

FUNGAI KHUMALO
and
SPECIAL WIDOWS GROUP
versus
CITY OF HARARE
and
OFFICER COMMANDING HARARE PROVINCE N.O.

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 4 October 2022 & 18 January 2023

Urgent Chamber Application

E Madzoka with B Chideme, for the applicants'
A Moyo, for the 1st respondent
N Tembo, for the 2nd respondent

KWENDA J: The second applicant described itself in the founding affidavit as an association of elderly and vulnerable widows. Its capacity to sue or be sued is not specifically pleaded. Same has not been contested by the respondents. I proceeded on the understanding that 2nd applicant is a common law universitas with the capacity to sue and to be sued. It has previously successfully sued in this court and the various correspondence submitted with the notice of opposition confirm that that the 2nd respondent is a bearer of rights. The 1st respondent described himself as the chairperson of the 2nd applicant duly authorised to act for it in these proceedings. That assertion, too, has not been contested. The 1st respondent deposed to the founding affidavit on his own behalf and on behalf of the 2nd applicant.

The matter before me is an application for a spoliation order. The applicants seek a final order restoring to them vacant possession of parking bays in Park street. The applicants have not delineated the parking bays in any manner that would render any judgment of this court executable by the Sheriff in the event that they succeed.

The application was initially opposed by both respondents. At the hearing the 2nd respondent opted to abide by the judgment of the court. The application is therefore opposed by the 1st respondent only.

The back ground to this application appears more fully in the 1st respondent's opposing papers. The applicants' papers are very terse, choosing to found their claim on an order of this court in case number HC 5229/22 dated 10 August 2022 which, they aver, has been disobeyed by the 1st respondent with the help of the 2nd respondent. Instead of pursuing the remedies which the law provide for disobedience of court orders the applicants have applied for a spoliation order. The background as stated in the 1st respondent's papers was not controverted by the applicants. It is therefore me is common cause.

As at 24 September 2022 the applicants were operating a weekend market from some parking bays along Park Street, Harare with the permission of the 2nd respondent. The exact location is not stated in the papers. In the event of the applicants succeeding, any order which fails to identify the exact place to which it applies would be vague and unenforceable.

The permission to operate a market, was granted by way of letter of the Town Clerk dated 18 June 2021 with the concurrence of the 1st respondent's Director of Medical Services contained in a letter dated 14 September 202. The latter set out the sanitary and health conditions attaching to the offer. The arrangement had been initiated by the Minister of State for Provincial Affairs and was gratuitous in the sense that the applicants were operating at the pleasure of the 1st respondent. The parties did not enter into any lease agreement. The applicants were simply permitted to sell their products from open spaces allocated to them in the parking bays along Park Street Harare on Saturdays and Sundays only, during which periods motorists were excluded. In actual place the 1st respondent never relinquished control of the parking bays but would simply allow the applicants, on compassionate grounds to use the bays to ply their trade.

Sometime in August 2022 the applicants became aware of the 1st respondent's intention to terminate the gratuitous arrangement. They pre emptied the implementation of the decision by filing an urgent chamber application under case no HC 5229/22 wherein they prayed for a provisional order. The draft final order sought was an order confirming that their occupation, operation of the applicants along Park Street parking bays was lawful, the 1st respondent's decision to terminate the permission it had given to them to ply their informal trade in the parking bays along Park Street during weekends was illegal and *ultra vires* s 68 of the Constitution of Zimbabwe (Amendment No. 20) Act 2013. Section 68 of the Constitution protects the right of every person to administrative justice in that every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair and that any person whose right, freedom, interest

or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct. In the interim they prayed for an interdict barring the first respondent from evicting them from the open space without due process. The applicants prayed for costs of suit.

At the hearing of that urgent chamber application on the 10th August 2022, the parties reached an agreement culminating in a consent order worded as follows:

- “1. Respondent be and is hereby interdicted from enacting applicants’ from their area of business operation being open space along Park Street parking bay without following due process.
2. Each party to bear own costs.”

Content with the reprieve, the applicants appear to have abandoned the issue of the declarator which they had sought initially. They may have failed to realise that the consent order did not confer or confirm any of the rights that they sought to be declared initially. An order of court does not confer rights; it confirms existing rights. See s 14 of the High Court Act [Chapter 7:06].

“14 High Court may determine future or contingent rights

The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

On 31 August 2022 the 1st respondent re-commenced the process of terminating the arrangement. The Small to Medium Enterprises Committee of the council sat and resolved to give the applicants fourteen days’ notice to stop flea market business along Park Street. The notice was served on the applicants on 15 September 2022. When the period elapsed the 1st respondent enlisted the help of the Zimbabwe Republic Police to barricade the parking bays and stop the applicants from vending illegally from the site. This urgent application is a response to the enforcement.

The cause of action is stated as follows:

- “6. This is an urgent chamber application for spoliation order against the first and second respondents.
7. Applicants are a group of vulnerable elderly widows who operate flea markets along Park Street parking bays during weekends and public holidays.
8. The process leading to applicants’ occupation and use of Park Street open space was sanctioned and authorised by first respondent.
9. There is actually a court order by consent issued this Honourable Court in favour of applicants against first respondent.
10. The order was granted by Honourable Katiyo J on the 10th of August 2022 and is hereby attached as **Annexure “B”**
11. The order of Katiyo J is valid and extant. It has not been suspended through legal process nor has it been reviewed.

12. The 1st respondent is still interdicted from enacting applicants from their area of business operations being space along Park Street parking bays without following due process.
13. Notwithstanding the clear terms of Katiyo J's order, the 1st respondent in collusion with the 2nd respondent has deliberately violated the terms of the order by consent.
14. On the early morning hours of Saturday 24 September around 5.30 a.m. applicants' members gathered as they always do, along Park Street and pitched tents and tables for their routine trading operations.
15. Around 7.30 a.m. in several truckloads of riotously dressed and armed police personnel descended on the scene with button sticks and shields and started to violently displace as from Park Street."

The applicants seek an order of this court restoring vacant possession of the parking bays to them and costs on the scale of legal practitioner client. While the applicants have named this application an 'application is for a spoliation order' what they in essence intent to achieve is to be able to sell their wares from Park street during weekends. The 1st respondent have always had possession of the parking bays and never relinquished it. The 1st respondent's act of allowing the applicants to sell wares from parking space does not entail relinquishing control

A litigant who seeks spoliation order should necessary plead that he was in peaceful and undisturbed possession of the property. It is based on the concept of *ius possidendi*, that is the right to demand control over a thing. See Siberberg and Schoeman's *the Law of Property 4th Edition* at p 256.

In this case the applicants did not have control of the parking bays. They were just allowed to sell their wares from some parking bays along Park street on Saturdays, Sundays and Public Holidays. I do not believe the gratuitous arrangement qualifies as peaceful and undisturbed possession of the parking bays. This is adequately explained in *Shoprite Checkers Ltd v Pangbourne Properties Ltd* 1994 (1) SA 616 (W) et 662 B-C:

"The mere fact that the applicant might or might not have had a right derived from contract which it entered into with the respondent to make use of the parking area in question, did not, in my view, amount to 'possession' as envisaged in the authorities."

At the same time it does not mean that the arrangement could not be terminated on notice. Due process does not necessarily mean, a court order. The applicants may be confusing eviction and spoliation. Eviction relates ejection from premises. See *Amler's Precedents of Pleadings*, Third Edition at p 130.

The applicants seem to believe that termination of the permission to operate a flea market business from an open space is illegal in the absence of a court order. The reliance by the applicants on s 74 of the Constitution as offering them protection from eviction without a court order is ill conceived. S 74 of the Constitution is worded as follows:

“74 Freedom from arbitrary eviction

No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances.”

The parking bays are not a home. Due process was fulfilled when the council followed due process to terminate the gratuitous arrangement. I believe that the applicants believe that the consent order conferred immutable rights to use the parking bays *ad infinitum*. Due process has now taken place in that the council has fulfilled its internal process and has given the applicants reasonable notice.

Despite the fact that costs normally follow the result I am disinclined to make an adverse order of cost against the applicants considering the circumstances of being widowed and elderly which is not disputed.

In the result the application lacks merit and I order as follows:

The application is dismissed with no order as to costs.

Mavhunga and Associates, applicants’ legal practitioners

Gambe Law Group, 1st respondent’s legal practitioners

Civil Division of the Attorney General’s Office, 2nd respondent’s legal practitioners