same entrance. It is not disputed that, on or soon after the day of the alleged spoliation, the respondent unsuccessfully sought to effect delivery of a consignment of chicks on to the disputed premises. The appellants alleged, and the first respondent denied, that he vacated the premises in question of his own accord following receipt of the letter from the Provincial Administrator for Harare Metropolitan Province, and in any case before the date of the alleged spoliation.

The first respondent's efforts to enlist the assistance of the police to regain entry onto the premises were futile, a circumstance that prompted him to file the urgent application that led to the High Court order now being appealed against.

The court *a quo* found in favour of the first respondent and issued an order in the following terms;

> "In the result, an interim order is granted on the following terms;
>
> 1. The second and third respondents restore undisturbed possession of Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm to the Applicant within one hour of the granting of this order.
> 2. The second and third respondents remove all chains and locks on the gate leading to the farm, within one hour of the granting of this Order.
> 3. Should the first, second and third respondents fail to restore undisturbed possession of Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm to the applicant within one hour of the granting of this Order, then the fourth and fifth respondents are hereby ordered to restore applicant's quiet use and undisturbed possession and to seek the assistance of a locksmith if necessary.

3(a) In the event that the intervention of the fourth and fifth respondents is necessary, the second and third respondents be and are hereby ordered to pay the fourth respondent's costs.

4. That second and third respondents and all those claiming occupation of Plot 4 Sun Valley Borrowdale, also referred to as Welston Farm through them be and are hereby interdicted from interfering with the applicant's quiet and undisturbed enjoyment and possession of the premises."

The appellants' appeal is premised on a number of grounds which may be summarised as follows:

1. The court *a quo* misdirected itself by granting a final order for the occupation and use of the entire property known as Plot 4 Sun Valley, Borrowdale, Harare (Welston Farm) when the applicant therein had only sought provisional relief in respect of the chicken runs situated on that property;

2. The court *a quo* erred in finding that the legal requirements of a spoliation order had been met; and

3. The court *a quo* erred in determining crucial factual issues in the face of material disputes of fact.

These grounds of appeal will be considered in light of the evidence before, and the reasoning of, the court *a quo*.

***1. Whether the court a quo misdirected itself by granting a final order for the occupation and use of the entire property known as Plot 4 Sun Valley, Borrowdale, Harare (Welston Farm) when the applicant therein had only sought provisional relief in respect of the chicken runs situated on that property.***

The appellants argue that, in not restricting its order to the portion of the property in question on which the first respondent ran fowl runs, the court *a quo* had misdirected itself by granting relief that was not sought from it. Specifically, it is argued that the court effectively granted occupation and use of the whole farm to the first respondent, thereby barring others who lawfully had a right to occupy and use the rest of the farm.

There is merit in the appellants' arguments. The first respondent, in the court *a quo,* initially attached to his papers a draft provisional order which sought spoliatory relief pertaining to the whole of the farm, that is, Plot 4 of Sun Valley, Borrowdale. However in his answering affidavit, he stated as follows;

> "I therefore continue to pray for an order in terms of the Amended Draft Order."

Page 46 of the record contains a document entitled "Amended Provisional Order". The provisional spoliation order that the first respondent now sought related to:

> "the portion of Plot 4 Sun Valley, Borrowdale, also referred to as Welston Farm where the fowl runs are and any portion which the applicant previously had control of and access to ..."

Evidently the first respondent narrowed his claim to encompass only the part of the farm that he had access to and used for running his poultry breeding operations. The learned judge *a quo,* however and with no explanation tendered, cited and granted the relief sought by the first respondent, as set out in the original discarded draft provisional order. Additionally and contrary to the provisional nature of the order prayed for, the learned judge granted a final order. The result, as correctly submitted for the appellant, was that the court *a quo*

> "not only restored possession of the fowl runs, but also gratuitously awarded the first respondent, in a final order, the entire property, including portions he hitherto did not

possess or have access to."

There can be no doubt that this evinces a clear misdirection on the part of the *court a quo*.

I find accordingly that the order of the court *a quo* was, in the respects alleged, incompetent.

In any case, even had the court *a quo* properly confined its order to the relief sought by the first respondent, the latter would still have had to confront the crucial hurdle of disproving the appellant's main ground of appeal, as indicated below.

***2. Whether or not the requirements of a mandament van spolie were met***

In determining this issue the judge *a quo* correctly cited the leading case of *Kama Construction (Private) Limited v Cold Comfort Farm Cooperative and Others* 1999 (2) ZLR 19 (SC) and listed the legal requirements for a *mandament van spolie* set out therein, which the applicant must prove on a balance of probabilities.

These are that:

(i) the applicant was in peaceful and undisturbed possession of the thing; and

(ii) he was unlawfully deprived of such possession.

In the case of *Botha and Anor v Barrett* 1996 (2) ZLR 73 (S) at 79E, also cited by the learned judge *a quo*, the court qualified "unlawful deprivation" to mean that the

respondent deprived the applicant of possession '*forcibly and wrongfully against his consent'*.

The court *a quo* went on to list the valid defences against a spoliation claim, among them that:

i) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and;

ii) the dispossession was not unlawful and therefore did not constitute spoliation.

The argument has been advanced *in casu* on behalf of the appellants that the first respondent, having previously and of his own accord vacated the premises, was in fact not in possession thereof, peaceful or otherwise, on the day in question. Possession being an essential element in spoliation proceedings, I find it necessary to first consider whether or not the facts established that the first respondent was in possession of the disputed premises at the relevant time. Should I so find, I would then consider whether such possession was peaceful and/or undisturbed.

According to the learned authors *Silberberg and Schoeman's 'The Law of Property', Second Edition* at page 114:

> "'Possession' has been described as a compound of a physical situation and of a mental state involving the physical control or *detentio* of a thing by a person and a person's mental attitude towards the thing. … whether or not a person has physical control of a thing, and what his mental attitude is towards the thing, are both questions of fact".

It is trite that in spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the status *quo ante* pending the determination of the dispute between the parties. This principle is clearly stated thus by the learned authors *Silberberg and Schoeman*, supra, at pages 135-136:

> "… the applicant in spoliation proceedings need not even allege that he has a *ius possidendi: spoliatus ante omnia restituendus est* …. All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession …. It is not sufficient to make out only a *prima facie* case …"

The evidence *in casu* shows that the first respondent relied on a number of documents and circumstances in his attempt to prove his entitlement to, and the fact of his having been in, possession of the premises in question. These were:

a) a lease agreement, not tendered into evidence and which had long since expired, entered into with one Mr Laing in 2004, the year in which he allegedly took possession of the disputed premises;

b) a "caretakership" agreement with the Government which, again, was not tendered into evidence;

c) that prior to the date of the alleged spoliation, he had brought chicken feed onto the premises;

d) that he was on the disputed premises 'everyday' until the 28th of February, 2012, the day of the alleged dispossession, and still had workers there; and

e) that on or about the day itself, he had sought, *albeit* unsuccessfully, to effect delivery into the fowl runs of some 120 000 chicks.

The court *a quo* was persuaded that the first respondent was indeed in possession of the premises in question at the time of the alleged spoliation, and that he had, therefore, been unlawfully dispossessed. The basis of such conclusion is apparent from the following excerpt at page 4 of the judgment of the court *a quo*:

> "The applicant explained that he occupied the property in question by virtue of a lease he entered (*sic)* with the first respondent …. I do not think that the applicant is expected to give a better answer than that …"

It is evident that the court *a quo* premised its conclusion that the first respondent was in possession of the disputed premises on his claim to a *ius possidendi*, that is, the right of possession. This is clearly a misapprehension of the applicable principle authoritatively enunciated by *Silberberg and Schoeman*, above. On the basis of this principle, the lease agreement in question and the alleged 'caretakership' agreement with the government that the first respondent sought to rely on, do not constitute a valid basis to establish possession on the day of the alleged spoliation. In any case, the appellants do not dispute that the first respondent, for a number of years prior to the alleged spoliation, had access to and use of the premises in question.

The first respondent, as indicated in paragraphs (c)-(e) also, correctly, sought to rely on factual evidence to show that he was in possession of the disputed premises on the day of the alleged dispossession. He attached to his answering affidavit Annexure 'C', which appears to be an invoice dated 20 January 2012, suggesting the purchase of chicken feed to be delivered to 'Sun valley, B'dale'. The appellants, however, disputed the prior delivery of chicken feed to the premises as claimed by the first respondent. Their evidence was that the premises in question were completely devoid of anything belonging to him that may have pointed to his possession thereof on the day in question.

I find that the invoice referred to, on its own, is insufficient to establish that the delivery of the chicken feed was in fact effected to the disputed premises. No supporting affidavit from another person attesting to such delivery has been filed. I take the view, in the light of this inconclusive evidence, that what the first respondent alleges can at best be taken as *prima facie*, not definitive, evidence of a claim to possession. I am satisfied it falls short of the requisite standard for possession, as set down in the authority cited above.

It is the first respondent's further assertion that he was on the premises in question 'every day', including the date of the alleged dispossession. He uses strong words to deny that he ever vacated the premises. He explains in his answering affidavit that his chicken business was run in staggered phases, where periods of time separated the various stages of the chicks' development, for instance, the period between 'harvesting' of grown chickens and the delivery of a new batch of chicks. A possible implication of this is that the first respondent and/or his workers may have stayed away from the premises during periods when there was little or no business activity underway. While this seems to contradict his assertion that he was on the premises 'everyday', it also, significantly in my view, reinforces the contention by the appellants that, at the time of the alleged spoliation, neither he nor his workers and any equipment of his were on the disputed premises.

The appellants insist that the first respondent had taken all his equipment and other assets and vacated the premises well before the date of the alleged dispossession. They contend this was in pursuance of a directive for him to do so, which was issued by the Provincial Administrator for Harare Metropolitan Province. It is not in dispute that this directive was contained in a letter to the first respondent dated 11 November 2011, which among other things called upon the first respondent to 'take away your equipment locked in

these shades by you (sic)'. It was after this event, the appellants further contend, that 'it was noticed' that vandals had started destroying infrastructure and other assets on the premises, a circumstance that had prompted them to put chains and locks on the gate to the farm and place guards by the gate, as a way of 'securing' the premises in question.

Beyond stating that he was on the farm 'every day' including the day of the alleged spoliation, and that he had workers on the premises, the first respondent has not tendered any other evidence to substantiate this assertion. He does not explain where he was at the time of the actual spoliation. Nor how the appellants were able, without any resistance from him nor any of his workers, to change keys and locks to the premises and to the main gate, effectively barring him from entering the premises. His claim, disputed by the appellants, to have workers resident on the premises has also not been backed up with any other evidence. Other sworn evidence might have helped to shed light on exactly how the alleged spoliation was carried out, who was present when it happened and whether any resistance, by or on behalf of the first respondent, had been put up against such a move. As already indicated, spoliation involves the element of dispossessing a person forcefully without his or her consent.

In the light of this, I find merit in the appellants' argument that the court *a quo,* in holding that the first respondent had been wrongfully dispossessed, misdirected itself when it stated as follows on page 6 of the judgment:

> "The defence raised by the respondent is that there was no unlawful dispossession. However, this does not appear to be supported by the surrounding facts. One would have expected there to be proper handover of the property to the respondents"

It hardly needs emphasis that the very nature of spoliation entails a defended, forceful and unlawful operation carried out in circumstances far removed from the situation where an applicant peacefully hands over the disputed 'thing' to the spoliator. In other words, had the first respondent 'properly' handed over the disputed premises *in casu*, there would have been no question of his having been dispossessed.

The appellants do not dispute that there was an attempt by the first respondent to deliver a consignment of chicks on or about the day of the alleged dispossession. However, like his evidence regarding the delivery of chicken feed, I find that the first respondent failed, on the basis of an attempt to deliver a consignment of chicks to the premises, to establish, to the required legal standard, that he was present or otherwise in possession of the premises in question on the day of the alleged spoliation. His absence from the premises may have been due to him having previously vacated the place altogether. Or it could have happened within a period during which there were no business operations going on there. In either case, the fact remains that the first respondent was, at the relevant time, not in physical possession of the property in question. As for his mental attitude concerning physical control, or *detentio,* of the premises, I find that whatever concept of such control he might have entertained in his mind did not find expression in events on the ground. He left no indication on the premises, for instance skeleton staff, that he or at least his business was still physically present thereon. The probabilities in my view favour a finding in support of the appellants' contention that the first respondent had relinquished possession of the premises on some unknown occasion, before the date and time of the alleged spoliation.

In the final result, it is the finding of this court that the first respondent failed to discharge the *onus* that he bore, to prove the compound referred to by the cited authority,

of a physical situation and of a mental state involving the physical control or *detentio* of the thing, that is the premises in question, at the time of the alleged spoliation. Accordingly, not having been in possession of the premises at the relevant time, he could not have been unlawfully dispossessed. In view of the fact that the alleged possession has not been proved, it follows that the need to qualify it as either peaceful or undisturbed falls away.

There is therefore merit in the second ground of appeal cited above, and it is upheld.

I am in the final analysis satisfied that the appellants proffered valid defences to the first respondent's claim for a spoliation order.

It should be pointed out that there is, on record, a substantial amount of evidence to suggest that the first respondent's past possession of the premises in question was neither peaceful nor undisturbed. This evidence is however no longer relevant in view of the finding made that the first respondent was not in possession, peaceful or otherwise, of the premises in question at the time of the alleged dispossession.

Since I consider the finding of this court on the competency of the order appealed against and also on whether or not spoliation was proved to be dispositive of this appeal, I do not consider it necessary to address the other grounds of appeal given by the appellant.

Accordingly, I make the following order.

1. The appeal be and is hereby allowed.
2. The order of the court *a quo* is set aside and substituted with the following:

"The application be and is hereby dismissed with costs."

3. The first respondent shall bear the costs of this appeal.

**MALABA DCJ:** I agree.

**GOWORA JA:** I agree.

**PATEL JA:** I agree.

**HLATSHWAYO JA:** I agree.

*Advocates of Zimbabwe*, appellants' legal practitioners

*Advocates Chambers*, first respondent's legal practitioners