JOHN STRONG (PRIVATE) LIMITED
and
TOBS STRONG (PRIVATE) LIMITED
versus
WILLIAM WACHENUKA
and
MINISISTRY OF LANDS, AGRICULTURE AND RESETTLEMENT

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 16 July 2009 and 23 June 2010

Mrs *J Wood*, for the applicants
K Gutu, for the second respondent

GOWORA J: This application was argued before me on 16 July which was the return day of a provisional order granted on 4 May 2009. Although the first respondent was at the initial hearing he did not appear on the return day. He had filed opposing papers as well as heads of argument even though he was not legally represented. Mr Gutu who appeared for the second respondent, the Minister and insisted on the matter being heard on the merits and seemed not to be alive to the absence of the first respondent and the prejudice that would ensue to the latter if the matter was heard on the merits. After hearing counsel I granted a final order as prayed by the applicants. Subsequent to the order being granted the first respondent has addressed several letters to the Registrar of this honourable court demanding a judgment. I have acceded to the request and I give my reasons hereunder. I have however endeavoured as much as possible not to touch on the case of the firsr respondent in order to allow him a window to put his case forward should he be so inclined.

The applicant applied to this court for a provisional order under a certificate of urgency and on 4 May 2009 this honourable court issued a provisional order in their favour in the following terms:

PROVISIONAL ORDER

TERMS OF FINAL ORDER SOUGHT

That you show cause to this honourable court why a final order should not be made in the following terms:

1. The first respondent and all those claiming occupation through him be and are hereby ordered to forthwith restore to applicants and their employees full possession, use and access to the tobacco barns, grading sheds, storage sheds, workshop, office and irrigation pump station on Plot 7 and all farming implements owned by the applicants and located thereon.
2. The first respondent and all those claiming occupation through him permit the applicants and their employees to grade their tobacco and remove it for sale thereafter.
3. The first respondent desists from threatening any of the applicants' workers or management in carrying out their normal duties.
4. Should the first respondent breach 1 and 2 or 3 that the Zimbabwe Republic Police Guruve be authorized to arrest the first respondent.
5. The first respondent shall pay the costs of this application on the legal practitioner and client scale.

INTERIM RELIEF GRANTED

Pending the determination of the above Final Order, the applicant is granted the following relief:

1. The first respondent and all those claiming occupation through him be and are hereby ordered to forthwith restore to applicants and their employees full possession, use and access to the tobacco barns, grading sheds, storage sheds, workshop, office and irrigation pump station on Plot 7 and all farming implements owned by the applicants and located thereon so as to restore the status *quo* prevailing on Plot 7 as at 15 April 2009.

2. The first respondent and all those claiming occupation through him permit the applicants and their employees to grade their tobacco and remove it for sale thereafter.

3. The first respondent desists from threatening any of the applicants workers or management in carrying out their normal duties.

4. The first respondent shall be entitled to the full use and occupation of Plot 7, other than the structures equipment referred to in paragraph 1 and the applicants shall refrain from interfering with the first respondent's farming activities, equipment and employees on Plot 7.

5. Should the applicants or the first respondent breach any provision of this Order the Zimbabwe Republic Police Guruve is hereby authorized to enforce the terms of this order.

INTERIM ORDER-RETURN DAY

1. The respondents shall file and serve their opposing papers in this matter by 7 May 2009.
2. The applicants shall file and serve their Answering Affidavit by 11 May 2009.
3. The applicants shall file and serve their Heads of Argument by 15 May 2009.
4. The respondents shall file and serve their Heads of Argument by 18 May 2009.
5. The respondents shall index and paginate the papers filed herein by 20 May 2009.
6. The Registrar is hereby directed to set this matter down for hearing in the opposed roll forthwith upon compliance with the foregoing paragraphs.

SERVICE OF PROVISIONAL ORDER

Service of this order may be effected by the applicants' legal practitioners on the respondents or their legal practitioners.

The two applicants are companies that are duly registered as such in accordance with the laws of this country. The second respondent is the minister responsible for agriculture and land resettlement. The first applicant is the former owner of Disi Farm which is situate in Mvurwi. The second applicant leased Disi Farm from the first applicant and was in terms of the agreement of lease carrying out farming activities on the said farm. Disi Farm has been acquired by the government under the land reform program.

In a founding affidavit sworn to by one Robert Strong, it is averred that the second applicant produces approximately 500 000 kgs of tobacco every year, 30 hectares of horticulture which is all targeted at export markets, 50 hectares of commercial maize, 30 hectares of sugar beans. The second applicant also has fifteen pedigree breeding cows with followers. The second applicant also operates a wheat meal and a bakery and supplies the surrounding areas with bread.

It is averred further that both the first and second applicants have been actively involved with the local community since the early 1990's and support a number of local projects. The first applicant is alleged to have paid a substantial sum towards the extension of

Chifumbo School in Mudindo, Guruve and both have fully supported rural electrification of all schools in the area. Both applicants are said to finance local school stationary requirements.

In total, both applicants have had four farms acquired by the government for purposes of land reform and have been assisting both A1 and A2 farmers on the acquired farms. There has been no interference with their farming activities on Disi Farm since the inception of the land reform program. However since May 2008 the first respondent has stated to the applicants that he had an offer farm for a section of Disi Farm. Through the existence of the alleged offer letter the first respondent then moved onto plot 7 on the said farm.

Due to the alleged illegal occupation of this portion of the farm by the first respondent the applicants sought and obtained an order for spoliation against him under case number HC 4110/2008 which was granted on 18 August 2008. Possession of that portion of the farm was restored in pursuance of the order granted. This enabled the second applicant to reap its tobacco. On 4 December 2008 it, second applicant, then commenced the process of loading the tobacco in the barns for purposes of having the tobacco cured. On 6 December 2008 the first respondent came to the farm and had a discussion with Robert Strong. He said that if the applicants wished to continue using the barns they had to pay for them. He said that he himself had no use for the barns as he had not grown any tobacco. The first respondent had then left but returned a short while later to threaten the applicants' workers from returning to work the following day. On 7 December 2008 the first respondent turned up armed with a pistol and locked all the gates. A report was made to the police, and subsequently an urgent application filed with the court on 11 December 2008 resulted in the court issuing *a mandament van spolie* against the first respondent. The order sought by the applicants was granted with the consent of the respondent and resulted in the applicants being restored possession of the disputed items and in addition a temporary interdict was granted against the first respondent preventing him from interfering with the applicants and their employees. That order was to be effective up until 15 April 2009. The acquiring authority had also consented to the order.

It was averred by the applicants that it had been agreed with the second respondent's legal practitioners that the order be for a limited period and that after its expiry the applicants should seek and obtain a formal lease for the tobacco barns and facilities from the second respondents. The applicants were assured that this was a mere formality. The applicants have, as stated above, sought a lease over the tobacco barn where their tobacco is currently stored. The lease has not yet been granted to them.

On 17 April the first respondent returned to the area known as Plot 7 armed with a pistol and pointed it at a clerk and forced him to hand over the keys to the storerooms, offices, workshop and tobacco grading sheds. He then placed locks on all the access gates. On 18 April 2009 the District Administrator instructed that the locks that the first respondent placed be removed but after this was done he, first respondent, came and threatened the workers and chased them off Plot 7. He was armed with a pistol. On 19 April the first respondent instructed his workers to switch off all the pumps and lock all the sheds. Again on 21 April the applicants' workers attempted to access the tobacco grading sheds. The first respondent came and switched off the pumps supplying water to the granadillas. There was a standoff between the respondent's workers and those of the applicants. The situation was only alleviated by the arrival of the police. The first respondent had indicated to the applicant's workers that he would only restore possession of the tobacco barns after he and the applicants would have negotiated a partnership agreement. Based on these allegations this court had issued a provisional order.

The insistence by the second respondent who was represented by Mr *Gutu* that the matter be should be argued on the merits despite the absence of the first respondent who is the party against him the substantive relief was being sought has placed this court in something of a quandary as the first respondent was in default. I will therefore only deal with issues as they relate to the second respondent and the applicants. It may however be unavoidable to make reference to the first respondent as it his alleged illegal conduct being complained against by the applicants and in fact the order being sought is mainly against him and not the Minister.

There is no dispute that the applicants have been in possession of Disi Farm and in particular the barns, equipment and structures situate at Plot 7. When the entire farm was acquired by the acquiring authority the applicants were left in situ and they have remained on the premises throughout. The barns, storerooms and curing facilities have been in their possession all along. The acquiring authority has however not seen it fit to evict the applicants from the same.

Mr *Gutu* was correct to state that an applicant to an order for spoliation must prove that he was in peaceful and undisturbed possession of the thing dispossessed. It was his contention that the applicants were not in peaceful and undisturbed possession. This contention is not supported by the facts on the papers. The applicants have attached to their papers a handwritten letter from the District Lands Officer dated 20 April 2009 and addressed to the

first respondent in which the writer is imploring the respondent to allow Mr Strong to have access to the tobacco curing facilities in order to facilitate the finalization of the curing process. This letter was attached to the founding papers and the interim relief was granted based on those papers. The paragraph in respect of which the contents of the letter are alluded to was not challenged by the second respondent. An allegation or averment which is not denied is taken to have been admitted. It is therefore difficult to understand the submission that the applicants never had possession.

The background to this application in fact goes back to 18 August 2008 when the first order for a *mandament van spolie* was granted against the first respondent. That particular order did not refer to the barns but merely sought to restore possession to the applicant of the portions of the farm not allocated to the first respondent. The second order granted on 16 December 2008 with the consent of the first and second respondent was to the following effect:

BY CONSENT IT IS ORDERED

1. The first respondent and all those claiming occupation through him be and are hereby ordered to restore full possession and use of tobacco barns on Plot 7 to the applicants forthwith.
2. The first respondent is interdicted from banning access to the applicants employees to the tobacco barn on Plot 7
3. The first respondent is interdicted from preventing the applicants and their employees from carrying out their duties in curing the applicants' tobacco.
4. The first respondent is interdicted from threatening the applicants' employees.
5. This Order will be effective up to 15 April 2009

The parties do not appear to have to anticipated the recurrence of problems between them subsequent to 15 April 2009. It may well be that the applicants anticipated that by then a lease would have been offered to them for the barns, it has not. The second respondent has argued that the first respondent took occupation of Plot 7 in 2007. The first respondent is not before me so I cannot comment on the manner in which he took occupation. The second respondent should however have ensured that the first respondent got vacant possession by evicting the applicants from the disputed barns and sheds. This was not done leaving the applicants in possession of the same.

The contention by the second respondent is to the effect that the farm was acquired by the government and as a result all infrastructure on the land belongs to the state. The second respondent further contends that as the applicants are not the holders of an offer letter and they are therefore in illegal possession of the barns and storerooms on Plot 7 which has been allocated to the first respondent. The contention is therefore that the applicants do not have *locus standi* to institute and defend any proceedings in respect of that portion of Disi Farm and the buildings situate thereon.

In the final analysis the protection of possession is part and parcel of the protection of the peace in a community, which could not be maintained if every person who asserts that he has a real right to a particular thing which is in another person's possession would be entitled to resort to self-help.[1] Thus the *mandament van spolie* is aimed at preserving peace and order in a community and to discourage self help. Consequently the question of ownership or the lawfulness of the possessor is not an issue for consideration by the court as long as the applicant can show that he was in peaceful and undisturbed possession and that he was dispossessed unlawfully, whether through violence, stealth or fraud. The aim is therefore to achieve a restoration of the status *quo ante*. In *Chisveto* v *Minister of Local Government & Town Planning*[2]; REYNOLDS J stated thus:

> "Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness of the applicant's possession of the property in question does not fall for consideration at all. In fact, the classic generalization is sometimes made in respect of spoliation actions that even a robber or thief is entitled to be restored to possession of the stolen property."

In *casu* the second respondent has argued that the first respondent is the holder of an offer letter in respect of Plot 7 and that the applicants did not oppose the occupation of Plot 7 by the first respondent. It is argued that the dispute arose when the applicants sought to continue to use the facilities on the first respondent's portion, the tobacco barns, grading sheds, workshop and office. The second respondent has contended further that the applicants were

[1] Per Silberberg The Law of Property 2ed p135
[2] 1984 (1) ZLR 250C-E

through an order of this court allowed to use the tobacco barns up to 15 April 2009 and that they did not approach the court for an extension of the continued use.

The second respondent is overlooking the fact that even after the first respondent moved onto Plot 7, the applicants remained in possession of the infrastructure that is central to this dispute and that in order to give effect to the offer letter the second respondent had to take legal steps to ensure that the possession by the applicants of the infrastructure was terminated properly and that thereafter the first respondent could assume possession. In *casu* the possession by the applicants of the disputed infrastructure is not due to an order of court. The court merely restored possession to them after an act of spoliation. The expiry of the period agreed to by the parties did not have any material consequence as to the possession. It did not affect the legal position of their possession which remains the same unless and until the acquiring authority takes some positive action for its determination. This was not done and the courts have held on numerous occasions that an applicant will be given possession of the property where it is shown that he was despoiled.

> "It is a fundamental principle that no man is allowed to take the law into his own hands; no-one is permitted to dispossess another forcefully or wrongfully and against his consent of the 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 inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principal so clear." [3]

In my view it matters not that the first respondent was granted an offer letter in respect of Plot 7 as the merits of the dispute are not in issue. It may well be that in the absence of an offer letter for the same property the applicants' occupation of the same may well be illegal. That however, is not the point. In order to enable the first respondent to occupy the plot legally the second respondent is obliged to evict the applicants from the plot and thus grant the first respondent vacant possession. Any occupation by the first respondent without an order of court evicting the applicants from the same will be an act of spoliation and will open the respondents to challenge regarding the said occupation. It is for these reasons that I confirmed the provisional order granted on 4 May 2009.

I did not grant an order for the arrest of the first respondent in the event that he was in breach of paragraphs 1, 2 and 3 of the draft order as firstly the first respondent was not before

[3] per INNES CJ in Nino Bonino v de Lange 1906 TS 120 at 122

me and his submissions on that aspect of the order had not been placed before me. In addition, this court cannot order the police to arrest a person on alleged breach of a court order before the court has made a finding that such person is in fact in breach of the court order. What the applicants seek is an order protecting them from an anticipated breach of this order. This in my view is not the correct manner to approach a court for an order of contempt of court. The requirements of contempt of court proceedings are known to legal practitioners and an application where an order is sought in anticipation of breach is irregular. Every legal practitioner knows or should be aware that before an arrest can be ordered by this court on allegations of a party being in breach of a court order, it is necessary for the respondent to be arraigned before the court for a finding that the person had deliberately flouted a court order served on him or her personally. This is done by the institution of proceedings for contempt of court proceedings against such party. Time and time again legal practitioners insert in their draft orders a paragraph for the arrest of a party in the event of breach of paragraphs in the order. This is irregular and contrary to any person's right to be heard before an order is granted against such person. I am not able to find a person in contempt of a court in anticipation of that such person is in contempt by obeying the court order in the absence of a hearing with regard to the refusal to obey the court order. Legal practitioners should therefore desist from drafting orders in this fashion. It is for these reasons I refused to confirm the paragraph requiring his arrest in the event of breach.

It is therefore ordered as follows:

The Provisional Order granted by this court on 4 May is hereby confirmed and an Order is issued in the following terms:

1. The first respondent and all those claiming occupation through him be and are hereby ordered to forthwith restore to the applicants and their employees full possession, use and access to the tobacco barns, grading sheds, storage sheds, workshop, office and irrigation pump station on Plot 7 and all farming implements owned by the applicants and located thereon so as to restore the status *quo ante* prevailing on Plot 7 as at 15 April 2009.

2. The first respondent and all those claiming occupation through him be and are hereby ordered to permit the applicants and their employees to grade their tobacco and remove it for sale thereafter.

3. The first respondent be and is hereby ordered to desist from threatening any of the applicants' workers or management in carrying out their normal duties.

4. The first respondent shall pay the costs of this application.

Venturas & Samukange, applicants' legal practitioners
Civil Division of the Attorney-General's Office, second respondent's legal practitioners