REPORTABLE (66)

(1) MSWELANGUBO FARM (PRIVATE) LIMITED (2) OBERT MPOFU (3) SIKHANYISIWE MPOFU
v
(1) KERSHELMAR FARMS (PRIVATE) LIMITED (2) ZEPHANIAH DHLAMINI (3) CHARLES MOYO (4) SIPHOSAMI PATRICK MALUNGA

SUPREME COURT OF ZIMBABWE
GWAUNZA DCJ, CHITAKUNYE JA & MWAYERA JA
BULAWAYO, 23 MARCH 2022 & 8 JULY 2022

S. Siziba, for the appellants

T. Mpofu with *J. Tshuma*, for the respondents

MWAYERA JA: This is an appeal against the whole judgment of the High Court, Bulawayo, handed down on 23 December 2021, granting a spoliatory relief in favour of the respondents.

FACTUAL BACKGROUND

The facts giving rise to this appeal are straight forward and largely common cause as set out herein. The first respondent is the owner of Esidakeni Farm held under Deed of Transfer 1980/90 ("the farm"). On 18 December 2020, the Minister of Lands, Agriculture, Water and Rural Resettlement acquired the farm, through a Notice of Acquisition being General Notice 3042 of 2020, under the land reform programme. The respondents instituted an

application in the court *a quo* seeking to nullify the purported acquisition on the basis that it was constitutionally invalid. That application is yet to be determined.

In March 2021, the second appellant visited the farm making enquiries about it. Pursuant to that visit in November 2021 the third appellant and a group of people visited the farm and advised the manager that they had come to occupy the farm. On 4 December 2021, the aforementioned group of people returned to the farm and started ploughing a field known as Block F and Block H. The group claimed that they had been given an offer letter. The fields they cultivated had been occupied by the respondents who at the time of invasion were preparing land for cropping.

Disgruntled by the conduct of the incoming intruders the respondents filed an urgent chamber application in the court *a quo* seeking spoliatory relief. They alleged that they had been in peaceful and undisturbed possession of the farm. The respondents contended that they had further installed improvements on the farm. The respondents further asserted that the appellants had unlawfully resorted to self-help thereby disrupting their farming activities.

The appellants opposed the application for spoliatory relief. They contended that they are the rightful occupants of the farm since they are holders of an offer letter and had given the respondents three months' notice to vacate the farm. The appellants further submitted that when they moved in they did not cause any violence and that there were no occupants at the time. They maintained that by virtue of the offer letter, they were legally entitled to occupy the farm as they did.

FINDINGS OF THE COURT *A QUO*

The court *a quo*, in coming up with a disposition reasoned that having an offer letter entitled a party to legally seek redress in the event that the former occupier remained *in situ*. It reasoned that the holder of an offer letter ought to follow due process of eviction in order to assert its rights. The court held that holders of offer letters are empowered to seek redress by lawful means as opposed to self-help. It thus granted the spoliation order on the basis that the requirements for such a relief namely being in peaceful and undisturbed possession and being wrongfully and forcibly removed were met by the respondents.

THE APPEAL

Aggrieved by the decision of the court *a quo*, the appellants lodged the present appeal to this Court. Essentially the appellants challenged the decision on the basis that the court *a quo* misdirected itself when it granted the spoliation order in favour of the respondents in spite of the fact that the appellants are holders of an offer letter. The appellants raised 5 grounds of appeal as follows:

1. In granting the spoliation order in favour of the respondents, the court *a quo* erred in relying on common law principles to effectively authorize the respondent's unlawful occupation of gazetted land and thus rendering nugatory the clear provisions of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*].
2. The court *a quo* erred in evicting the appellants from the property when it was common cause that the appellants were holders of an offer letter which made them lawful occupiers of the disputed portion of the farm.
3. Subdivision A of subdivision B of Umguza Block measuring 195,8095 hectares, having been further subdivided, the court *a quo* erred in failing to appreciate that the appellants were in occupation of a distinct piece of land being the remaining extent of subdivision

A of subdivision B of Umguza Block, measuring 145 hectares, as described in the offer letter and which portion was unoccupied by the respondents at the time the appellants took possession.

4. The court *a quo* erred in making a finding that the respondents were wrongfully or forcibly deprived of possession when no admissible evidence was adduced to that effect.
5. By ordering the appellants to pay costs of suit the court *a quo* erred in granting assistance to the respondents who were acting in open defiance of the law.

SUBMISSIONS BEFORE THIS COURT

Mr *Siziba*, for the appellants, submitted that the appellants as holders of an offer letter were entitled to occupy the farm ahead of the respondents who remained in occupation in violation of s 3 of the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28]* ("The Act"). He further contended that although the court does not condone self-help, spoliation should not be granted where a former owner of acquired land continues to stay on the farm after the expiration of ninety days. He submitted that the court does not have jurisdiction to assist an occupant who remains on the land after it has been gazetted and acquired by the State. The appellants' counsel relied on the case of *Commercial Farmers Union and Ors v Minister of Lands and Rural Settlement and Ors* SC 2010 (2) ZLR 576 (S).

Per contra, Mr *Mpofu,* for the respondents, submitted that the assertion that the appellants were holders of an offer letter does not legally entitle them to resort to self-help and disturb peaceful possession of the respondents. He submitted that although the case of *Commercial Farmers Union supra* was distinguishable from the facts of this matter the case made it clear that both the recipient of an offer letter and the former occupiers had to resort to

lawful means and follow due process in effecting change of occupancy. He contended that instead of resorting to self-help the appellants as holders of an offer letter could institute ejectment proceedings. He argued that the court *a quo* properly granted spoliatory relief to the respondents.

ISSUE FOR DETERMINATION

Although the appellants raised 5 grounds of appeal only one issue commends itself for determination. The issue is whether or not the court *a quo* erred in granting spoliation relief in favour of the respondents.

THE LAW

It is settled that in order to obtain a spoliation order two requirements must be satisfied. In the case of *Botha and Another v Barret* 1966 (2) ZLR 73(S) GUBBAY CJ (as he then was) at p79 D-E stated that:

> "It is clear law that in order to obtain a spoliation order two allegations must be made and protected. These are:
> 1. That the applicant was in peaceful and undisturbed possession of land;
> 2. That the respondent deprived him of the possession forcibly or wrongfully against his consent."

The requirements for spoliatory relief were further discussed in *Streamsleigh Investments (Pvt) Ltd v Autoband (Pvt) Ltd* SC 43/14. 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:
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> > "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.""

From case law it is apparent that even if one is not the rightful owner,if they are in undisturbed and peaceful possession due process and not self-help ought to be followed to evict the possessor. In the case of *Forester Estate Private Ltd vs M.C.R. Vengesai and The Minister of Lands in the Office of the President and Cabinet* HH19-10, PATEL J (as he then was) made the following pertinent remarks at p3:

> "An offer letter does not entitle the holder to occupy the land allotted to him before the current occupier has been duly evicted by due process of the law. Consequently the offeree cannot resort to self-help in order to dispossess or eject the occupier, no matter how intransigent the latter may be in his refusal to vacate the property. The offeree must wait until the State has taken steps to evict the occupier through a court order granted by a court of competent jurisdiction under the Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*] or otherwise. In the absence of such court order or the consent of the current occupier, the offeree has no self-executing right to occupy the land."

In spoliation matters it is apparent 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 authorization of invasion in a lawless manner. In spoliation matters, the issue of ownership does not arise. The one seeking spoliation relief only has to show that they were in peaceful and undisturbed possession and were wrongfully and forcibly dispossessed.

APPLICATION OF THE LAW TO THE FACTS AND ANALYSIS

In casu it is not in dispute that the respondents were in occupation of the farm in question, whether lawfully or otherwise. It is also not in contention that the appellants approached the farm and occupied the land in question although they term it land lying fallow. The land in question being a farm it would not be feasible for the respondents or its workers to be on each and every inch of the farm. It is sufficient that the respondent as *defacto* occupants

were *in situ* and had commenced land preparation. The coming in of the appellants was not sanctioned by law since there was no court order for eviction.

The respondents, who had been despoiled therefore, had to approach the court seeking a *mandament van spolie* order. The court *a quo* granted the spoliation order. What is at stake as highlighted earlier in case law is the lawfulness or otherwise of the actions of the incoming possessor. The court in restoring the *status quo ante* will be seeking to uphold the essential rationale for the remedy which is that the rule of law does not countenance resort to self-help. See *Ngukumba v Minister of Safety and Security and Others* 2014 (7) BCLR 788 (CC) para 10, where the court held as follows at page 8:

> "The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to the possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process."

The appellants in this case by descending on Esidakeni Farm and starting land preparations, disrupted the respondents' peaceful and undisturbed possession. The fact that the appellants had an offer letter does not entitle them to resort to self-help in taking over possession without due process of the law. It is this disregard of the law which prompted the respondents to approach the court *a quo* for redress. The court *a quo* correctly granted the spoliation order in favour of the respondents. In so doing the court *a quo* was buttressing the core values and objectives of protection of possession of property against unlawful dispossession. The sentiments of the court in the case of *Chiwenga v Mubaiwa* SC 86/20 resonate well with the circumstances of this case. The court stated as follows at page 9:

> "The same applies to spoliation, a remedy designed to avert self-help in a democratic civilized society. The remedy forbids the law of the jungle where survival of the fittest

> reigns supreme. Thus, the courts will quickly come to the aid of the vulnerable and the weak to restore custody and possessions where one is unlawfully deprived of the same by the strong and valiant."

See also *Base Minerals Zimbabwe (Pvt) Ltd and Ors v Mabwe (Pvt) Ltd* SC 29/15 at p 7 of the judgment where GWAUNZA JA (as she then was) made the following pertinent remarks:

> "Apart from these contentions coming nowhere near establishing any of the defences recognized by law in spoliation proceedings, I find that the appellants are effectively advocating for an environment where the "take the law into your own hands" adage becomes the norm. It hardly needs mention that this approach offends against the very *raison d'etre* of the law generally and a *mandamus van spolie* in particular, that is, the preservation, promotion and enforcement of law and order in and amongst members of the society."

In casu the mere fact that the appellants hold an offer letter is not sufficient basis for them to take the law into their own hands and seek to dispossess the respondents who were in possession immediately prior to being despoiled. It is the brazen invasion by the appellants to the farm which disrupted the respondents who were in peaceful and undisturbed possession, which calls for spoliatory sanction. The appellants, without following due process, imposed themselves on the respondents' possession. The dispossession of the respondents by the appellants was unlawful and it was done without the respondents' consent. The court *a quo*, properly frowned at self-help which is repugnant to our constitutional values. It thus properly restored possession to the respondents by granting the spoliation relief.

The requirements for a spoliation order were clearly satisfied. The decision of the court *a quo* is unassailable. The appeal is without merit and must fail.

As regards costs there is no reason why we should depart from the normal trend that costs follow the result.

Accordingly, it is ordered as follows:

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

Ndove & Associates, appellants' legal practitioners.

Webb Low & Barry, respondents' legal practitioners.

GWAUNZA DCJ: I agree

CHITAKUNYE JA: I agree