

APOSTOLIC FAITH MISSION IN ZIMBABWE

versus

CHRISWELL MUPONDA

and

TIRI MUGOVERA

and

SHEILA MUGOVERA

and

MUNASHE MUGOVERA

HIGH COURT OF ZIMBABWE

ZHOU J

HARARE, 23 February 2022

Urgent Chamber Application

F Mahere, for the applicant

G Gumiro, for the respondents

ZHOU J: This is an application for a *mandamant van spolie*. The order sought relates to premises known as Number 238 Waller Avenue, Mount Pleasant, Harare which, it is common cause belongs to the applicant. The premises are a place of worship for the applicant's members. The application is opposed by the respondents.

The material facts, which are essentially common cause, are as follows. The applicant is a church organisation with juristic legal personality in terms of the common law. All the respondents are, as at the time that the application was filed, not members of the applicant. It seems that the respondents previously worshipped at the premises referred to above. The first respondent together with two other persons namely James Kashenje and Confidence Munjeri approached the Magistrates Court under case number 3208/21. They obtained an order against Prosper Muchineripi Charukwa who is the applicant's pastor at the premises, which are commonly referred to in the papers as AFM Mt Pleasant Assembly, and one Abel Mahango. Although the order is prefixed as one for a *mandamant van spolie*, the relief granted is not for the restoration of possession. The order is for the two cited respondents not to unlawfully deny the applicants named therein access to the Mount Pleasant Assembly without a court order. The second part of the order directs the two cited respondents to open all entrance and access doors at the premises to the applicants, failing which the Messenger of Court was to give such

access. It is common cause that armed with the Magistrates' court order, the Messenger of Court accompanied by the respondents, herein attended at the premises. The Messenger of Court broke the keys to some of the structures of the premises. He they effectively gave the respondents, including those who were not parties to the Magistrates' court order who are cited herein, access to the premises. The respondents then went on to install their own locks and employ their own security guard to guard the premises. Effectively, the respondents took possession of the premises. This is what triggered the filing of the instant application.

The requirements for a *mandament van spolie* are settled. They are that

- (a) The applicant was in peaceful and undisturbed possession of the property and
- (b) The respondents wrongfully deprived the applicant of such possession without the consent of the applicant.

It is admitted by the respondents that the applicant was always in peaceful and undisturbed possession of the property. That possession it is common cause, was vicariously through its pastor Prosper Muchineripi Charukwa and the other employees at the premises. The first requirement for the *mandament* to be granted is therefore established.

It is also common cause that the respondents despoiled the applicant, when they locked the structures at the premises after the departure of the Messenger of Court. This act of spoliation or deprivation of possession is therefore admitted. It cannot have been lawful, because the order which the respondents brought did not entitle them to take possession of the premises. In fact, some of the respondents were not even parties to that order, and cannot claim to have been giving effect to it.

The respondents opposed the application on the ground that after they had unlawfully locked the premises and employed their own security guard to guard them, the applicant went on to take away the keys from that security guard, and replaced the locks with their own locks. This fact is denied by the applicant. In any event, it does not excuse the respondents from their own act of deprivation. Respondents are essentially setting out a defence of counter-spoliation by the applicant, which could only be raised by the party that has engaged in an act of counter-spoliation. But the fact is that it has not been established that the applicant engaged in counter-spoliation to recover the property which it had been unlawfully dispossessed of by the respondents. The only fact, which is common cause is that they were deprived of possession by the respondents on 3 February 2022.

The respondents have not tendered any defence which is valid at law. Once the requirements for the *mandament* have been proved then the principle *spoliatus ante omnia*

restituendus est applies. Its effect is that the *status quo ante* must be restored. In this case, the *status quo ante* was the peaceful and undisturbed possession of the premises by the applicant.

Applicant has asked for costs against the respondents on the attorney-client scale. Attorney-client costs are a punitive award which is given where there are special reasons such as the vexatiousness of the defence or some other reprehensible conduct on the part of the affected party. In this case three of the respondents were not even parties to the Magistrates' Court order which they used to justify the act of spoliation. Even if they were parties, clearly that order does not entitle them to take over control of the applicant's premises to the exclusion of the applicant and its members. The very idea of installing new locks and employing a security guard shows that in their minds the respondents were taking effective control of the property. The suggestion that they installed new locks and employed a security guard in order to secure the property is mischievous given that they claim no title, other than access to the premises. Such access can only be within the bounds permitted by the applicant as the owner of the property. For these reasons, it seems to me that the applicant is entitled to recover its full costs because of the reprehensible conduct of the respondents and the vexatiousness of their defence.

In the result, the application succeeds.

IT IS ORDERED THAT:

1. The respondent be and are hereby ordered to restore vacant possession of the property known as No. 238 Waller Avenue, Mount Pleasant, Harare to the applicant upon service of this order, failing which the Sheriff be and is hereby authorised to remove all locks and any other such similar materials and to give vacant possession thereof to the applicant.
2. The respondents shall pay the costs of suit on the attorney-client scale.

Mtewa & Nyambirai, applicant's legal practitioners
Moyo, Chikono & Gumiro, respondent's legal practitioners