RICHARD THOMAS ETHEREDGE
versus
THE MINISTER OF STATE FOR NATIONAL SECURITY
RESPONSIBLE FOR LANDS, LAND REFORM AND
RESETTLEMENT
and
SENATOR EDNA MADZONGWE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 4 February 2009

Urgent Chamber application

D Drury, for the applicant.
P Ndlovu, for first respondent.
G N Mlotshwa, for the second respondent.

GOWORA J: In this application the applicant sought relief in the form of a *mandament van spolie*, premised on an alleged act of spoliation by persons acting on behalf and at the behest of the second respondent. There was no substantive relief sought against the first respondent, the Minister and as a consequence no papers were filed on his behalf. Mr *Ndlovu* who appeared on behalf of the Minister appeared as a watching brief and took no part in the proceedings. Effectively, therefore I only had one respondent and the second respondent will therefore be referred to as the respondent.

The day before the matter was to be argued before me, the applicant filed a supplementary affidavit in which he indicated that possession and control of the farm had been restored to him and his family through the efforts of the police and that some of the stolen property had been recovered but that recovery of the same was an ongoing process. The applicant further indicated that it appeared that there was a policy shift by the police from inaction to positive action. The respondent did not raise any objection to the admission of the supplementary affidavit and it went in unopposed. The effect of the supplementary affidavit was that the status *quo ante* had been restored some time prior to the matter being argued before me. The applicant however persisted with the application and for relief connected thereto. There was no application to amend the order being sought.

The facts surrounding this dispute are as follows. The applicant and his sons occupy Stockdale Farm, which has since been gazetted by government for acquisition under the land reform program. In June 2008 various persons moved forcibly onto the farm under the leadership of one George Moyo in an effort to occupy the same. The applicant and his sons were forcibly evicted. The persons who moved onto the farm allegedly did this on the instructions of the respondent. An attempt to have the trespassers removed by the police having failed to yield results, the applicant therefore approached the court on a certificate of urgency for a *mandament van spolie* and ancillary relief thereto. It is common cause that an order for a *mandament van spolie* had been granted in favour of the applicant in the past against the respondent. It is also common cause that the respondent had been given what is commonly referred to as an 'offer letter' by the Minister to move onto the farm under the land reform program. The respondent denies however that she was responsible for the latest attempt to forcibly remove the applicant from the farm and to occupy the same.

Before delving into the merits of the dispute I should deal with the points in *limine* raised by the respondent. The first point raised was that the applicant had no *locus standi in judicio* to bring the application. It was argued on behalf of the respondent that as the relief being sought by the applicant includes an interdict the court would have to go beyond the question of the *mandament van spolie* and determine whether, in fact, the applicant has established the requisites for an interdict. The applicant is alleged to have lost his right by virtue of the acquisition of the farm by the government. Mr *Mlotshwa* premised his submissions on the dicta in a number of judgments of this Honourable Court which have been decided in relation to land disputes arising out of the distribution of land in terms of the Land Acquisition Act. The respondent contends that the applicant has lost his right to institute these proceedings because the farm has been acquired by the government. The farm in question has been gazetted for acquisition.

On the papers before me there is no indication of the date of such gazettting but it seems to be accepted by both parties that it was some time prior to the alleged acts of spoliation. The contention by the applicant is that he is entitled to possess the farm and that, until he is lawfully evicted from the same, no-one has the right to move onto the farm and despoil him of his possession through such occupation. He has submitted further that where a

possessor is violently despoiled of his property he is immediately clothed with *locus standi* to bring an application for the restoration of possession to that property.

What I have therefore is a situation where the applicant is alleging that the respondent has acted violently and dispossessed him of his farm and in the same breath saying I should not concern myself with the merits of his entitlement to the land in question but look at the alleged dispossession. On the other hand the respondent contends that by virtue of the nature of his possession the applicant does not have the *locus stand in judicio* to even bring the proceedings because, in terms of statute, the applicant is committing an offence by occupying the land in excess of the period allowed him by the Gazetted Lands (Consequential Provisions) Act [Chapter 20: 28]. For this contention the respondent has cited the following decisions as his authority; *Van Der Merwe v Chirinda & Ors*, *J W Hall (Pvt) Ltd v Mliswa & Ors*, which are judgments of this court, but which however have not been made distributable. *The respondent has also sought reliance on Airfield Investments (Pvt) Ltd v The Minister of Lands Agriculture and Rural Resettlement & Ors.*[1]

All three matters are concerned with residual rights of a former owner of rural land which has been acquired by the government under the land reform program. In the matter of *Airfield Investments (Pvt) Ltd v The Minister of Lands Agriculture and Rural Resettlement (supra)* the court was discussing section 9 of the Land Acquisition Act [*Cap 20:10*] which then was to this effect:

> b) in relation to any agricultural land required for resettlement purposes, the making of an order in terms of subs (1) of s 8 shall constitute notice in writing to the owner or occupier to cease to occupy, hold or use that land forty five days after the date of service of the order upon the owner or occupier, and if he fails to do so, he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment:
>
> Provided that-
>
> (i) the owner or occupier of that land may remain in occupation of his living quarters for a period of not more than ninety days after the date of service of the order;

[1] SC 36/07

(ii) the owner or occupier shall cease to occupy his living quarters after the period referred to in proviso (i) and if he fails to do so he shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

The Supreme Court construed the subsection in the following terms at pp 5-6 of the cyclostyled judgment:

> 'The provisions of subs (1) of s 9 are subject to subs (3) of s 8, showing that the rights embodied therein are a limitation to the exercise of rights of ownership by the acquiring authority and are reserved for the former owner or occupier of the expropriated land to the extent that the owner or occupier is there on the land to occupy, hold or use it and the living quarters thereon for the duration of the time prescribed. At the end of the maximum period of ninety days from the date of service of the order of acquisition, the rights of the former owner or occupier cease to exist and by operation of law he must leave the land or be evicted by order of court. Should the acquiring authority withdraw a letter of offer of the land to another person, the land reverts to the acquiring authority and not the former owner or occupier unless of course, the acquiring authority also revokes the order of acquisition.'

Since the handing down of that judgment there have been further developments in the law, to wit the promulgation of s 16B of the Constitution which section was brought into effect by Act 2 /2005. The force and effect of this amendment was to immediately vest ownership in the State of rural land which has been gazetted in terms of s 5 (1) of the Land Acquisition Act [*Cap 20: 10*] either prior to 8 July 2005 or after 8 July 2005 but before 14 September 2005 which is the appointed date. What is clear therefore is that once the land is acquired the former owner or occupier loses the right, after the period stipulated in the subsection, to occupy or use the land. This is by operation of law and since the possession of land is premised on one's occupation of the same, once the right to occupy is extinguished by operation of law can an occupier of the same, who is precluded by law from occupation seek protection of the law in continued occupation of the land in issue? In *Van Der Merwe v Chirinda* (*supra*) (which is unreported) OMERJEE J, in discussing the rights of a former owner or occupier of agricultural land after it had been acquired by the acquiring authority had this to say at p 6 of the cyclostyled judgment:

> "In this regard s. 3 is to the effect that once the acquiring authority has identified and duly gazetted agricultural land i.t.o.s. 16B of the Constitution, the former owner or occupier of that land shall cease to occupy, hold or use such land within 45 days of the date of posting the gazette notice, failure of which such former owner or occupier shall

> be guilty of an offence and liable to prosecution and punishment. This means the former owner is dispossessed of any right to occupy, hold or otherwise utilize the farming land within 45 days of the land being gazetted. It must be emphasized that the mere identifying and gazetting a particular spread of agricultural land, by the acquiring authority, constitutes sufficient notice to the former owner or occupier of the fact that the State has immediately acquired the land and full rights therein are now vested in the State."

The learned judge went on to explain that the former owner or occupier had a grace period of 90 days in total after the notice to remain on the farm but after the expiration of that period any continued occupation on his part constituted a criminal offence.

In casu, it would appear that at some stage criminal proceedings had been instituted against the applicant for an alleged contravention of the section. There was also some suggestion that the notice under which such prosecution had been commenced had been alleged to be defective. It is accepted now that the land has been properly gazetted and that the ninety days allowed in terms of the Act has now expired. The land now belongs to the State and by virtue of s 3 of the Act, the applicant has not only lost any right to hold, use or occupy the land and any continued occupation or use by him of the same constitutes an offence. His right to possess has thus been extinguished by operation of law. *Locus standi* is predicated on the existence of a right or the claim of a substantial interest in the subject matter of the litigation. The existence of any right on the part of the applicant has now been removed by operation of law.

However, it is trite that in spoliation proceedings the court should not enquire into the lawfulness or otherwise of the possession of the applicant in the subject matter of the application. The applicant has referred this court to the matter of *Mutsotso & Ors v Commissioner of Police & Ors*[2] which was concerned with an application for a *mandament van spolie.* The parties to the dispute had agreed to have a provisional order issued by consent and the learned judge therefore did not have to decide the matter on the merits. However, when the respondent had initially responded to the application, he had raised, as an issue, the lawfulness of the occupation of the farm by the applicants. Without going into the merits of the application, the learned judge discussed the basis upon which a spoliation order is sought and granted. This is what he had to say at p 332H-334B

[2] 1993 (2) ZLR 329 (H)

> "If when this matter comes before it, the court were to find that the riot police had behaved towards the applicants in the manner alleged and that the applicants had thereby been cowed into leaving their dwellings and the Farm against their will, so that they had been dispossessed of their dwellings and, in the case of certain of the applicants, their household goods through the duress applied by the servants of the first respondent, for the benefit of the second respondent, then the law to be applied in such a situation is clear. The general principle was stated by INNES CJ in *Nino Bonin v de Lange 1906 TS* 120 at 122 thus*:*
>
> 'It is a fundamental principle that no man is allowed to take the law into his own hands; no-one is allowed to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immoveable. If he does so, the court will summarily restore the status quo ante, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.'

As explained by MILLIN J in *De Jager & Ors v Farah & Nedstadt 1947 (4) SA 28 (W*) at 35, a case where demolition of premises was undertaken without legal process:

> "What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejectment proceedings, cannot be interfered with in his possession except by the due process of law, and if he is so interfered with the court will restrain such interference pending the taking of action against him for ejectment by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejectment, does not mean that proceedings for ejectment can be dispensed with, nor does it make any difference to the illegality of the respondents' conduct that the occupation by the applicants carries with it penal consequences'. ".

In casu, the law has stated that the right of the applicant has been extinguished by operation of law and he occupies in contravention of a statutory provision. By virtue of the provisions of s. 3 of the Act the applicant has lost the right to assert any pretension of possession of the land because such possession is now precluded by law. In this instance that right has been extinguished by operation of law and as a consequence the result is that the applicant no longer has the right to occupy or use the land in question. The question that then arises is whether as a result of the statutory provision even the right to protect himself from self helpers has been lost to him. Any act of spoliation is an illegal act which the law ought to, and justifiably so, frown upon. Can one say that the mere fact that a former owner still occupies gazetted rural land outside the requirements of a statutory provision lays that particular occupier to the mercy of any who cares to come onto the land without due process.

The other aspect which the legal practitioner did not fully ventilate before me is whether this court can grant an order the effect of which is to sanction a contravention of s. 3 of the Act by the applicant. In *J W Hall (Pvt) Ltd v Mliswa* (supra) the court was alive to the to the consequences of granting a *mandament van spolie* to an applicant whose right to occupy had been removed by the gazetting of the farm in terms of s. 3 of the Act. This is what CHITAKUNYE J had to say at p 4 of his cyclostyled judgment:

'What the applicant prays for before this court should thus not be seen as a way of undoing what the law deems to be the position. In terms of s.3 of the Gazetted Land (Consequential Provisions) Act, the applicant's stay is now unlawful hence his arrest and arraignment before the magistrate in 'Mhangura. By virtue of that Act, the applicant can now not be seen to be granted authority or an order by which to continue doing that which the law says is unlawful. This is akin to what MALABA JA, observed in *Airfield Investments Private Limited v The Minister of Lands, Agriculture and Rural Resettlement and Others SC 36/04* wherein at page 13 of the cyclostyled judgment he said;

> "Similarly the court a quo was being asked by the appellant to sanction the continued illegal farming operations and occupation of the living quarters on the land despite the clear and unambiguous language of the Act to the effect that failure to cease occupation or use of the land at the d of forty five days from the date of service of the order of acquisition and the living quarters at the end of ninety days of service of the order of acquisition constituted a criminal offence."

It is my view that a spoliator is in no better position than the former owner or occupier of farm land in the sense that in moving onto the land without due process he is equally guilty of an infraction of the law. As the law stands, a former occupier still has to be evicted by lawful process from the gazetted land and if it were the intention of the Legislature to deprive him of *locus standi* to protect his possession of the gazetted land from self helpers and would be spoliators, then the Legislature would have provided for such in specific terms. It did not do so. I do not therefore accept that the applicant has been denuded of his right to approach the court for an order of spoliation to restore the *status quo ante*. The relief of *mandament van spolie* is a common law remedy and it is my view that its requirements have not been done away with by the promulgation of legislation to do with land acquisition. He thus has *locus standi* to approach the court for a *mandement van spolie*. He is however not in a position to

persist with the restoration of possession because the police have evicted the trespassers and he has been restored possession of the farm. That part of the order sought therefore falls away.

However as part of the interim relief sought, the applicant also sought an interdict in the following terms:

(b) That the respondent and all other persons claiming occupation and possession of Stockdale through them are interdicted from in any way interfering with the possession, control and use of Stockdale or of any property owned by or possessed by the applicant, his representatives, agents, employees or invitees or of in any way interfering with the normal farming and business operations of applicant, his employees, representatives or agents.

One of the requisites for a temporary interdict is the existence of a right, either a clear right or prima facie right which may be open to doubt. The property in respect of which the interdict is sought is now vested in the State which, in the exercise of its rights of ownership has given notice to the applicant that he no longer has the right to use, occupy or possess the land in question. The applicant has thus lost the right by operation of law. Apart from having owned the farm, he has no other residual rights that he can claim over the property. Even the right to occupy or possess has been taken away by law. In *Airfield Investments (Pvt) Ltd v The Minister of Lands, Agriculture and Rural Resettlement & Ors (supra)* MALABA JA stated:

> "The threshold the appellant had to cross was the production of evidence which established the existence in it of prima facie rights of ownership in the land at the time the application for interim relief was made. An interim interdict is not a remedy for past invasions of rights and will not be granted to a person whose rights in a thing have already been taken away from him by operation of law at the time he or she makes an application for interim relief."

Thus an interdict is an order from a court prohibiting or compelling the doing of a particular act for the purpose of protecting a legally enforceable right which is threatened by continuing or anticipated harm and therefore it is appropriate only when future injury is feared. In *Stauffer Chemicals Chemical Products Division of Cheesebrough-Ponds (Pty) Ltd v Monsato Company*[3] HARMS J discussing the nature and purpose of interdicts had this to say:

> "As far as interdicts are concerned, the ordinary rules relating to interdicts apply. Terrell on The Law of Patents 13th ed at 419 correctly points out that the basis of an

[3] 1988 (1) SA 805 (T) at 809 E-G

> interdict is the threat, actual or implied, on the part of the defendant that he is about to do an act which is in violation of the plaintiff's right and that actual infringement is merely evidence upon which the Court implies an intention to continue in the same course. I would have thought it axiomatic that an interdict is not a remedy for past invasion of rights. It is for the protection of an existing right. *Cf Meyer v Meyer* 1948 (1) SA 484 (T). It is therefore not strange that *Saccharin Corporation Ltd v Quincy* 17 RPC at 339 held that:
>
> "An injunction cannot be properly granted except in respect of a patent which the defendant has infringed, or threatened to infringe, and only during the continuance of that patent'.'

As the applicant has lost his ownership in the land by virtue of the acquisition process and his right to legally occupy the same he has not established a right that would entitle him to seek an interdict against any future acts of spoliation on the part of the respondent. The relief he seeks is therefore not available to him.

I turn now to deal with the question of *lis pendens* raised by Mr *Mlotshwa.* He submitted that the applicant is currently before the SADC TRIBUNAL where he and other farmers whose farms are the subject of acquisition orders have claimed certain relief from that body. In view of my findings above it is not necessary that I consider this issue. The applicant cannot obtain an interdict on the papers before me and to venture into a foray of the issues before the tribunal would be in my view an exercise in futility.

Co-joined with this submission is a further submission that this court lacks the jurisdiction to hear the matter because of the process in the Tribunal and a judgment that was passed by the Tribunal against the government of this country. An interim judgment has indeed been handed to me but it is not a judgment I can consider without reference to the protocol that brought the Tribunal into force as well as the SADC Treaty. I note that in the heads of argument the submission of lack of jurisdiction is not premised on the same basis as it appears in the opposing affidavit. It is not clear therefore what argument the court should follow. I will therefore deal with both issues as one and the same.

The Treaty makes provision for the establishment of a Tribunal. The Protocol is the document that then sets up the Tribunal and provides for the powers of the Tribunal. I have examined the protocol very carefully and I have not observed therein any reference to the courts of any of the countries within SADC. If indeed the intention was to create a Tribunal which would be superior to the courts in the subscribing countries that intent is not manifest in

the document presented to me. The supreme law in this jurisdiction is our Constitution and it has not made provision for these courts to be subject to the Tribunal. This court is a court of superior jurisdiction and has an inherent jurisdiction over all people and all matters in the country, and its jurisdiction can only be ousted by a statutory provision to that effect. I do not have placed before me any statute to that effect and the protocol certainly does not do that.

From a perusal of the interim judgment it is clear that the nature of relief being sought in the Tribunal is different to what is sought before me and there is therefore no justification for the view that the applicant is seeking the same relief in different *fora*. I hold that this court has jurisdiction and that it has the capacity to determine the dispute between the parties.

In view of my earlier findings on the points *in limine*, there is no need to enquire into the merits of this application. The applicant is non-suited and the application is hereby dismissed with costs.

Gollop & Blank, legal practitioners for the applicant.
Civil Division of the Attorney-General's Office, legal practitioners for the 1st respondent.
Antonio & Associates, legal practitioners for the 2nd respondent.