REPORTABLE (45)

ZONDIWA NYAMANDE
v
(1) ISAAC TAMUKA MAHACHI (2) CHITUNGWIZA MUNICIPALITY (3) MANYAME RURAL DISTRICT (4) MINISTER OF LANDS, AGRICULTURE, WATER FISHERIES, CLIMATE AND RURAL DEVELOPMENT

SUPREME COURT OF ZIMBABWE
GUVAVA JA, MUSAKWA JA & MWAYERA JA
HARARE, OCTOBER 17, 2022 & MAY 29, 2023

T. Zhuwarara with *N. Ndlovu,* for the appellant
P. Mufunda, for the first respondent
T. Muchini, for the second respondent
No appearance for the third and fourth respondents

GUVAVA JA:

[1] The High Court (the 'court *a quo*') granted an application filed by the first respondent on an urgent basis for spoliatory relief. The appellant, disgruntled by the decision, appealed to this Court.

[2] At the commencement of the hearing, counsel for the appellant raised a point *in limine* that the second respondent's heads of argument were improperly before the court as they were filed in support of the appeal. He thus prayed that they be struck out with no order as to costs. Counsel for the second respondent, Mr *Muchini,* was not opposed to the striking out of the heads of argument. As a result, an order by consent was issued

striking out the second respondent's heads of argument. There was therefore no appearance for the second respondent before the court.

FACTUAL BACKGROUND

[3] The first respondent is the holder of an offer letter for subdivision 6 of Braemar Farm in Seke District (the farm) under the jurisdiction of the Manyame Rural District Council. The farm was allocated to him on 17 November, 2009 and is 122,540 ha in extent. The farm had been gazetted on 3 September 2004 in the Government Gazette Extraordinary Vol. LXXXII, No. 72. The acquisition of the farm by government is still extant.

[4] On 10 May 2022, the first respondent filed an urgent chamber application for a spoliation order against the appellant. The first respondent alleged that on 5 May 2022 at around 3.00 pm the appellant instructed his workers to build a two roomed house and a surrounding wall in his cattle grazing area. The appellant proceeded to dig trenches for the wall and completed building the two roomed house. Upon enquiring from the appellant about the reason why he had built a structure on his farm, the appellant responded that he had been allocated the piece of land by the second and third respondents for the purpose of constructing a school. The first respondent requested for a meeting with the appellant as a means to iron out the issue but the appellant declined to attend. The first respondent reported the invasion by the appellant to the police but did not get much assistance. The first respondent thereafter made an application for a spoliation order in a bid to recover the portion of the farm that had been taken by the appellant.

[5] The appellant opposed the application. In his opposing affidavit, he raised five preliminary objections. Firstly, he alleged that the first respondent had no cause of action against him. It was appellant's position that he was entitled to occupy and possess the portion of the farm as it was now Stand Number 7727 Nyatsime Township (the 'stand'). The appellant further stated that he acquired the stand through a lease agreement entered into between him and the second respondent. He further stated that the stand was not part of a farm but was a planned urban settlement which fell under the jurisdiction of the Manyame-Chitungwiza Joint Committee. The appellant also stated that the land on which the first respondent was entitled to occupy was different from where his stand was situated as evidenced by the layout plan and site plan for the area.

[6] The second preliminary point was that the remedy of spoliation was wrongly sought. It was appellant's view that any charge against the appellant should have been for trespass and not spoliation. The third point was that the application was made using the wrong form thus failing to comply with the rules of court. The fourth point was that the matter was not urgent and finally that the first respondent ought to have joined the Minister of Local Government and Public Works as well as the Manyame-Chitungwiza Joint Committee to the proceedings. On the basis of these preliminary points the appellant sought an order that the application be dismissed.

[7] On the merits of the matter, the appellant denied sending his workers onto the first respondent's farm. He argued that the piece of land belonged to him and that he was developing it in order to build a school. He maintained that the first respondent was never in peaceful and undisturbed possession of the land where the appellant built his structure as such piece of land did not belong to him. The appellant further averred that

the first respondent was mistaken in thinking that the stand was part of his farm as evidenced by the lease agreement.

[8] The second respondent opposed the application and raised a preliminary point that the application was not urgent. On the merits, the second respondent averred that the gazetted land on which the farm stood, had since been placed under the jurisdiction of the Manyame-Chitungwiza Joint Committee as established under S.I. 211/21. The second respondent averred that the stand was allocated to the appellant lawfully with all processes duly followed. It was also the second respondent's averment that the offer letter issued to the first respondent had since been withdrawn by the fourth respondent. The second respondent thus prayed for the dismissal of the application.

[9] The third respondent also opposed the application and raised two preliminary points. The first point being that there was non-joinder of the Manyame-Chitungwiza Joint Committee and secondly that the matter was not urgent. On the merits of the matter, the third respondent averred that the first respondent failed to furnish any proof that he was in peaceful and undisturbed possession of the land occupied by the appellant. Further, that the first respondent failed to fulfil the requirements to be satisfied in an application for spoliation.

[10] Not to be outdone, the fourth respondent also opposed the application and raised the preliminary point that the matter was not urgent. On the merits, the fourth respondent averred that the offer letter giving the first respondent authority over the farm was withdrawn on 7 February 2015 and the land was subsequently parceled out to the Ministry of Local Government and Public Works. Thus, the fourth respondent

suggested that the offer letter in the possession of the first respondent was null and void and therefore he had no legal right to be on the farm.

DETERMINATION BY THE COURT *A QUO*

[11] The court *a quo* in dealing with the application found no merit in the preliminary points raised. The court *a quo* held that an application for spoliation is urgent by its nature and thus the application was properly before it. It also found that there was a valid cause of action before it as first respondent had an offer letter in his possession which gave him a right to be on the land. It held further that the form which had been used by the first respondent was not the correct one but found that there was substantial compliance with the rules. It further found that non joinder of a party to proceedings did not necessarily vitiate the proceedings.

[12] With regards to the merits of the case, the court *a quo* found that the land occupied by the first respondent was a commercial farm held by the fourth respondent. As it was a commercial farm it fell outside the jurisdiction of the Ministry of Local Government and Public Works, the second and third respondents. They thus had no mandate over the farm. The court found that the Minister of Local Government and Public Works had no power or authority to establish or expand an urban settlement. The court held that the second and third respondents could not come on the first respondent's farm and impose conditions on that land. It held further that the appellant had no legal basis to take the land from the first respondent as this was the sole prerogative of the President.

[13] The court *a quo* noted that the actions by the second respondent in issuing a lease agreement to the appellant amounted to an exercise of authority reposed only in the

President and that such actions were therefore illegal and criminal. The court a *quo* accordingly found that the first respondent was despoiled of his farm and granted the application for spoliation against the appellant. It also ordered that the appellant and all those claiming occupation through him must vacate the farm. It made a further order that the appellant must remove all structures which he had constructed and refill all the trenches that he had dug on the farm.

[14] Aggrieved by the decision of the court *a quo*, the appellant appealed to this Court on the following grounds of appeal;

(1) "The court *a quo* erred in finding that the requirements for spoliation were satisfied in circumstances where the 1st respondent failed to establish that the appellant was in occupation of subdivision 6 of Braemar Farm Plot thereby despoiling him.

(2) The court *a quo* erred in granting spoliatory relief in circumstances where there was no evidence before it that the appellant's [illegible] 2nd respondent related to a farm and not a designated stand.

(3) The court *a quo* erred in affording the relief of spoliation in circumstances where there existed material dispute of fact as to which land belonged to the appellant and which land belonged to the respondent.

(4) The court *a quo* erred in holding that the matter was urgent in circumstances where the urgency was self-created by the 1st respondent.

(5) The court *a quo* erred in determining that the appellant had a cause of action against the appellant in circumstances where they were in occupation of different pieces of land.

(6) The court *a quo* erred in ordering the appellant to pay costs of suit on a higher scale in the absence of evidence on record justifying such a course."

THE APPELLANT'S SUBMISSIONS ON APPEAL

[15] Counsel for the appellant, Mr *Zhuwarara*, submitted that the appellant had proved before the court *a quo*, that the land that the first respondent alleged to have been dispossessed of by the appellant was non-existent. Counsel argued that the offer letter issued to the first respondent was withdrawn by the fourth respondent and as such he had no legal

right to occupy the land. He further argued that the court *a quo* ignored S.I 211/21 that had empowered the appellant to use the land in issue. Counsel further argued that there is evidence on record to show that the fourth respondent had informed the court that the farm no longer existed as it was now council land.

[16] Counsel submitted that the judgment in *Commercial Farmers Union & Ors v Minister of Lands and Rural Settlement & Ors* 2010 (2) ZLR 576 (S) made it unlawful to seek spoliatory relief for anyone who was in occupation of acquired agricultural land. He further argued that spoliation cannot occur in relation to a thing that does not exist and hence that the court *a quo* granted relief that was a *brutum fulmen*.

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

[17] Counsel for the first respondent, Mr *Mufunda*, submitted that the issue of the withdrawal of the offer letter was raised for the first time during the hearing before the court *a quo*. Neither the fourth respondent nor the appellant had produced a copy of the notice of withdrawal of the offer letter. Counsel further submitted that the matter had to be postponed to allow for the withdrawal letter to be furnished to the court. He further argued that there was no due process to notify the first respondent that there was a withdrawal of the offer letter. It was counsel's argument that the second respondent had no jurisdiction to enter into a lease agreement with the appellant over gazetted agricultural land. He maintained that the farm is not under the jurisdiction of the second respondent and the appellant could not legally enter into a lease agreement over that land. Counsel thus prayed for the dismissal of the appeal.

ISSUE FOR DETERMINATION BEFORE THIS COURT

[18] One issue arises from the grounds of appeal and the submissions made by counsel before this Court. The issue to be determined by this Court is whether or not the court *a quo* erred in granting the first respondent's application for spoliation.

ANALYSIS

[19] Spoliation proceedings hail from a common law remedy which is meant to discourage members of the public from taking the law into their own hands (see *Mswelangubo Farm (Pvt) Ltd & Ors v Kershelmar Farms (Pvt) Ltd & Ors* SCB 80/22, *Chiwenga v Mubaiwa* SC 86/20). The remedy encourages members of society to follow due process in obtaining or acquiring any *res* they believe belongs to them in circumstances where they have been unlawfully disposed. The *mandement van spolie* is therefore a possessory remedy aimed at the restoration of possession where a party is unlawfully deprived of its prior peaceful and undisturbed possession of property. The facts of each matter determine whether or not spoliation or unlawful disposition has occurred. It is trite that in spoliation proceedings, the lawfulness or otherwise of the possession is not an issue. Spoliation simply requires the restoration of the status *quo ante* pending the determination of the dispute of right between the parties (see *Augustine Banga & Anor v Solomon Zawe & Ors* SC 54/14).

[20] The essential elements to be fulfilled in an application for spoliation were enunciated in the case of *Botha and Another v Barrett* 1996 (2) ZLR 73 (S) where GUBBAY CJ (as he then was) at p 79 D-E stated that:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

(a) that the applicant was in peaceful and undisturbed possession of the property; and

(b) that the respondent deprived him of the possession forcibly or wrongfully against his consent."

The requirements were further discussed in *Streamsleigh Investments (Pvt) Ltd v Autoband (Pvt) Ltd* 2014 (1) ZLR 736@743G. The court held as follows:

> "It has been stated in numerous authorities that before an order for *mandamus van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly."

See also *Nino Bonino v De Lange* 1906 TS. 120 at page 122 where the court in outlining the scope of the *mandamus van spolie* stated as follows:

> "It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to depose another forcibly or wrongfully against his consent of possession of property whether movable or immovable. If he does so the court will summarily restore the status *quo ante* and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.""

[21] The above authorities make it clear that the underlying principle in an application for spoliation is to quickly restore possession and ward off self-help. In making such an application, the applicant must show that he was in peaceful and undisturbed possession and that possession was illegally taken without his consent. I will deal with these requirements *seriatim*.

WAS THE FIRST RESPONDENT IN PEACEFUL POSSESSION OF THE PROPERTY

[22] There is no doubt that the first respondent was peacefully minding his own business on the farm when the appellant started building on his grazing land. He was the holder of an offer letter which had been issued to him by the fourth respondent in 2009. The

offer letter gave him the legal right to live and carry out farming operations on the farm. He was carrying out farming operations at that farm for over thirteen (13) years. He had set aside part of the farm for grazing his cattle.

[23] In opposing the application, the appellant submitted that the first respondent could not claim that he was in peaceful possession of the farm. He argued that the first respondent's offer letter had been withdrawn and as such he had no legal right to occupy the farm. It was not in dispute that the purported withdrawal of the offer letter was never communicated to the first respondent as the hard copy of the notice was only provided to the court when the matter was heard. In fact, it was not part of the documents filed by the respondents *a quo* and the court had to adjourn the proceedings to enable fourth respondent to produce it.

[24] A perusal of the notice of withdrawal reflected that it had been issued on 27 May 2022 and was not served on the first respondent. It was also apparent that the notice was issued after the invasion by the appellant on the farm had occurred. Clearly therefore, at the time when the appellant was building structures and digging trenches, the first respondent had a valid offer letter. That effectively disposes of the issue of first respondents' possession of the farm.

[25] In any event this is an issue which would raise the question of rights to the land which issue is not necessary for the disposal of such applications. This point has been determined in various cases of this Court. As was noted by GOWORA JA (as she then was) in *Gumbo v Zimbabwe Anti-Corruption Commission* 2018(1) ZLR 672 @ 674 E that:

> "The court *a quo*, correctly in my view, came to the conclusion that the lawfulness of his possession was not a factor for consideration in an application for a *mandement van spolie* brought on the specific facts before the court. In an application for spoliation, the court does not decide what the rights of the parties to the property were before the alleged spoliation. The only factors to consider were the possession and whether or not the appellant had been unlawfully deprived of the property in question." (Underlining is my own)

See also the case of *Magadzire v Magadzire* SC 197/98 wherein the court reiterated that spoliation has nothing to do with rights of ownership, but is concerned solely with possession and the unlawful deprivation thereof.

WAS THE FIRST RESPONDENT UNLAWFULLY DESPOILED

[26] It is common cause that when the appellant started construction work on the first respondent's farm on 5 May 2022, the first respondent was in possession of a valid and extant offer letter which gave him authority to use and possess the farm. The appellant submitted that on the dicta in *Commercial Farmers Union & Ors v Minister of Lands and Rural Settlement & Ors (supra),* that the first respondent could not seek spoliatory relief against the appellant over agricultural land and therefore he could not be despoiled but could only be sued for trespass. The appellant's argument that a *mandament van spolie* cannot be sought over agricultural land is legally unsound. The appellant sought to rely on the following passage in *Commercial Farmers Union & Ors case* (*supra*) at p594 E-F where it was held that;

> "It was submitted that the orders were issued in spoliation proceedings. Spoliation proceedings cannot confer jurisdiction where none exists. A court of law has no jurisdiction to authorise the commission of a criminal offence. In any event, spoliation is a common law remedy which cannot override the will of Parliament. A common law remedy cannot render nugatory an Act of Parliament."

The *ratio* in the Commercial *Farmers Union & Ors* case was emphatic that both a former land owner and the holder of an offer letter who resorts to self-help will be acting outside the law. Clearly the judgment is not authority for the proposition that a land owner who has been despoiled cannot approach the court for spoliatory relief. A proper reading of the case shows a contrary position. The decision supports the proposition that where spoliatory relief has been obtained, a land owner cannot brandish that order in order to resist prosecution and subsequent eviction under s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]. Thus, the appellant completely misunderstood the import and *ratio* of the above case.

[27] The case of *Mswelangubo Farm (Private) Limited & Ors v Kershelmar Farms (Private) Limited & Ors* SC 80/22, left this position beyond doubt. The court in this case discussed and elaborated on the *dicta* established by the *Commercial Farmers' Union* case which the appellant was relying on. The court had this to say: -

> "In spoliation matters it is apparent that the deciding factor is that deprivation should be effected lawfully. Our law deprecates self-help. Even the Commercial Farmers Union case *supra* makes it clear that anarchy and chaos brought about by self-help is not acceptable. The individual with an offer letter has the locus *standi in judicio* to seek the eviction of a former owner after acquisition of land by the state. This by no means suggests authorisation of invasion in a lawless manner. In spoliation matters, the issue of ownership does not arise. The one seeking spoliation only has to show that they were in peaceful and undisturbed possession and were wrongfully and forcibly dispossessed."

In this case the first respondent is the holder of a valid offer letter for the farm. The first respondent was allocated the farm by the fourth respondent. The land remained gazetted land and was not established as a town under the authority of the second and third respondents as provided for under the Urban Councils Act [*Chapter 29:15*]. *In casu*, the appellant despoiled the first respondent of his farm by building a structure and

digging trenches for a security wall without his consent. A spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law (see *Ngukumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC) and as such, the fact that he was the holder of a lease agreement could not be a defense to the application for spoliation mounted by the first respondent against the appellant.

WHETHER THE APPELLANT RAISED APPROPRIATE DEFENCES TO THE CLAIM

[28] In *Gumbo v Zimbabwe Anti-Corruption Commission* (*supra*) at page 674 F-H the court commenting on the defences available to a despoiling party held that:

> "Once an applicant has established deprivation, it is incumbent upon the respondent to establish a defence. The only defences available in spoliation are the following:
>
> (a) that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;
> (b) that the dispossession was not unlawful and therefore did not constitute spoliation;
> (c) that restoration of the thing is impossible;
> (d) that the respondent acted within the limits of counter-spoliation in regaining possession of the article; see *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-op & Ors* 1999(2) ZLR 19 at 21G-H."

I have already found that the first respondent was in peaceful and undisturbed possession of the farm and that the appellants' dispossession was unlawful. Paragraphs (c) and (d) set out in the above case are clearly not applicable to the facts of this case. The farm is still in existence and first respondent's possession can still be restored. The question of whether land use has been changed is an issue which relates to the question of title and, as already explained above, is not an issue for determination in spoliation

proceedings. There is no question of a counter spoliation application in this case. Clearly, therefore the appellant failed to mount an appropriate defence to the claim.

DISPOSITION

[29] The requirements for a spoliation order were clearly satisfied. The first respondent was in peaceful and undisturbed possession of the farm. The dispossession of the farm was unlawful. There was no due process in dispossessing the first respondent. The issue of rights was not an issue for determination before the court *a quo* in an application for a *mandamus van spolie*. The restoration of possession of the farm was possible for the first respondent. The appellant thus had no legal right to occupy part of the farm belonging to the first respondent. The decision of the court *a quo* in that respect is unassailable.

[30] With regards to costs granted *a quo*, it is apparent that the court granted costs on a legal practitioner and client scale without giving the reasons for the order. The court fell into error in this regard. It is trite that while the award of costs is in the discretion of the court, a court that awards costs on a legal practitioner and client scale must establish a legal basis for doing so. These are punitive costs and the court must justify why the party so saddled with this cost has raised the ire of the court. Whilst the award may have been justified, unfortunately the reasons for this decision remained embedded in the mind of the judge. In the absence of such reasons, the order of costs made by the court *a quo* cannot stand and all that can be done is to substitute the award to an award

on the ordinary scale. In this regard the appeal will succeed only to the extent that the order for costs on a higher scale is set aside.

[31] In respect to costs in this Court it is our view that the appellant, having only succeed on the issue of costs and not on the merits, should not be rewarded with an award of costs against the first respondent. The results of this case shows that both parties have registered reasonable success. The most appropriate order will be for each party to bear its own costs.

It is accordingly ordered as follows:

1. The appeal be and is hereby allowed in part with each party bearing its own costs.
2. Paragraph 3 of the order of the court *a quo* is set aside and substituted with the following:

"3. The first respondent shall pay costs on an ordinary scale."

MUSAKWA JA: I agree

MWAYERA JA: I agree

Tabana and Marwa, appellant's legal practitioners
Mufunda and Partners Law Firm, 1st respondent's legal practitioners