

CRYSON JENA
and
JUNIOR CHIPO MAKUMBE
and
BRIGHTON KANDIMBA
and
COSMOS A KAWONDERA
and
BEAU K TSATSI
and
OLIVER MASOMERA
and
VIOLET MABUGU
and
CONRAD SHAMBARE
and
ANDREW JEMEDZE
and
ERICA MAPURANGA
and
MABHUGU TREVOR
and
KARIMAZONDO DANIEL
and
TAKAWIRA TYAVAMBIZA
and
KAHARI RANGARIRAYI
and
NYASHA MATIMAI
versus
GODSPLAN SIZIBA
and
CITY OF HARARE (DIRECTOR OF THE DEPARTMENT OF WORKS)
and
MINISTER OF LOCAL GOVERNMENT AND PUBLIC WORKS
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 15, 18, 19 September 2023 & 29 November 2023

Urgent application for a Spoliation Orders

T J Muhonde with Mafusire, for the applicant
E Samundombe with C Nyamhongo, for 1st respondent

CHITAPIJ: The applicant and his fourteen co- applicants comprise a group of mainly senior Zimbabwe National Army Officers who claim rights of ownership and /or possession of a piece of land measuring 4.1 hectares which is described as stand 393 Greendale Township off Cunningham Road Greendale suburb Harare. The first applicant's founding affidavit was adopted by the other fourteen applicants who authorized the first applicant to act on their behalf.

To the extent that a brief background may help to put the matter into perspective and appreciate the nature and basis of the application, I briefly set out the background facts from the applicants narration. They claim that in 2019, they identified the piece of land aforesaid in Greendale and became interested to be allocated the land for residential purposes. They followed due process and approached the first respondent, City of Harare and the third respondent, the Minister of Local Government and Public Works for due process steps required to be done when a person intends to purchase or lease urban land for residential purposes. The intricate details of the due process steps which the applicants claim to have taken are not relevant for purposes of this application which is one for an order *mandament van spolie*.

The applicants, to the extent it is again relevant attached a copy of an approved concept plan for the housing development which the second respondent approved. The applicants claimed that they were granted permission by the second respondent to develop 2-6382 hectares and that they would then be issued with offer letters to individual stands once all process required to be done were carried out. In pursuance of the need to ensure compliances as aforesaid the applicants claim that they carried out cadastral surveys beacon relocation and water, sewer and road survey and designs. The applicants claimed in paragraphs 'K' and 'L' of the founding affidavit that they moved earth moving machinery to the site. They claim to have erected "two make shift houses" to accommodate field officers and other employers. The applicant claimed that the two structures were "demolished by the first respondent and all those who are claiming occupation title rights and interest over the property attached hereto as Annexures '04' and "05" are (see) pictures of destroyed make shift houses". The applicants also attached photographs of roads developed to what they termed as base level. The pictures are annexures '06' and '07'. They also attached copies of correspondence between them and the second respondent on change of reservation. I must point out that the paper trail of compliance with requirements for transfer or granting of offer letters to the applicants are

largely irrelevant because in a spoliation application these considerations do not determine whether or not a case for spoliation has been made. Rights of ownership and occupation are not determinant factors although they may be adjunct considerations which do no more than give context to the claimed spoliation.

In what I read from the founding affidavit regarding the actual act of the alleged spoliation the applicants alleged in p 11 of “the founding affidavit that they have been in peaceful and undisturbed possession of “the property until 24 August 2023.....” The applicants allege that the undisturbed and peaceful possession was interrupted on 24 August 2023 when the applicants discovered that the

“first respondent and all those who claim ownership/ and or occupation of the property despoiled them by demolishing their make shift houses, erecting security fence and digging trench foundations on the aforesaid property without any court order authorizing them to do so.”

The applicants therefore averred that they were deprived of their peaceful possession of the property without their consent.

In relation to the urgency of the matter the applicants averred that they made a report to the police upon learning of the spoliation on 25 August, 2023. The report was allegedly made at Morris Depot Police Station and was noted as reference ER 78/23 CCD. The applicants averred that they were deployed for election duties in various parts of the country when the spoliation occurred. They averred that they resolved to engage their legal practitioner Mr *Muhonde* who was however out of the country and returned on 2 September, 2023. They thereafter consulted with the applicants on 4 September, 2023. The applicants averred that their legal practitioner hastily prepared and filed this application on 11 September, 2023. In para 12(h) of the founding affidavit the deponent states:

“ The matter is urgent because the first respondent and all these who are claiming title interest and /or any right of occupation of the property through him are destroying the applicants property willy nilly, disturbing the applicants from carrying out any development on the property and damaging the property by digging trench foundations which are not in accordance to the applicants concept plan.”

In seeking the intervention to the court, the applicants sought a provisional order which they couched as follows:

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms-

- a. The application to be granted with an order of costs of attorney and own client scale to be paid by the first respondent.
- b. The first respondent and all persons claiming occupation, right title and interest through him, shall remove or cause the removal of themselves and all such persons occupying stand 393 (open space) Greendale Township- off Cunningham Road, Greendale, Harare, measuring 4.1 hectares
- c. Failing such removal, the Sheriff of this Honorable Court or his lawful deputies assisted by any member of the lawful enforcement agencies, as the case may be, are authorized and directed to evict first respondent and all persons claiming occupation rights, title, and interest through and under him from a piece of land stand 393 (open space) Greendale Township- off Cunningham Road, Greendale, Harare, measuring 4.1 hectares and restore peaceful and undisturbed possession to the parties.

INTERIM RELIEF GRANTED

Pending determination of this matter, the applicants are granted the following relief:

- a) The first respondent and all persons claiming occupation, right title and interest through him ordered to stop destroying and/ or interfering with applicants movable and immovable property at stand 393 (open space) Greendale Township – off Cunningham Road Greendale, Harare measuring 4.1 hectares.”

The order sought is a strange one for a spoliatory order as generally understood. Spoliation orders are meant to restore a *status a quo* where the applicant has been despoiled of property or possession of property corporeal or incorporeal, fixed or movable, in fact, property of any kind. The restoration of the *status quo* is done to ensure that those who take the law into their own hands do not have their way. The subject of spoliation or *mandament van spolie* is well trodden in jurisprudence on the subject. In the recent judgment of the Supreme Court in case No SC 45/23 being *Zondiwa Nyamande v Isaac Mahadu & 3 Ors* a judgment of GUVAVA JA with MUSAKWA JA and MWAYERA JA concurring the learned judge stated on p 20 of the cyclostyled judgment as follows:

“[20] The essential elements to be fulfilled in an application for spoliation were enunciated in the case of *Botha and Another v Barret* 1996 (2) ZLR 73(S) where GUBBAY CJ (as he then was) at p 79 D-E stated that:

“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are

- (a) that the applicant was in peaceful and undisturbed possession of the property; and
- (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent”

The requirements were further discussed *Hreamleigh Investments (Pvt) Ltd v Autoband (Pvt) Ltd* (1) ZLR 736 & 743G.

The court held as follows:

“It has been stated in numerous authorities that before an order for *mandamus van spolie* may be, issued the applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly”

see also

Nino Bonino v Delange 1906 TS 120 at p 122 where the court in outlining the scope of the *mandamus van spolie* stated as follows:

“It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess 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 so as a preliminary to any enquiry or investigation into the merits of the dispute.”

The learned GUVAVA JA then concluded her observations on the law by stating on p 21 of her judgment as follows:

“[21] The above authorities make it clear that the underlying principle in an application for spoliation is to quickly restore possession and ward off self – help. In making such an application the applicant must show that he was in peaceful and undisturbed possession and that possession was illegally taken without his consent.....”

The provisional order is a strange and curious one because although the applicant purports to seek an order *mandament van spolie* as the founding affidavit and supporting documents allege, the relief sought in the provisional order in the interim is for an interdict to restrain or stop the first respondent from “destroying or interfering with applicants movable and immovable property at stand 393 (open space) Greendale Township- off Cunningham Road, Greendale. The relief sought is not restorative in nature or character and certainly not the usual *mandament van spolie* order which courts are asked to grant daily to restore despoiled persons to their ante – spoliation statuses.

In relation to the final order sought, the applicants pray for the eviction of the first respondent and all those claiming through him and the removal of their properties and belongings from the disputed piece of land. Such order is not in the nature of spoliatory relief but quite the opposite of a restitutory remedy which is what a *mandament van spolie* order is. There is an irreconcilable conflict between the relief sought in the provisional order and the application which purports to be one for a *mandament van spolie*. No attempt was made to amend the provisional order so that it speaks to spoliation. Even if I were to consider that the court or judge is not bound to the draft order in an urgent application for a provisional order as provided in rule 60(a) which reads that:

“(a) Where in an application for a provisional orders the judge is satisfied that the papers establish a *prima facie* case he or she shall grant a provisional order either in terms of the draft filed or as varied,”

I do not consider in this case that it would amount be a proper exercise of discretion to exercise power to vary a provisional order where the application and the provisional order do

not speak to the same relief. To do so would amount to building a case for the applicant where the papers filed are in conflict. One bears in mind that in application proceedings the applicant's case is made or fails on the founding affidavit. If the founding affidavit and the draft orders are in conflict and no amendment is prayed for and granted then the application must fail.

The other point to note is that in an application for a spoliation order, the relief sought is final in nature. It is unusual to apply for a spoliation order through issue of a provisional order. Spoliatory relief results in the immediate restoration of possession of a particular *res* to the applicant. It is a relief that curbs self-help. There is therefore no scope for the issue of a provisional order of restoration and a return date for confirmation. It is the self-help which the law does not allow and once the applicant proves the act of self-help without consent then a final order is granted. It follows that when pleading a case for a *mandament van spolie* order the applicant should be mindful of the fact that the degree of proof needed is not just to establish a *prima facie* case as would result in a provisional order being issued in terms of rule (60) (a) of the High Court Rules but that the case for spoliation must be established on a balance of probabilities since the remedy is final. The relief sought by the applicant in this case for this reason is again not tenable.

The first respondent filed a notice of opposition and opposing affidavit. The rest of the respondents did not file any responses. The first respondent averred that the application was not urgent and ought to be struck off the roll. The first respondent's submission in this regard was that the applicants had during the first week of July threatened to forcibly remove the first applicant from occupancy of the disputed piece of land. The applicants however did not carry out their threat after the second respondent (City of Harare) had asked the applicants to produce documents of ownership of the property which they failed to do. He averred that the applicants ought to have acted immediately thereafter and come to court. The first respondent was ill advised and confuses a *mandament van spolie* with an ordinary interdict. The applicants did not act on their threat and no act of spoliation occurred. Therefore they could not have sought a spoliation order then. A spoliation order cannot be sought on the basis of an anticipated or apprehended spoliation. It is a remedy available when a spoliation act has been committed. The attack on want of urgency of the application on the basis that the applicants did not come to court when they were allegedly threatened and it ended there did not amount to a spoliation.

The first respondent also averred that the applicants ought to have come court immediately after the alleged dispossession on 24 August 2023. He averred that the two weeks that went by to the date of filing the application was an unreasonable period. The first

respondent did not deny the applicants excuse for not acting on the turn after the spoliation being that they were deployed around the country to cover elections. He also averred that the applicants explanation that they waited for their legal practitioner to be available showed that they did not treat the matter with urgency because another legal practitioner in the same firm could have assisted and taken the brief. The first respondent to use his words stated as follows on p 4 of the founding affidavit and I only quote an except

“Urgency has been defined in a lot of causes in this jurisdiction and it relates to spontaneous reaction”

In this regard the first respondent misses the point and must be referred to the celebrated judgment of MATHONSI J (as then he was) in the case *Telecel Zimbabwe (Pvt) Ltd v Portraz* HH 446/15 where the leaned judge bemoaned the increasing tendency on the part of respondent legal practitioners to think that every opposing affidavit in an urgent applicant is predicated by point of limine of urgency even where no relief will be gained by raising the issue. *In casu* urgency has in my view been raised for the sake of it.

In the case of *Pascoe v Minister of Lands and Rural Resettlement & Another* HH 11/17. I examined authorities on what constitutes urgency in a given case. I expressed the dicta on p 9 of the cyclostyled judgement that:

“whether or not a matter is urgent is a value judgment which a judge reaches upon a consideration of all the objective facts and circumstances surrounding the matter.....”

The circumstances which the first respondent did not dispute were that the applicants were out on elections duty deployments when the spoliation allegedly occurred. They could not have been expected to abandon their duties and rush to court. The fact that their legal practitioner of choice was not available cannot simply be answered by a simple retort that they should have sought alternative legal counsel. The choice of legal practitioner is not a process akin to a person not finding the product in one supermarket and proceeding to buy from another supermarket. A litigant is entitled to be given a reasonable opportunity to arrange for and engage a legal practitioner of choice. A litigant engages a legal practitioner that he or she has confidence in or is his or her usual legal practitioner. A lot more is involved in engaging a legal practitioner and this includes but is not limited to the availability and subject matter expertise of the legal practitioner, and his or her charge rate as well as the financial preparedness of the litigant to raise the fees charged. Since the applicants did not sit on their laurels but contacted their legal practitioner who then acted with circumstantially reasonable promptitude and the legal practitioner filed the application on 11 September, 2023 after engaging the applicants on

4 September, 2023 the delay cannot be said to be inordinate nor without explanation since the legal practitioner had been away. The urgency objection in *limine* was not well taken and stood to and had to be dismissed.

On the merits the first respondent denied the applicant's claimed right to the land in question. Again I do not deal with these issues of ownership or who between the applicants and the first respondent has superior rights over the land for the same reason of irrelevance to a *mandament van spolie* application. The first respondent denied that the applicants were in possession of the property and queried why there was no developmental activity since October 2022 which was the month in which the second respondent allegedly barred the applicants from taking occupation of the land in question.

The first respondent averred that he took occupation of the land in question in the first week of July, 2023 following which the applicants threatened him to leave and he refused. The first respondent averred that there was nothing in the applicant's affidavits to demonstrate their alleged peaceful and undisturbed possession. I am inclined to agree that there was no proof on a balance of probabilities adduced by the applicants to establish peaceful and undisturbed possession of the land in issue. The applicants at best produced a photograph (annexure 05) to the founding affidavit. The photograph on scrutiny shows a small truck carrying what appears to be partitions of a wooden cabin with other partitions on the ground. The applicants described the partitions as "pictures of destroyed makeshift houses" without anything further said.

In submissions to the court, the first respondent counsel argued that there were no makeshift houses which were destroyed whilst the applicants counsel insisted that there were there and had been destroyed by the first respondent. As there was no easy way for me to reconcile the polarized positions, I directed both parties legal practitioners with their consent to conduct their own inspection in loco and report on their observations on the ground. They did so but came up without an agreed position on their fact finding. I was left to decide the matter on the papers. It is clear upon a consideration of the papers that the applicant's papers show that they took this application as a simple one. A spoliation application should normally not be a difficult application to a party or legal practitioner who is mindful that it is evidence which determines the result of a dispute. The applicants went on and on with seeking to establish their entitlement to the land in dispute yet all that they needed to do was to allege and establish facts that showed peaceful and undisturbed possession and how it was lost. They could have obtained supporting affidavits from persons who were in physical possession of the despoiled property or in charge of the structures. It is those persons who would be victims of the physical act of spoliation.

Their evidence would assist in establishing the acts of spoliation. The question” what happened on the ground? “is not adequately addressed by the applicants. The applicants were victims of their ineptitude in pleading their case. Whether it was them individually or collectively or their legal practitioner who failed them is neither nor there. It becomes a domestic problem in their camp. I must go by what is before me which is that the founding affidavit was perfunctorily prepared and does not establish the alleged acts of spoliation.

I must explain that I have proceeded to deal with the alleged spoliation on the merits despite finding that the application and the draft provisional order were in contest only in order to be fair to the parties in that my view is that even if I am wrong to hold that the application would be dismissible on the basis that it is a confused application I would still dismiss it on the basis that the applicants did not prove on a balance of probabilities that the first respondent committed an act of spoliation against them.

I must lastly decide the issue of costs. Costs are in the discretion of the court. This principle is trite and has been applied in the courts since many years ago. In the case of *Fripp v Gibbon & Co.* 1913 AD 354 at 363 the Appeal Court stated:

“Questions of costs are always important and sometimes difficult and complex to determine; and in leaving the magistrate a discretion the law contemplates that he should take into consideration the circumstances which have a bearing upon the question of costs, and then make such order as to costs as would be fair and just between the parties. And if he does this and brings his unbiased judgement to bear upon the matter and does not act capriciously or upon any wrong principle, I know of no right on the part of appeal. The court to interfere with the honest exercise of his discretion.”

The point here is that in the exercise of the court discretion regarding an award of costs, the discretion ought to be exercised judiciously in the interests of justice taking into account all the circumstances of the case.

In casu, I have criticized what I called inept pleading on the part of the applicants in failing to appreciate the requirements for a spoliation order and drawing up papers where the application and draft order are in contest. The respondent has not done better either because his notice of opposition also addresses issues irrelevant to spoliation. In the process he also wasted the judges time. He responded at length to and sought to show better title by taking the court through the trail of events of acquisition of the property and how the applicants are unsuited to be in possession of the property. Whilst it may be relevant to refer to the background this could have been made in passing. I consider that the poor pleading of the cause of action and the defence presentation merit equal blame. An appropriate costs order in my view is that I make no order of costs.

Accordingly, I determine this application as follows:

IT IS ORDERED THAT

The application be and is hereby dismissed with no order as to costs.

Muhonde Attorneys, applicant's legal practitioners
Samundombe and Partiers, first respondent's legal practitioners