JOSEPH WILLIAM WHALEY HH 172/03
vs CASE NO HC 638/03
CHESTER NHAMO MHENDE

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 3 and 22 October 2003.

OPPOSED APPLICATION

Mr *J Samkange* for applicant
Mr *Mandizha* for respondent.

MAKARAU J: This matter came before me for the confirmation of a provisional order issued by this court on 28 January 2003. The provisional order called upon the respondent to show cause why the Deputy Sheriff should not restore possession of certain described movable property to the applicant. The provisional order also granted certain interim relief to the applicant, including restoring to the applicant possession of the assets mentioned in his application.

The backdrop to this application is contained in case no HC 2687/03, another case between the parties and to which I was referred in the respondent's heads of argument. A perusal of that record indicates that the applicant was the owner of a farm known as Cebilly in Mashonaland West Province, ("the farm"). The farm was acquired under the provisions of the Land Acquisition Act, [Chapter 20.10], (" the Act"), under what is commonly referred to as the land reform programme. In due course, the farm was allocated to the respondent by the acquiring authority. The respondent took occupation of the farm in the absence of the applicant and under circumstances where his move onto the farm was dogged by resistance from more than one quarter. At the farm were a number of movable assets belonging to the applicant and fully described in an annexure to the application. These assets include pets, livestock, farming implements and equipment, irrigation equipment, vehicles, stocks of fuel and items of personal clothing and household effects. When the applicant attempted to collect the property, the respondent

resisted the attempt, resulting in an approach to this court that resulted in the issuance of the provisional order I have referred to in the opening paragraph of this judgment.

The respondent has opposed the confirmation of the provisional order. In his opposing affidavit, he raises two main grounds. His first ground is as follows: The applicant was duly and properly served with an order in terms of s 8 of the Act. In terms of that order, ownership of the farm vested in the acquiring authority and the applicant had to vacate the farm by 30 October 2002, taking with him all his personal belongings. The applicant did vacate the farm in accordance with the dictates of the notice and took with him certain assets, which he, the respondent, is not fully aware of. In the circumstances, the applicant cannot claim to have been in possession of property he deliberately left behind. Whatever property was left behind was abandoned property.

In the heads filed on his behalf, the argument was advanced that an erstwhile owner of a farm who is served with a s8 order cannot be said to be in peaceful and undisturbed possession of the movable assets on the farm. With respect, I am unable to agree. The position that has become clear from case authority is that ownership in the land vests in the acquiring authority upon the service of a s 8 order upon the erstwhile owner. Ownership and possession of the movable assets remain unaffected as a s8 order does not and cannot compulsorily acquire movable property.

At the hearing of the matter, it became apparent to me that the first ground raised by the respondent in resisting confirmation of the provisional order as detailed above is without merit. In addition to what I have pointed out above, no evidence was adduced in the opposing affidavit to show that the applicant ever abandoned his property. To the contrary, the evidence was to the effect that the applicant has been resisting the presence of the respondent on the farm and his possession of the property. I was further persuaded by the reasoning that even if the applicant left the property on the farm when the period granted him by the Act expired, he was still in possession of the property for the purposes on the remedy *mandament van spolie*. The gradual move of the respondent onto the farm, lawful as it was under the authority of the land reform programme, did not deprive the

applicant of possession of the movable property on the farm. He retained control over the property with the requisite intention of deriving a benefit from it. (See *Best of Zimbabwe Lodges (Private) Limited and Another v Croc Ostrich Breeders of Zimbabwe (Private) Limited HH5/03).* In my view, Mr *Mandizha*, for the respondent, was wise in not pursuing this line of argument.

Secondly, the respondent avers in his opposing affidavit that the applicant is not entitled to a spoliation order as he sold to the respondent all the movable property on the farm, together with his rights to certain markets for his produce. No details of the alleged sale were given in the affidavit. The applicant filed no answering affidavit denying the alleged sale. However, because the issue of the sale was before the judge who issued the provisional order on 28 January 2003, it was apparent that the sale was disputed by the applicant and was, on the basis of the papers filed of record, rejected by the judge. It was therefore a dispute before me. It further appeared to me that proof of the alleged sale was the only basis upon which the respondent could defeat the confirmation of the provisional order. Due to the paucity of information in the opposing affidavit relating to the alleged sale and the absence of an answering affidavit, it appeared to me that I could not resolve the factual dispute of whether the applicant sold his property to the respondent on the basis of the affidavits and without oral evidence. Rather than refer the matter to trial on the dispute, I directed in terms of rule 239 (b) that oral evidence be led in the application. In my view, a referral of the matter to trial on the single issue would have been costly to the parties and would have unnecessarily lengthened the proceedings. It was my further view that the dispute of fact between the parties was such that I could not dispose of the matter without a determination as to whether or not the parties entered an agreement of sale for the movable property. (See *Masuskusa v National Foods Limited 1983 (1) ZLR 232 (H) and Vesta Sithole v Petros Sithole HH /03).*

At the resumed hearing of the matter, the respondent gave evidence. His evidence was to the following effect:

He was allocated the farm in April 2002. His move onto the farm then was resisted by the applicant and by the Governor of the province. At one stage, he was

evicted from the farm through the efforts of the Governor. He moved back onto the farm a few days later and was yet again ejected by armed police officers. He then contacted a neighbouring farmer to intervene and see if he could purchase he applicant's property. A meeting was held between the parties at which the applicant's wife objected to the sale. Later, the respondent received intimation that the applicant was willing to sell his implements and rights to a market for his produce, for the sum of US$600 000-00. Negotiations for the purchase price commenced with the assistance of the Governor who at some stage advised the respondent that the applicant would accept the sum of US$200 000-00. Eventually, the parties settled at US $100 000-00, which was paid by the respondent to the Governor at his business premises in Harare. The respondent asked for a receipt after paying the Governor the said sum, whereupon the Governor remonstrated with him and advised that if he did not trust him, he could take his money away and forget about the deal. Thus, no receipt or any other acknowledgment for the payment was obtained.

Before leaving after making the payment, the respondent pointed out to the governor and to the applicant that, he the respondent was purchasing the applicant's movable property and the applicant's rights to the farm. The respondent understood this to mean that he was literally stepping into the shoes of the applicant and in the event that the applicant was entitled to compensation for the acquisition of the farm from the government, the respondent would collect it. A written agreement was to be produced before the Governor would pay out the money to the applicant. The written agreement was not forthcoming. Whenever he asked for the agreement, the Governor would advise him to wait for the applicant. Prior to 31 October 2002, when he finally took occupation of the farm, the respondent then received a letter through the Governor's office, allocating to him a new farm. He took occupation of this new allocation. On 31 October 2002, he took occupation of Crebilly Farm. This was a date after the 90 days stipulated in the s8 order served on the applicant had expired.

The respondent was subjected to searching cross-examination. He maintained his story under cross-examination that he had paid the sum of US$100 000-00 to the

Governor of Mashonaland West for the movable property on the farm. Despite his consistency, I did not believe him. It is most improbable that the respondent would have agreed to pay such a large sum of money to the Governor in the absence of the applicant or any other person to bear witness to the transaction. Further, the respondent testified that he did receive some of the money from relatives in the Diaspora. He however did not adduce any evidence to show that he was the recipient of some foreign currency from outside the country. In his testimony, the respondent does not appear clear as to the *merx* he purchased from the applicant. As indicated in an earlier part of this judgment, the applicant seeks an order to restore to him various items of movable property including livestock, vehicles and pets. It is not clear from the evidence of the respondent what was purchased and what was not. It is not conceivable that the applicant would have sold some of the personal property that is included on the list annexed to his application. The respondent has testified that the applicant has reported him to the police on thirteen occasions for alleged theft of some of the property. In view of the role that the police have to date played in the land reform programme, it is not plausible that they would have entertained such charges had the respondent explained to them that he had purchased the items through the intervention of the Governor of the province. Secondly, I find it hard to believe that the respondent would pay such an astronomical amount of money to the Governor for a farm that had been allocated to him under the land reform programme. It is common knowledge that under the programme, land is allocated for no payment. In my view, it is not probable that after receiving the sum of US$ 100 000-00 for Crebilly Farm, the Governor would pocket the money and arrange for the respondent to be allocated another farm. This suggestion is scandalous to say the least. As pointed out by Mr Samkange, if the basis of the respondent's move onto the farm was the sale agreement, he would not have waited for the 90 days stipulated in the s8 order to expire before he moved onto the farm. His cause for moving onto the farm would have been the sale agreement and he would have either recovered his money from the Governor or made the Governor secure his move onto the farm.

Weighing all the evidence before me I am not satisfied that the respondent has discharged the onus on him. He has not been able to prove that he purchased the applicant's movable assets that are the subject of the spoliation proceedings before me.

Two procedural issues remain for my ruling. The first one relates to the pressing urged upon me by Mr Samkange to report the respondent to the authorities for purchasing foreign currency illegally. In his evidence, the respondent admitted under oath that he procured part of the US$100 000-00 by purchasing part of the amount from unauthorised foreign currency dealers. The other amount he allegedly received from relatives in the Diaspora. Notwithstanding this admission, I will not refer the matter to the authorities for investigations. Elsewhere above, I have indicated that I do not believe such evidence from the respondent. It is not credible and I have rejected it. I therefore cannot refer the matter for investigation on the basis of evidence that I have rejected.

Finally, Mr Samkange took a point in *limine* on which I did not give reasons. These they are. Mr Samkange urged me not to hear the respondent as he is in contempt of the interim order granted by this court on 28 January 2003. It has been indicated that despite numerous attempts, the deputy sheriff has been unable to restore possession of the movable property to the applicant as granted him by the interim order of 28 January 2003. I declined the pressing. The interim relief does not impose a specific obligation upon the respondent to restore the property to the applicant. The deputy sheriff is to do that with the assistance of the police. The police have failed to assist the deputy sheriff to execute an order of this court against an individual citizen. They may be in contempt of this court. To avoid such a situation, I will however make a specific order against the respondent in this application.

In the result, the provisional order is confirmed. It is ordered that:

1. The respondent is hereby ordered to restore to the applicant, possession of the movable assets listed in the annexure "A to the applicant's application, together with 80 cattle, 40 sheep, 5 horses, 30 laying hens, 2 dogs and a cat, forthwith.

2. Should the respondent fail to restore to the applicant possession of the assets listed in the annexure "A" to the applicant's application together with 80 cattle, 40 sheep, 5 horses, 30 laying chickens, 2 dogs and a cat, the Deputy Sheriff is hereby ordered to restore possession of the assets to the applicant.
3. Should the Deputy Sheriff meet resistance from the respondent or the respondent's agents in carrying out the order in (2) above, the Officer commanding Mashonaland West is hereby directed to avoid a breach of peace by anyone obstructing the Deputy Sheriff from carrying out this order.
4. The respondent shall pay the costs of this application.

Byron Venturas &Partners, applicant's legal practitioners

Mandizha & Company, respondent's legal practitioners.