

ELIZABETH MUCHENJE
versus
FANUEL MUSERENGA
and
FREDDY CHIMBUYE
(and all those claiming through him)
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 24 January 2024 & 23 May 2024.

URGENT CHAMBER APPLICATION

N Mugiya, for the applicant
W Mandinde with M Magava, for the respondent

MAXWELL J

I heard this matter on 24 January 2024 and upheld the preliminary points raised by the first and second respondents. Consequently, I struck the matter off the roll with costs. Apparently, a request for reasons was uploaded on the integrated electronic case management system on 25 January 2024. Regrettably, the request only came to my attention during the Easter vacation of the year 2024. The challenge with the IECMS comes where notification that a document has been filed does not immediately come to the attention of the person. Responsible for actioning it. That being said, these are the reasons for my decision.

BACKGROUND

On 12 January 2024 Applicant filed an Urgent Chamber Application for Spoliation. The notice stated that the first and second respondents despoiled Applicant of estate assets of her late husband and distributed them before the state was registered without authority to do so. In the certificate of urgency, it is stated that the first and second Respondents took advantage of the demise of the Applicant's husband and started plundering his estate on the claim that he is their brother. Further that the Applicant was left with nothing and could be evicted anytime from the remaining property. In her Founding Affidavit, Applicant stated the following. She was customarily married to one Gilbert Maserenga and the marriage was blessed with one child

who is now five years old. Her husband had been previously married. He passed away on 1 January 2024. On second January 2024, the first and second Respondents teamed up with some relatives to harass her alleging that she was a prostitute and that she only came into the marriage to get property. On the 4 January 2024 she returned from the rural areas where she had gone to bury her husband.

On the 6 January 2024 the first and second Respondents came to her place of residence and told her to choose which of the houses she wanted since they wanted to share the deceased's assets. She was stunned. They promised to start the process the following day and left. On the 8 January 2024 first and second Respondents came with three men, relatives of her husband's late wife, and they started harassing her, threatening to evict her from stand number 153 Southlea Park where she had lived with her late husband and child. The three men shouted alleging that they needed the house as their sister also worked for it before she died. They left when she called the police. On the 9 January 2024 first Respondent came in the company of second Respondent and told her that they were going to share her husband's assets and he was taking house number 1534 Southlea Park and she must not set foot thereat. He told her that second Respondent had been given the other house at Number 12 Njiri Street, Mufakose Harare. first Respondent also claimed a Toyota Harrier vehicle which he drove away. second Respondent claimed a Toyota truck which he also drove away. The following day first Respondent also drove away another Toyota truck after claiming it. She was given a Toyota Surf vehicle which is a non-runner. Her attempts to report the matter at the Southlea Park Police were not successful as she was advised that it is a civil matter. first and second Respondents and the other relatives are not cooperating with her to enable her to register the estate of her late husband with the 3rd Respondent. Because of their attitude she was not able to get a death certificate of her late husband. She subsequently sought legal advice which resulted in her filing this application. She averred that before she was despoiled of all the assets, she was in peaceful and undisturbed possession of same and she has no other remedy than to approach the court. first and second Respondents opposed the matter. The opposing affidavit was deposed to by second Respondent who raised the following preliminary points. The draft order filed by the Applicant is defective as it does not identify the motor vehicles to be returned. He disputed being in control of house number 12 Njiri Street, Mufakose, Harare. He pointed out that the draft order seeks an interdict in paragraph 6 which was not sought in the application. Further that paragraph seeks a compelling order the basis of which was not laid. second Respondent also averred that there are material disputes of facts which cannot be resolved on the papers.

He prayed for the matter to be struck off the roll with costs on a higher scale. On the merits, he disputed that Applicant was customarily married to Gilbert Maserenga and that she had a child with him. He further disputed harassing the Applicant. He confirmed that the deceased had been previously married and that that marriage of 48 years terminated with the death of his first wife. He disputed the date which Applicant claimed to have returned from the burial of the deceased and indicated that she left the rural area before cultural practices after burial were done. He disputed visiting Applicant on the 6th of January 2024. He stated that he was not afforded the opportunity to pack the deceased's stuff as he was obliged to do culturally and that the distribution of the stuff is still outstanding. He disputed sharing any house without registering with the Master of the High Court which registration he alleged was frustrated by Applicant. He denied visiting the Applicant on the 8th and 9th of January 2024. He indicated that stand number 1534 Southlea Park Harare is registered in the name of his late uncle's late wife Olivia Gwamba. He indicated that neither first Respondent nor himself are benefitting from the properties as Applicant collected rent for January after his uncle's death. He denied that either of them took any vehicles from Applicant and he also denied offering Applicant one. He denied despoiling Applicant at all and prayed that the matter be dismissed with an order for punitive costs. first Respondent deposed to a Supporting Affidavit associating with the averments of the second Respondent.

PRELIMINARY POINTS

At the hearing of the matter Mr Mandinde persisted with the preliminary points. I was of the view that the first preliminary point was dispositive of the matter.

1. Defective Founding Affidavit.

The founding affidavit does not contain sufficient details to warrant granting of the order- the identities of the motor vehicles in issue are not given. It is trite that the Founding Affidavit is required to contain all relevant facts in the matter. See *Honeycomb Hill (Pvt) Ltd v Herentals College (Pvt) Ltd* HH 15/15. It is not allowed to present a skeleton of a case in the Founding Affidavit and then seek to supplement it in the Answering Affidavit. See *Chiparaushe and Others v Triangle Limited and Others* HH 504/16. For that reason I upheld the first point *in limine*. If the Founding Affidavit is defective, it means that there is no application before the court.

2. Material Disputes of Fact

The concept of material disputes of fact is defined in *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi*, HH 92/2009 as follows;

“A material dispute of fact arises when such material facts put by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence”.

There is a dispute on crucial issues that go to the root of the matter. It is disputed that Applicant was married to the deceased. Applicant, as she alleged a customary law marriage, was obliged to have the deceased’s relatives confirm such marriage. On the papers, there is no confirmation of the marriage. This issue is central to the Applicant’s claim as she is approached the court on the basis of the customary marriage. The Respondents are therefore correct to aver that this issue cannot be resolved on the papers.

There is an averment that some of the motor vehicles subject of the matter were not owned by the deceased. Ownership is not relevant in spoliation proceedings. Possession is. In *Zondiwa Nyamande v Isaac Tamuka & Ors* SC 445/23 at p 19 the court discussed the effect of a *mandament van spolie* as follows:

“Spoliation proceedings hail from the common law remedy which is meant to discourage members of the public from taking the law into their hands (see *Mswelangubo Farm (Pvt) Ltd & Ors v Kershelmar Farms (Pvt) Ltd & Ors* SCB 69/21, *Chiwenga v Mubaiwa* SC 86/20). The remedy encourages members of society to follow due process in obtaining or acquiring any *res* he believes belongs to him. The *mandament 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. It is trite that in spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the status *quo ante* pending the determination of the dispute between the parties (see *Augustine Banga & Anor v Solomon Zawe & Ors* SC 54/14).”

In *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ stated as follows at p 79 D-E:

“It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are: That the applicant was in peaceful and undisturbed possession of the property; and, that the respondent deprived him of the possession forcibly or wrongfully against his consent.”

I am of the view that the question of ownership would be dealt with on distribution of the assets of the deceased's estate. It is not material in these proceedings.

There are other issues where disputes are evident. It is not clear whether or not Applicant was harassed. In para 7 of founding affidavit she stated that she was harassed and called a prostitute who had only come to get property whilst the body of her late husband was still in the mortuary. This was denied by second Respondent in para 11 of opposing affidavit who stated that it is actually the Applicant who was using some bouncers denying them permission to board a Nyaradzo bus.

When Appellant came back from rural home is also in dispute. In paragraph 9 of founding affidavit she stated that she came back on the 4 January 2024, whereas in para 13 of opposing affidavit, second Respondent claimed that she came back on the 3rd. The court was left with no clear picture of what transpired. I found that there were material disputes of fact which could not be resolved on the papers.

3. Incompetent Relief Sought in Paragraphs 6-8 of the Draft Order

In paragraph 6 of the draft order, Applicant seeks an interdict which is not sought in the Founding Affidavit. In para 7 she sought a n order to compel registration of the deceased's estate and assistance in acquiring a death certificate when no earlier efforts turned down were demonstrated. In paragraph 8 Applicant a peace order is sought in spoliation proceedings. The remedy in relation to the incompetent order sought would be to strike out the offending paragraphs. It is not dispositive of the matter.

DISPOSITION

On the basis that I upheld that the founding affidavit is defective, considering that a matter stands or falls on the founding papers, the present application cannot stand. In addition, there were material disputes of fact which could not be resolved on the papers before me.

I therefore made the following order.

The application be and is hereby struck off the roll with costs.

Mugiya Law Chambers, Applicant's Legal Practitioners
Maseko Law Chambers, first and second Respondents' Legal Practitioners.