PATRICK JOHN STOOKS

and

P.J STOOKS (PVT) LTD

versus

JONATHAN CHAMBOKO

and

GIBSON CHAMBOKO

and

CHANCE THOMAS RWODZI

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 9 November 2010

Mr *A.N.B. Masterson*, for the applicant

Mr *T.S.T. Dzvetero*, for the respondents

 CHIWESHE JP: On 3 December 2010 I dismissed this urgent application with costs and indicated that my reasons for doing so would follow. These are they.

 The applicants are the former owners of Homefield Farm (“the farm”) situated in the Banket area of Zvimba District. It is common cause that this farm was acquired by the State in terms of s 16 B of the Constitution. It is therefore “gazetted land” and in terms of s 3 (1) of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*] “……………………..no person shall hold, use or occupy Gazetted Land without lawful authority.” Lawful authority is defined in s 2 of the same Act as either an offer or a permit or a land settlement lease. The applicants hold none of the above documents. They do not have lawful authority to hold, use or occupy this farm. Being former owners of gazetted land they are required by law to vacate the farm after the expiry of the statutory period specified in the Act. They have not so vacated the farm. They continue to hold, use or occupy the farm in flagrant violation of the law.

 On the contrary the applicants hold valid offer letters. It is the applicants who have lawful authority to hold, use or occupy the farm or such portions of it as their offer letters may indicate.

 Armed with these offer letters the respondents have taken it upon themselves to occupy the farm and evict the applicants without due process. The applicants have resisted these manoeuvres by the respondents, and, needless to say, there have been violent clashes leading to the disruption of the applicants’ farming activities. It was for this reason that the applicants approached this court under case No. HC 7094/10 wherein they sought and were granted a spoliation order couched in the form of a provisional order.

 The respondents have filed appeal papers with the Supreme Court challenging the decision of this court in granting the order for spoliation. They argue that the appeal noted suspends the decision of this court pending the hearing and disposal of the appeal. On the other hand, the applicants argue that the order should be enforced notwithstanding the noting of the appeal. The applicants have argued in the main that the appeal lacks all reasonable prospects of success and that it has been noted purely for purposes of frustrating the applicants in their quest to restore normalcy at the farm.

 The question that I must decide in this application is therefore whether, despite the noting of an appeal, the applicants are entitled to enforce the spoliation order granted by this court in HC 7094/10.

 In general a party will succeed in an application to execute an order pending appeal if it can show that there are reasonable prospects that the appeal will succeed. The converse is true. Thus in this case the applicants contend that there are no grounds upon which to suspend the order of this court evicting the respondents from the farm. There have been two schools of thought with regards spoliation proceedings instituted by former owners of gazetted land against beneficiaries holding offer letters or other lawful authority to occupy and utilise such land. Some judges are of the view that former owners are entitled to spoliation orders where beneficiaries, armed with offer letters or other lawful authority have taken it upon themselves to occupy such land and evict, extra judicially, the former owners and all persons claiming through them, from such land.

 On the other hand other judges of this court have taken a different view declining to grant spoliation relief even as it may seem that beneficiaries are acting outside judicial process.

 The former approach was favoured by my brother BERE J in *Bok Estates Private Limited vs Hubert Masara and 3 others* HH 148-09 (HC 6764/08). In that case, in response to a submission by the respondents that the applicant did not have *locus standi* to seek an eviction order against the respondents as all their rights to the gazetted land had now passed to the acquiring authority, the learned judge took the view that the applicants’ *locus standi* arises from the relief of spoliation which relief was available even to a thief. (See *Chisveto v Minister of Local Government* 1984 (1) ZLR 248). The other point the learned judge made was that the legislature, in its wisdom, had provided for the manner in which vacant possession of gazetted lands would be secured, namely, by way of prosecution of the offender in terms of s 3 of the Gazetted Land (Consequential Provisions) Act [*Cap 20:28*]*.* Not even the acquiring authority (since none of the sort had been provided for in the Act) could summarily remove an offender. A beneficiary therefore, armed with an offer letter, is not empowered to evict an offender. That course of action would be the preserve of the acquiring authority acting in terms of s 3 of the Act leading to prosecution and, if a conviction is secured, the mandatory eviction that follows that result. Allowing the beneficiary to take the law into his hands would be to sanction illegality.

 I agree with my brother’s reasoning but with respect I think that his approach is one sided.

 I think it is important to ascertain the intention of the legislature in enacting s 3 of the Act. For me the intention is very clear – former owners of gazetted land must vacate the properties concerned at the expiry of the stipulated period.

 These clear provisions cannot be interpreted to mean that former owners should wait until they have been successfully prosecuted in order to vacate these properties. Rather the words used prohibit occupation of the gazetted land further than the stipulated period. Any such further occupation is not only illegal but renders the former owners liable to prosecution and eviction upon conviction. It is clear that dominium and any other rights that the former owners might have enjoyed prior to gazetting cease by operation of law and automatically vest in the acquiring authority.

 The intention of the legislature is to create vacant possession for the resettlement of those persons authorised by the acquiring authority to take up such land. Former owners of gazetted land who refuse to vacate such land are acting in open defiance of the law. For that reason their hands are dirty – until they purge themselves of this scourge by removing themselves from gazetted lands they should not be heard by the courts. They must themselves first comply with the law before approaching the courts. To grant them relief as contemplated in this and other cases would be sanctioning illegality. That cannot be the proper function of this court. The fact that beneficiaries decide to take the law into their own hands cannot be condoned – it is also illegal to do so. But that on its own does not give the former owners any right to remain on the land in defiance of an Act of Parliament. The illegality of the beneficiaries’ actions are only in respect of applying the wrong procedures to secure a legitimate right conferred upon them by the substantive law of the land. The offer letters give them real rights which rights they can enforce against the whole world. On the contrary, the former owners no longer have any rights over these properties. The illegality placed upon their defiance of the will of Parliament is morally greater than the illegality placed upon beneficiaries who may seek to secure their given rights extra judicially.

In any event the remedy of “*mandamus van spolie*” is a common law remedy available to any possessor where he is dispossessed illegally. But we are in this case dealing with property specifically distinguished by legislation where specific possessors of such property have been targeted by legislation. It could not have been the intention of the legislature that such possessors be allowed to defy its express intentions by pleading the common law remedy of spoliation. After all, it is a well known principle of our law that legislation overrides the common law. In my view the former owners cannot rely on possession which is no longer recognisable at law. They no longer have possession. In this respect I take a view different from that taken by my brother BERE J.

 I also do not agree that by providing for the prosecution of former owners and eviction upon conviction the legislature intended to take away the common law right of the acquiring authority or indeed the beneficiaries to seek relief in their own right by approaching the courts seeking the eviction of offending former owners. In other words, there is nothing in the Act or any other law, that precludes the acquiring authority or any beneficiary from taking that course of action. If the legislature had intended to so preclude any other remedy founded at common law, it would have so provided in open and simple language. I take the view that prosecution as envisaged under s 3 of the Act is only but one remedy available to the acquiring authority in its endeavour to secure vacant possession of gazetted properties.

 For these reasons I align myself to the latter approach in cases of this nature, that is the approach taken by BHUNU J in *Top Crop (1976) (Pvt) Ltd and Anor v The Minister of Lands, Land reform and Resettlement and Anor* HH 74-2009 (HC 36/2009).

 Because I am in entire agreement with BHUNU J’s sentiments on the issues at hand and because he has expressed himself so eloquently and succinctly, I am tempted to quote, as I hereby do, what he said at pages 6 and 7 of the cyclostyled judgment.

“What emerges quite clearly from the authorities is that the applicants were dispossessed of their land not by the respondents but by due automatic operation of law. For that reason it appears to me that when the second respondent took occupation of the land the applicants no longer had legal possession of that land. Their continued occupation of the land in defiance of the law was therefore a nullity as such possession was not recognised by law. On the contrary such possession was and is still prohibited by law. Thus in the eyes of the law the applicants were no longer in possession of the land and living quarters at the material time warranting protection of the law because the relevant statutory periods entitling them to occupy, hold or use the land had expired.

That being the case, it can hardly be found in the applicants’ mouth to say that they were in peaceful and undisturbed possession of the disputed land when in fact and in truth they are painfully aware that at the time the second respondent took occupation their possession was disturbed and precarious if not non-existent by operation of law. I accordingly find it doubtful that the applicants were in peaceful and undisturbed possession at the material time despite the respondents’ concession on this point.

Looked at from a different angle. The spoliation order being sought is a common law remedy. It is trite and a matter of elementary law that common law cannot be used to modify statute let alone constitutional provisions. I am therefore of the firm view that where the constitution and an Act of parliament come into conflict with common law, common law must give way to constitutional and statutory provisions.

It is also my considered view, that the courts cannot use common law principles such as spoliation to authorise conduct which is forbidden by the legislator without unsurping the function of Parliament. In this case the legislator has prohibited the occupation or use of gazetted land without an offer letter, a permit or land lease. The applicants not being in possession of any of those requirements, it follows that they are prohibited by law from occupying the disputed land.

That being the case, the Court cannot give an order which is at variance with the law without the Court itself contravening the law. I do not perceive any court in our jurisdiction ordering restoration of possession of dagga, a firearm or gold to a person without a license or permit regardless of the circumstances under which such person may have lost possession. The possession, occupation or use of land cannot be treated differently. This is for the simple but good reason that the court cannot authorise an illegality under the guise of the common law principle of spoliation.

This prompted MALABA DCJ in the Airfield case (*supra*) to remark that:

“The appellant was acting in contravention of para (b) of subs (1) of the Act at the time it applied for the interim relief. It had not ceased to occupy, hold or use the land at the end of forty-five days from the date of service of the order of acquisition, nor had it ceased to occupy, hold or use the living quarters on the land at the end of ninety days from the date of service of the order of acquisition on it.

An interim interdict as a remedy for the prohibition of unlawful conduct could not be granted for the protection of the illegal activities of the applicant. In other words the applicant wanted the Court to grant an order stopping the authority from acting lawfully so that it could continue to commit an offence in carrying out farming operations illegally.”

On the basis of such observation the Supreme Court dismissed the applicant’s appeal for an order restoring possession in circumstances akin to those of the applicant in this case. In this case the applicants want to present the holder of an offer letter legally entitled to occupy, hold and use the land from doing so in order that they can unlawfully occupy, hold or use the land without an offer letter, permit or land lease in contravention of the law.”

 It is clear from the above that I do not agree with the applicants when they argue that the appeal mounted by the respondents in the Supreme Court has no reasonable prospects of success. On the contrary I hold the firm view that this appeal is more likely to succeed than not.

 It was for these reasons that I dismissed the application with costs.

*Coghlan, Welsh & Guest*, applicants’ legal practitioners

*G.N. Mlothswa & Co*, respondents’ legal practitioners