

MARTIN MILLERS AND ENGINEERS (PVT) LTD
versus
MAZOE HOTEL (PVT) LTD

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 13 December 2023 & 4 January 2024

Urgent Court Application

T G *Kuchenga*, for the applicant
B *Mkwachari*, for the respondent

CHIKOWERO J:

INTRODUCTION

[1] This is an urgent court application in which the applicant seeks the following relief:

- “1. That the actions of the respondents (sic) or their lawful agents in taking over the property at Stand 836 and 837 Mazoe is an act of spoliation.
2. The respondent or any of their agents are hereby ordered to restore possession of Stand 836 and 837 Mazoe District to the applicants (sic) forthwith.
3. That it is hereby ordered that any other person is barred from interfering with the premises on Stand 836 and 837 Mazoe District without a lawful cause and order of the Court of Competent Jurisdiction.
4. Respondent shall pay costs on the scale of legal practitioner and client.”

FACTUAL BACKGROUND

[2] In a nutshell, the applicant seeks a spoliation order on the basis that the respondent illicitly deprived it, on 7 November 2013, of possession of Stands 836 and 837 Mazoe District.

[3] The applicant alleged that the respondent placed some building material on the land in question on the said date, dug a foundation and commenced construction work.

[4] Attached to the founding affidavit are photographs of a huge pile of bricks, drums, construction stones, pit sand and a foundation.

[5] It is not at all clear, even after oral submissions, whether the piece of land occupied by the respondent and on which construction work is in progress, is Stand 836 Mazoe District or Stand 837 Mazoe District or a portion of both pieces of land.

[6] The allegations that the applicant was in peaceful and undisturbed possession and was illicitly dispossessed of the piece of land in question are clearly and categorically disputed. This is borne out by the opposing affidavit which reads in part:

- “12.1on 3 October 2023, respondent concluded a lease agreement with Zimbabwe National Water Authority (ZINWA) in terms of which the respondent leased from ZINWA 20 000 square metres piece of land situate at Mazoe Dam in addition to an existing lease of another 20 000 square metres upstream of Mazoe Dam. The lease agreement for both pieces of land is still extant and subject to renewal in terms thereof, only lapse on 30 June 2030. Copies of the lease agreements are attached hereto as Annexures “F” and “F1” respectively.
- 12.2 Pursuant to and in terms of the lease agreement, ZINWA gave respondent vacant possession of the 20 000 square metres piece of land. This piece of land is clearly depicted and marked as ‘Mazoe Hotel Ext 2 Ha’ in ZINWA diagrams attached hereto as Annexures “G” and ‘G1’.
- 12.3 At all material times on and after respondent’s vacant possession and occupation of the property;
- 12.3.1 There were no indications of any occupation by any person other than the respondent;
- 12.3.2 There was no construction in progress or signs of any previous construction having taken place;
- 12.3.3 There certainly was no security personnel on the entirety of the 20 000 square metres and respondent or any of its agents/representative, have not, unto this day, met any such security personnel.”

[7] The opposing affidavit was deposed to on 12 December 2023.

LOCUS STANDI OF THE APPLICANT

[8] Mr Mkwachari acted properly in conceding that this preliminary point was without substance.

[9] In the opposing affidavit, as in oral submissions, the preliminary point had been taken that the applicant has no *locus standi* to institute this application. The respondent had, then, taken the position that:

- “5. Applicant, has no *locus standi* to bring the present application on the basis that, as shown in paragraph 8 of the founding affidavit as read with Annexure ‘C’ thereto, the offer of the recreational Stand by Mazowe Rural District Council was made to one D M Makonese and not to the applicant. Applicant only appears on the offer letter as the said D M Makonese’s trade name.
This is fatal to the application in its present form.”

[10] In short, the respondent thought then that D M Makonese should have instituted these proceedings, as applicant, and not Martin Millers and Engineers (Pvt) Ltd. In argument Mr

Mkwachari had initially submitted that since the present applicant was just D M Makonese's trade name, and hence not a legal persona, the "wrong" applicant was before me.

[11] He eventually agreed with Mr Kachenga, for the applicant, that the applicant is a firm as defined in s 11(1) of the High Court Rules, 2021. Therein, a firm is defined to include a business carried on by the sole proprietor under a name other than his or her own. Section 11(2) provides that a firm or association may sue or be sued in its own name. Where a firm is a litigant, there is no requirement to allege the names of the proprietor.

[12] Nothing further needs to be said about this preliminary point. It was, in any event, conceded to be without merit.

NON-URGENCY

[13] Despite Mr Mkwachari's spirited efforts, I am satisfied also that this preliminary point is without substance.

[14] The founding affidavit clearly explains why this application was filed on 7 December 2023 when the cause of action is said to have arisen on 7 November 2023.

[15] The applicant initially thought that its opponent was one Sylvester Chibhanguza. That is why it had sued him, for the same relief, at the magistrates court in Concession.

[16] Chibhanguza then filed a notice of opposition and opposing affidavit. He professed complete ignorance of that which was imputed to him in that application. His averments, to the applicant, appeared genuine. The applicant says it only knew that its correct opponent was Mazoe Hotel (Pvt) Ltd when the latter filed and served an application to be joined in the proceedings then pending at the Concession magistrates court. That application was served on the present applicant on 22 November 2023. This explains why the applicant withdrew the matter it had filed at the magistrates court. With that, the application for joinder fell away.

[17] The applicant thought the matter could be amicably resolved without resort to further litigation. It addressed a letter to the present respondent's legal practitioner on 23 November 2023 in this vein. I have seen that letter. It was not responded to. This then led to the applicant filing this application on 7 December 2023.

[18] I take the view that the applicant itself treated the matter as urgent and has explained the circumstances surrounding the issuance of this application on 7 December 2023 when what it says

is the cause of action arose on 7 November 2023. The test for urgency set out in a number of decided cases, including *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H), is satisfied.

THE MERITS

[19] The matter turns on the merits.

[20] I find that the two requirements that an applicant must not only allege but prove on a balance of probabilities for a court to grant a spoliation order have not been established.

[21] A plethora of authorities have traversed this terrain. See *Botha & Anor v Barret* 1996 (2) ZLR 73 (S); *Swimming Pool and Underwater Repair (Private) Limited & Ors v Rushwaya & Anor* SC 32/12; *Banga & Anor v Zawe & Ors* SC 54/14; *Mswelangubo Farm (Pvt) Ltd & Ors v Kershelmar Farms (Pvt) Ltd & Ors* SCB 80/22; *Chiwenga v Mubaiwa* SC 86/20 and *Nyamande v Mahachi & Ors* SC 45/23.

[22] In *Streamsleigh Investments (Pvt) Ltd v Autoband Investments (Pvt) Ltd* 2014 (1) ZLR 736 (S) GOWORA JA (as she then was) with the concurrence of MALABA DCJ and GARWE JA (as they then were), in this regard, said at 743 G – 744 C:

“It has been stated in numerous authorities that before an order for a *mandament van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly. In *Scoop Industries (Pty) Ltd v Langlaagte Estate and GM Co. Ltd* (in vol liq) 1948 (1) SA 91(W) LUCAS AJ said at pp 98-99:

‘Two factors are requisite to found a claim for an order for restitution on an allegation of spoliation. The first is that the applicant was in possession and, the second that he has been wrongfully deprived of possession against his wish. It has been laid down that there must be clear proof of possession and of the illicit deprivation before the order is granted. (See *Reiseberg v Reiseberg* 1926 WLD 59 at 65). It must be shown that the applicant had free and undisturbed possession (*Hall v Pitsoane* 1911 TPD 853). When it is shown that there was such possession, which is possession in the physical fact and not in the juridical sense, and there has been such deprivation, the applicant has a right to be restored in possession *ante omnia*. On a claim for such restoration it is not a valid defence to set up a claim, on the merits.’

Broken down in simple terms, an applicant for an order for a *mandament van spolie* must establish the following:

- (1) That he was in peaceful and undisturbed possession of the property;
- (2) That he was unlawfully deprived of such possession.

See also *Davis v Davis* 1990 (2) ZLR 136 (h) at 141 B – C.”

[23] Her Ladyship continued, at 744D – E:

“It was necessary, in my view for the respondent to have shown that it was in occupation of the premises in question and that further to that it was, in fact, the appellant, as opposed to AMI P/C, that caused its unlawful dispossession from the premises. It did not establish that it was in peaceful and undisturbed possession and that it was disposed by the appellant.

Consequently, there is no substance to the allegation by the respondent that it had been unlawfully dispossessed of occupation of the hospital premises by the AMI P/C against which it took no action.”

[24] In *Nyamande v Mahachi & Ors* (supra) GUVAVA JA, with the concurrence of MUSAKWA and MWAYERA JJA stressed at para 19:

“Spoliation proceedings hail from a common law remedy which is meant to discourage members of the public from taking the law into their own hands.....The remedy encourages members of society to follow due process in obtaining or acquiring any res they believe belongs to them in circumstances where they have been unlawfully disposed. The *mandement van spolie* is therefore a possessory remedy aimed at the restoration of possession where a party is unlawfully deprived of its prior peaceful and undisturbed possession of property. The facts of each matter determine whether or not spoliation or unlawful disposition has occurred.”

[25] On the facts of this matter the applicant placed no shred of evidence before this court to prove that it was in peaceful and undisturbed possession of the piece of land at the time that the respondent dug the foundation and placed its building material on site. No evidence pertaining to the number and identity of the vehicles which brought the building material on site, the number of trips undertaken and the date(s) and times in respect thereof was availed. No evidence was tendered on the reaction of the alleged security personnel not only to the off-loading of building material on the piece of land but also the digging of the foundation thereon. In fact, Mercy Makonese, who deposed to the founding affidavit, does not say that she was present on site and saw the respondent taking possession of the piece of land in question. Her affidavit, which is pregnant with hearsay evidence, does not reflect that anyone was in peaceful and undisturbed possession of the piece of land in question, for and on behalf of the applicant, when the respondent took occupation. The founding affidavit does not name a single person as having been in occupation of the piece of land when the respondent took occupation of the same piece of land.

[26] I am aware that in para(s) 10, 11, 12 and 13 of the founding affidavit the following allegations are made:

- “10. On or around 2013 the applicant had finished construction of a fuel service station and food outlet on the property. Unfortunately, the property was destroyed by parties who had an ill political motive. An order was granted in the year 2014 which gave applicant possession and removing the parties which sought to remove applicant. See Annexure “D”.
11. The applicant however managed to retake possession of the property sometime in 2017 after enforcing the order and has been in peaceful control and possession of the property since then.

12. The applicant had begun to make strides in preparation of construction of the property and has been engaging the relevant authorities on the property. I attach hereto as Annexure “E” a copy of a correspondence to that effect.
13. At all material times, the applicant has been in peaceful undisturbed possession of the property and has had security personnel on the property protecting its interests.”

[27] It is true that in 2014 this court granted a spoliation order, by consent, in terms whereof some seven respondents were ordered to restore possession of Stands 836 and 837 Mazowe, Mazowe Ecocity, to the applicant. The present respondent was not party to that lawsuit.

[28] Whether the applicant, pursuant to that order, retook possession of the two pieces of land in 2017 is not relevant for my purposes.

[29] What is material is whether the applicant has proved on a balance of probabilities that it was in peaceful and undisturbed possession of the piece of land in question on 7 November 2023 and was thus deprived of such possession illicitly by the respondent. I have already answered that question in the negative. The applicant did not even attach supporting affidavits of the alleged security personnel to its founding papers. Had that been done, those affidavits would have contained primary evidence in substantiation of the applicant’s allegations that it was, through the security personnel, in peaceful and undisturbed possession of the piece of land and that the respondent illicitly deprived it of such possession. No reason was proffered in the founding affidavit why such primary evidence, if it existed, was deliberately withheld from the court. No reason was given why even the names of such security personnel were also withheld from the court.

[30] It must be remembered that the respondent gave clear evidence in its opposing affidavit disputing that anybody, the applicant included, was in occupation of the piece of land when the respondent itself took occupation. The averments of the respondent in this regard are buttressed by the contents of para 12 of the founding affidavit. Therein, the applicant does not allege, let alone prove, that it was in occupation of the piece of land in question. Annexure “E” to the founding affidavit is the applicant’s letter of 29 March 2022 engaging the Environmental Management Agency over renewal of an environmental impact assessment licence, apparently in respect of a project to be carried out on the two pieces of land once new structures had been erected thereon in place of the destroyed petrol service station and food outlet. The annexure advances the applicant’s case *vis-à-vis* establishing the requirements of a spoliation order not at all.

[31] The applicant has neither alleged nor proved that it put up a structure, such as a cabin, for use by its unnamed security personnel as they protected the applicant's interests from 2017 to 7 November 2023. I have looked at the pictures of the piece of land in question. Indeed, there is no visible evidence on the ground tending to prove that anybody was in occupation of the piece of land prior to the respondent taking possession thereof.

[32] Even in its letter of 23 November 2023 the applicant does not allege spoliation by the respondent. Bearing an "URGENT" sticker, the applicant's legal practitioners wrote to the respondent's lawyers in these terms:

"23 November 2023

T.H. CHITAPI AND ASSOCIATES
1st Floor
Local Government House
86 Selous Avenue
Harare

R.E: MAZOWE HOTEL LTD v MARTIN MILLERS AND ENGINEERS (PVT) LTD
CASE NO. C 209/23

We acknowledge the receipt of your letter.

May you please note that the matter has been abandoned and will be withdrawn by the end of today or tomorrow.

We take the view that our client has existing rights, he purchased the property in 2010 and he acquired rights over the property in 2010 and the property was still being managed by Mazoe RDC. We are of the opinion that the allocation of land through a lease agreement by Mazoe RDC is null and void. And our clients have the right to challenge the allocation of the lease agreement.

If possible, can you advise your client to cease construction on the property until the matter has been resolved. We are of the opinion that it may be beneficial for both parties.

As per our telephone conversation with our Mr Kuchenga, if the matter may be we can have a round table meeting at the earliest convenient (sic).

Regards

(signed)
MAKURURU AND PARTNERS."

[33] This letter forms part, not of the founding papers, but of the opposition to the application.

[34] If the applicant had been in peaceful and undisturbed possession of the piece of land in question on 7 November 2023 and was illicitly deprived of same by the respondent, the probabilities are that the letter whose contents I have quoted above should have been speaking to those issues instead of attacking the legal validity of the respondent's lease agreement which was the basis of its occupation of the piece of land in question.

[35] Since I have found that the applicant failed to prove that it was in peaceful and undisturbed possession of the property at the material time, it follows that the question of illicit deprivation of possession does not arise.

COSTS ON A PUNITIVE SCALE

[36] This application is an abuse of the court process.

[37] It was founded on patently false factual allegations. The applicant knew, well before instituting these proceedings, that its cause of action was not spoliation at all. The letter whose contents I have reproduced makes this manifest. It deliberately decided not to pursue the course of litigation threatened in the letter in favour of fabricating what it knew was a false cause of action. The motivation was to reap the undeserved benefit of the quick remedy that spoliation proceedings generally entail. What the applicant exhibited is dishonest conduct of litigation, hence it abused court process. See *Mahomed & Son v Mahomed* 1959 (2) SA 688 (T). Further, the applicant caused the respondent to incur unnecessary legal costs in defending this suit. The latter is justified in seeking a full recovery of such costs. I have already observed that the founding affidavit is full of hearsay evidence, most of which is incidentally also false.

THE INTERDICT

[38] Before concluding this judgement I pause to observe that I cannot accede to the "consequent" prayer to interdict unknown persons, who are not before me, from interfering with the non-existent "premises" on Stands 836 and 837 Mazowe District. The founding affidavit neither pleaded nor proved such a case. The draft order, in that regard, had no leg to stand on.

ORDER

[39] **In the result, IT IS ORDERED THAT:**

1. The application be and is dismissed.

2. The applicant shall pay the respondent's costs on the legal practitioner and client scale.

CHIKOWERO J

Makururu and Partners, applicant's legal practitioners
T H Chitapi and Associates, respondent's legal practitioners