

L.S WATERS (PVT) LTD
and
JOHANNES JAKOBUS LAUBSCHER
versus
ZIMBABWE NATIONAL WATER AUTHORITY
and
MANYAME CATCHMENT COUNCIL
and
A.H. KATSANDE – ACTING MANAGER
MANYAME CATCHMENT COUNCIL
and
CDE E. MHLANGA – CHAIRMAN UPPER MANYAME
SUB-CATCHMENT COUNCIL
and
UPPER-MANYAME SUB-CATCHMENT COUNCIL
and
WENSLEY MUCHINERI – THE COMPLIANCE
MANAGER OF UPPER MANYAME
SUB-CATCHMENT COUNCIL
and
MINISTER OF ENVIRONMENT, WATER
AND CLIMATE N.O

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 17 February 2016, 19 February 2016 and 24 February 2016

Urgent Chamber Application

O Mawadze, for the applicants
J Dondo, for the 1st, 2nd, 3rd, 4th respondents
J Chikura, for the 5th and 6th respondents
N M Muzuva, for the 7th respondents

MUREMBA J: This is an application for a spoliation order wherein the applicants seek the following relief against the respondents:

“Terms of the final order sought

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

- 1) That the Provisional order granted in this matter be and is hereby confirmed.
- 2) The 1st, 2nd, 3rd, 4th, 5th and 6th respondents shall jointly and severally the one paying for (*sic*) the others to be absolved pay costs of suit on a legal practitioner and client scale, or the 3rd, 4th and 6th respondents shall jointly and severally pay costs , of suit *de bonis propriis* on a Legal Practitioner and client scale.

Interim relief granted:

1. Pending finalization of this matter, the first and second applicants be granted the following relief:-
 - A. That the first, second, third, fourth, fifth, sixth and seventh respondents and all those purporting to act through them, or on their behalf be and are hereby directed and ordered to restore possession of No. 10 Metcalf Road, Greendale, Harare, restore to the first and second applicants and reconnect at their costs, 6 X 6 bulk water abstraction pumps electrical cables, water pipes and other ancillary assets unlawfully despoiled from the first and second applicants, remove all poisonous or other substances administered or thrown into applicants boreholes, to the applicants' authorised representatives/agent immediately upon service of this order upon them, failure which the Sheriff of the High Court of Zimbabwe through the assistance of the Police and Officer-in-charge of Rhodesville Police Station be and is hereby ordered and directed to immediately take all necessary steps to restore possession and control of the aforesaid properties and assets set out above to the applicants or their duly authorised agents.
 - B. The first to sixth respondents shall jointly and severally the one paying for (*sic*) the others to be absolved pay costs of suit on a legal practitioner and client scale”.

In opposing the application the first to the sixth respondents started by raising some points in *limine* in their opposing affidavits. The first one was that the matter was not urgent. The second one was that there was need to join the police as co-respondents since they were the ones who had seized the applicants' property. At the start of the hearing Mr. *Dondo* advised that they had discussed the points *in limine* as counsels and had agreed that the matter was urgent. So the respondents were abandoning that point *in limine*. On the second point in *limine* on the joinder of the police as co-respondents, Mr. *Dondo* advised that they had failed to reach a consensus with Mr. *Mawadze*, counsel for the applicants who remained adamant that there was no need to join the police because they had never been involved in the seizure as no police report had ever been made against the applicants. The counsels then agreed that instead of dealing with the issue of joinder of the police as a point in *limine* they would rather deal with it in the merits. So the two points in *limine* were abandoned and we went straight into the merits. Mr. *Muzuva* for the

seventh respondent submitted that the seventh respondent would abide by the decision of the court, so he was not contesting the matter.

The facts of this case are largely common cause. From 2008 the applicants were running a commercial bulk water abstraction and bottling plant at No. 10 Metcalf Road, Greendale, Harare pursuant to a permit granted to them by the respondents in terms of the Water Act [Chapter 20:24]. Their permit having expired on 31 December 2015, the applicants aver that in January 2016 they applied for a new permit which has not been granted. Despite the lack of renewal of the permit, the applicants continued with their operation of bulk water abstraction, yet in terms of s 17A of Statutory Instrument 90/2013 for anyone to operate ground water abstraction they need to be registered as well as to be a holder of a valid water abstraction permit. Section 34 of the Water Act also prohibits any operation in the absence of an abstraction permit.

It is also pertinent to mention that on 12 November 2015 the second respondent, Manyame Catchment Council, wrote to the applicants giving them notice of a ban of abstraction of bulk water within residential areas. The applicants were being informed that they were no longer permitted to conduct any bulk water abstraction operations at No. 10 Metcalf Road, Greendale. The applicants were given 7 days' notice up to 19 November 2015, to stop all operations. The second respondent mentioned in that letter that the decision for such a ban had been necessitated by the need to protect finite groundwater resources from over exploitation and the risks associated with bulk water abstraction in an urban set up. The second respondent indicated in the same letter that by copy of the letter it was directing the first respondent and the fifth respondent to conduct an inspection at the applicants' premises on 20 November 2015 and thereafter carry out periodic inspections to ensure that the applicants have stopped all bulk water operations.

It must be noted that when this letter was written to the applicants, their permit had not yet expired. It was due to expire on 31 December 2015. It is common cause that the applicants did not take heed. They continued with their operations and disregarded the letter. However, on 18 November 2015, the applicants lodged an appeal with the Administrative Court against the decision of the second respondent to ban bulk water abstraction at No 10 Metcalf Road, Greendale. The appeal is under case No. Misc/WZ3A/15 and is still pending.

Having lodged the appeal, the applicants continued with their operations even after their permit had expired on 31 December 2015. It is not disputed that, again, on 19 January 2016, the fifth respondent wrote to the applicants reminding them that their water abstraction permit had expired on 31 December 2015. It also informed them that, that permit would not be renewed as had been stated by the second respondent, Manyame Catchment Council, in its letter of 12 November 2015. The letter reiterated that all bulk water operations in urban areas had since been stopped and as such the applicants needed to be guided accordingly.

On 2 February 2016, the fourth respondent, Cde E. Mhlanga, the board chairman of Manyame Catchment Council also wrote to the applicants giving them another warning, subsequent to the warning of 16 January 2016, reminding them to stop bulk water abstractions at No. 10 Metcalf Road, Greendale, following the expiry of their permit. In that letter Cde E. Mhlanga threatened to invoke the provisions of the Water Act and the Water (Permit/Amendment) Regulations Statutory Instrument 90 of 2013 without any further warning or notice. This letter was even copied to Rhodesville Police Station.

Again, on 10 February 2016 the applicants filed another appeal in the Administrative court under case No Misc/WA/03/2016. In their notice of appeal they stated that they were appealing against the decision of the respondents not to renew their permit as evidenced by the fourth respondent's letter of 19 January 2016 wherein he stated that the applicants' permit was not going to be renewed. That appeal is also still pending.

It is not in dispute that, on 10 February 2016, the applicants' property was seized from 10 Metcalf Road, Greendale. The applicants said that the property includes the immovable property itself, i.e. 10 Metcalf Road, Greendale and equipment which includes water abstraction pumps, water tanks, pipes and electrical cables. The applicants said that the property was seized by the first to the sixth respondents who were in the company of or through their unknown employees whom they instructed. On the other hand, the respondents say that following the applicants' defiant behaviour of continuing to operate without a permit, the second respondent ended up reporting the matter to the police and it is the police who seized the applicants' equipment in accordance with s 17A (5) of the Water (Permits/Amendment) Regulations Statutory Instrument 90 of 2013. This provision authorises the police to seize property pursuant to a criminal charge having been preferred against the offender. The property is seized pending the outcome of the

prosecution of the case. The respondents said that the case was reported at Highlands Police Station and the RRB number is 273161 and the CR thereof is 109/02/16.

The Law

The *mandament van spolie* is used to summarily undo the unlawful taking of existing control by restoring the lost control without investigating its merits¹. The applicant's control is restored without investigating the merits of the parties' rights to the thing simply because control has been seized unlawfully by self-help. Restoration of the thing must be done first before the merits of the case are examined². The rationale is that no-one should be allowed to take the law into their own hands otherwise there will be chaos and a breach of peace³. The remedy of the *mandament van spolie* maintains the control of a thing without any reference to the merits thereof. As a result, unlawful or illegal control can be restored by means of this remedy.

To succeed in getting the remedy of the *mandament van spolie* the applicant has to satisfy two requirements⁴:

- (a) The applicant had peaceful and undisturbed control of the thing before the disturbance took place.
- (b) The respondent took or destroyed the control of the applicant unlawfully.

However, if the respondent can proffer valid defences, the applicant will not succeed with his application even if he has satisfied all the requirements of the *mandament van spolie*⁵. It is the respondent who bears the onus to prove any such defences. The applicant has no onus to prove the absence of defences⁶. The respondent must raise and prove the necessary facts to succeed in his defence(s). If he does so successfully the application will fail.

Amongst the admissible defences that can be raised by the respondent is the defence that he did not commit spoliation. The respondent can say he was neither directly nor indirectly

¹ NJJ Olivier, G J Pienaar, AJ Van Der Walt *Law of Property Students handbook*, 2nd ed p 182.

² *Nino Bonino v De Lange* 1906 TS 120 122.

³ NJJ Olivier, G J Pienaar, AJ Van Der Walt *Law of Property Students handbook*, 2nd ed p 182.

⁴ *Nino Bonino v De Lange supra*; *Yeko v Qana* 1973 (4) SA 735.

⁵ NJJ Olivier, G J Pienaar, AJ Van Der Walt *Law of Property Students handbook*, 2nd ed p 185

⁶ NJJ Olivier, G J Pienaar, AJ Van Der Walt *Law of Property Students handbook*, 2nd ed p 184

involved in the alleged spoliation⁷. At law the principal is responsible for the spoliation of his agent and on the other hand, the agent cannot escape his own responsibility on the basis of the agency relationship⁸.

Application of the law to the facts

It is not in dispute that the applicants were in peaceful and undisturbed occupation of No. 10 Metcalf Road, Greendale. They were also in peaceful and undisturbed possession of the equipment that they were using for abstraction of water, although illegally, until 10 February 2016, when the equipment was taken away from them. The property was forcibly taken away from them. The applicants therefore managed to satisfy the two requirements of spoliation. The defence by the respondents is that they are not the ones who despoiled the applicants of their equipment. They aver that it was the police who seized the equipment following a report that had been made to them by the second respondent, following continued illegal bulk water abstraction by the applicants. Further to that, the respondents averred that the police are empowered by statute, namely the Water (Permits/Amendment) Regulations Statutory Instrument 90 of 2013 to seize equipment pending prosecution of the offender. The provision reads as follows:-

- “If a person is charged with contravening subsection (1), any inspector, or police may seize-
- (a) any water being sold in bulk, in contravention of subsection (1); and
 - (b) any vehicle or other equipment used in connection with the selling or transportation of water in bulk in contravention of subsection (1);
- pending the outcome of the prosecution of an offence.”

The respondents went on to give the police reference numbers in a bid to show that the equipment had been seized by the police, and not by them.

Looking at the founding affidavit of the applicants I am not inclined to grant the application in their favour because they said that they were despoiled of their equipment by the first to the sixth respondents yet the first, second, and the fifth respondents are not natural persons. The founding affidavit does not state who acted on behalf of each one of them in despoiling them. The founding affidavit does not categorically state if the third and fourth

⁷ *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 (3) SA 218 (c) 222 D – E.

⁸ NJJ Olivier, G J Pienaar, AJ Van Der Walt *Law of Property Students handbook*, 2nd ed p 196

respondents were there in person or they acted through their agents. The only person who seems to have been identified during the time the equipment was being seized was the sixth respondent. He is said to have been giving instructions to some unknown persons, who were taking the applicants' equipment. With the applicants not saying which people acted on behalf of the first, second, and the fifth respondents who are not natural persons it is clear that the applicants cannot say with certainty that these respondents were involved in despoiling them and that it is the respondents who took their equipment. This taken against the backdrop of the respondents' defence that it is the police who took the property makes it difficult for me to grant an order ordering the respondents to restore the applicant's equipment. The applicants did not adequately deal with the identity of the people who despoiled them of their property. If it is indeed true that the property was seized by the police and is in the custody of the police pending prosecution of the applicants as the respondents allege, then an order that the respondents restore the property to the applicant is not capable of being complied with. In other words, restoration will not be possible since the property is not in the control of the respondents, but of the police who are a third party and not party to the present proceedings. If restoration is not possible then an order that the respondents restore the *status quo ante* will be *brutum fulmen*. The applicants did not show on a balance of probabilities that it is the respondents or their agents, and not the police who despoiled them. Maybe the applicants ought to have taken a hint from the respondents' point in *limine* on the issue of joinder right from the start and joined the police as co-respondents. If it is indeed true that it is the police who have the property pursuant to a criminal report which was made by the second respondent, then no spoliation was committed as the seizure is sanctioned by law. At law the *mandament* can be excluded by statute, but statutes of this nature are interpreted restrictively⁹.

The applicants averred that they were also despoiled of their immovable property No. 10 Metcalf Road, Greendale, Harare, but they did not explain clearly in their founding affidavit how or in what manner they were despoiled of the property. Neither did they aver that they were chased away from the premises by the respondents nor did they aver that the respondents took occupation of the said premises. It was only during the hearing that Mr *Mawadze* sought to

⁹ NJJ Olivier, G J Pienaar, AJ Van Der Walt *Law of Property Students handbook*, 2nd ed p 183

explain that the respondents have not taken occupation of the premises, but that they frequently visit the premises and disturb the applicants in their enjoyment of the premises by the threats that they are always making against continued abstraction of water. For this kind of action by the respondents, the applicants should not be seeking a *mandament van spolie* because the action does not satisfy the requirement that the respondents have taken control of the premises. Spoliation implies a deprivation and not a mere disturbance of possession¹⁰.

In view of the foregoing, the application is dismissed with costs.

Manase & Manase, applicants' legal practitioners
Dondo & Partners, 1st, 2nd, 3rd, 4th respondents' legal practitioners
Hove & Associates, 5th & 6th respondents' legal practitioners
Civil Division, Attorney General, 7th respondent's legal practitioners

¹⁰ Van Rooyen v Burger 1960 (4) SA 356 (O) @ 363B-F