

SNACK HOUSE (PVT) LTD  
versus  
STANLEY CHIWESHE

HIGH COURT OF ZIMBABWE  
CHITAPI J  
HARARE, 20 November, 2020 & 28 March 2022

Urgent Chamber Application for spoliation

*Ms R.S Ruwona*, for the applicant  
*Ms Murambatsvina*, for the respondent

CHITAPI J: This application was an urgent chamber application for a spoliation order. After hearing the parties, I granted an order as follows:

IT IS ORDERED THAT

1. Applicant be and is hereby restored full control, occupation and possession of the farm house which has been allocated to it on St Gerera Farm.
2. Respondent and any persons acting through him be and are hereby ordered and directed to vacate St Gerera Farm within twenty-four (24) hours of the grant of this order so that applicant is restored the free and undisturbed use, occupation and possession of the property.
3. Failing respondent's compliance with the direction set out in para 2 above, the Sheriff of Zimbabwe or his lawful deputy be and is hereby directed to eject respondent and all those acting through him from St Gerera Farm.
4. Applicant's legal practitioners be and are hereby granted leave to serve this order on the respondent.
5. Respondent shall pay costs of suit

The respondent requires a fully dressed judgment. I accordingly provide the reasons for the order which I made.

The background to the application is that the applicant company had a lease agreement with another company called Southey Road Investment Company (Pvt) Ltd over a piece of land situated in Mazowe called St Gerera. The applicant was the lessee. It leased a Maputi making plant and retail business at the farm. The lease agreement commenced on 1 September 2018 to August, 2021. It had a renewal option for a further 3 years upon its expiry. The lease did not specify other improvements which were subject to its terms. On 28 August, 2020 the lessor Southey Road Company (Pvt) Ltd addressed a letter to one Tinashe Mhembere of the applicant company. The letter states:

RE: FARM ACCOMMODATION

Dear Mr Mhembere

Following, deliberations on the availability of the cottage at St Gerera which Mike Lamb is currently occupying we are pleased to advise that this has been offered to your employee TINASHE DANIEL TONHODZAI, National I.D Number 29-224 781 Q 04. We further confirm that he can prepare to take vacant possession on 1 November, 2020.

Daniel can make the necessary arrangements with our TATENDA FAKERO and Mike Lamb for the handover/takeover.

Yours faithfully

Alfred Gwanzura  
General Manager 0772 416 886

The above letter was attached to the applicants founding affidavit. In regard to the two, the applicant stated in para 9 of the founding affidavit as follows:

“9. On 28 August, 2020, it was agreed between the applicant and lessor that applicant would take occupation of the farm house adjacent to the one I previously occupied from 1 November, 2020. Applicant would surrender the one it mutually occupied to another tenant who had been secured by the lessor. The letter in which the agreement is contained is attached hereto and marked annexure “C”

In relation to the matter at hand, the applicant had to establish that it was in peaceful and undisturbed possession of the property. In this regard the deponent to the founding affidavit averred that Mr Lamb who had occupied the property the subject of spoliation had vacated the farm house on the morning of 5 November, 2020. The deponent averred that Mr Lamb had advised that he would remove “the remainder of his furniture and other belongings and handover the property directly to me (him)” see para 10 of the founding affidavit. He averred that at 7:00am Mr Lamb telephoned him asking that they meet at the farm house where Mr Lamb then handed him keys to the farm house.

In para(s) 12 and 13 of the founding affidavit, the deponent stated;

“12. It was my intention to immediately start moving my furniture from the house we occupied to the one previously occupied by Mr Lamb and had already disconnected electrical appliances such as the stove and refrigeration in preparation for the migration. Mr Lamb was present in the farm house pointing out some of his furniture which I had later agreed to deliver to him.

13. Within an hour of applicants peaceful and undisturbed possession of the farm house and as I was about to lock the premises in order to go and collect my furniture from the house. I was moving out of; respondent arrived at the scene claiming rights over the same as a nephew of the deceased director in Southley Road Investment Company (Pvt) Limited. It was on this basis that he demanded without a court order that I vacate the property.”

The applicant’s representative averred that he refused to “vacate” the property because the applicant had been given authority to occupy the property as per the lease agreement. He averred further that his refusal to vacate the farm house prompted the respondent to make several telephone calls and during this time the respondent asked the deponent to speak to Paul Chiweshe on the phone. Paul Chiweshe is said to have similarly ordered the deponent to vacate the premises.

In para 15 of the founding affidavit the deponent averred that his refusal to vacate the premises annoyed the respondent. The deponent stated that he tried to plead with the respondent for forty minutes to try and agree that the issue be resolved by the lessor. The deponent averred that the respondent “snatched” keys from the kitchen door and locked the house. The deponent upon advising the respondent that the deponent had spare keys resulted in the respondent placing a plastic bin inside the house and threatening to report to the police a case of theft if anyone removed the bag. The respondent locked the door thus denying access to the deponent and Mr Lamb. The deponent averred that both the respondent and the applicant’s property manager made

reports to the local police station. The nature of the reports are issues to which the deponent was not privy to although he purported to give evidence of a hearsay nature in that regard.

In respect to the *status quo* the deponent to the founding affidavit stated as follows:

“18. Although applicant was hopeful that the matter would be resolved by the police that has not happened. Respondent is adamant and he remains on the property without a court order or applicant’s consent. His actions are wrongful and unlawful. Applicant had been given peaceful and undisturbed possession of the property and yet respondent has used self-help to get occupation of the property. Applicant’s representative does not wish to share the property with the respondent who has no right of occupation of the same and who has exhibited and continues to exhibit belligerent behaviour. To that end the unlawful conduct of respondent is continual and ought to be purged immediately. Applicant is therefore left with no alternative but to approach this court for assistance in seeking the urgent and immediate removal of respondent from the premises.”

In para 19 of the affidavit headed “relief sought” the deponent averred that the applicant required an order of “restoration of its full control, occupation and possession of the farm house on St Gerera Farm” and the eviction of the respondent and anyone claiming occupation through the respondent.

The applicant’s case from the depositions of the respondent was that it was in peaceful and undisturbed possession of the property before being despoiled of that possession by the respondent.

The applicant attached a supporting affidavit deposed to by Michael Lex Lamb. Mr Lamb described himself as the applicant’s former neighbour and co-tenant at the farm. He is the one who was leasing the farm house, subject matter of this spoliation application. He averred that an agreement had been reached between the farm owner and the applicant to the effect that the applicant would take possession of the farm house on 1 November, 2020. He deposed that he however sought and was granted an indulgence by the deponent to the applicant’s affidavit to remove his remaining belongings from the “premises on 5 November, 2020 and handover the property to the applicant.”

Significantly the deponent stated as follows in regard to the events of 5 November, 2020 when the spoliation allegedly took place:-

“6. On 5 November, 2020, before 0700 hrs, I advised Mr Tonodzai to come and collect the keys to the property as I had removed the remainder of my furniture. Soon thereafter after I had given Mr Tonhodzai keys to the property and as he was about to lock up the premises in order to go and collect his furniture to move into the property I was vacating, the respondent arrived and demanded that applicant should surrender the property to him”.

Mr Lamb in para(s) 8 and 9 of his supporting affidavit averred that Mr Tonodzai refused to surrender the property arguing that the applicant had a lease agreement with Southey Road

Investment Company (Pvt) Ltd and that he derived authority from the company to occupy the farm house. Significantly Mr Lamb stated in para 9 of his affidavit.

“.....this resulted in numerous back and forth telephone calls between respondent and other parties who were said to be respondent’s family members”.

Mr Lamb further deposed that when the deponent to the founding affidavit sought to lock the premises, the keys were missing from the kitchen door because the respondent had removed them. The respondent locked the doors whilst the deponent to the applicant’s affidavit and Mr Lamb were outside the house. The respondent proceeded to the police station and so did a representative of the farm owner. They filed criminal complaints against each other.

The respondent filed an opposing and supplementary opposing affidavit which I collectively analyse on material points. He averred that the deponent to the applicant’s affidavit had told a lot of falsehoods. He averred that he was the one who acted as the family’s liason officer in respect of Mr Lamb’s occupation of the farm house. He averred that Mr Lamb who deposed to the applicant’s supporting affidavit had been introduced by the respondent to the respondent’s father whereafter a joint venture was concluded between them.

In relation to events of 5 November 2020 subject of this application, the respondent averred that Mr Lamb had called him to collect the keys because he was the point person in relation to Mr Lamb’s occupancy of the farm house. He averred that there was polarization within the Chiweshe family and a dispute over directorships was pending in the magistrate’s court awaiting prosecution. The respondent attached to his supplementary affidavit undisputed evidence in the form of cellphone messages exchanged between Mr Lamb, Paul Chiweshe and the respondent. In one of the messages sent of 30 October 2022 Mr Lamb advised the respondent that he would put up at the farm on Wednesday and that the respondent be available on Thursday morning. The Thursday would be 5 November 2020 and coincided with the alleged spoliation events.

The respondent averred in para 8 of the opposing affidavit that from the time that he was given keys to the farm house by Mr Lamb, he was involved in a dispute with the applicant’s representative and he refused to the representative occupancy of the house. He therefore argued that the applicant’s representative never had peaceful and undisturbed occupation of the house. The respondent averred that Mr Lamb informed him that he was leaving so that there would be a

proper handover/takeover and that he had then moved in with his family, obviously after the altercation.

In the replying affidavit, the applicant's representative denied that the respondent was a director, shareholder nor a liaison officer of the company which owned the farm. The applicant's representative averred that he did not have any prior interaction with the respondent prior to the date of spoliation. The applicant attached a copy of the CR14 for the company which owned Jerara Farm to show that the respondent was not a director thereof.

The deponent also denied that Mr Lamb handed over the house keys nor occupation of the said house to the respondent. Mr Lamb confirmed this fact in his supporting affidavit to the answering affidavit. Mr Lamb stated in para 2 of his confirmatory supporting affidavit to the answering affidavit that although he communicated with the respondent previously, he never did so to invite him to collect the keys to the farm house. He averred that during his tenure at the farm, the respondent was not a liaison officer and that the persons who allocated accommodation were the General Manager Alfred Gwanzura and Precious Chiweshe, a direction of the landlord company. He reiterated that his instructions were to handover keys to the applicant's representative and employee Mr Tonodzai on vacating the farm house. He averred that:

“.....It is for this reason that I contacted Mr Tonodzai in the morning of 5 November, 2020 to handover keys to him, which I did prior to his dispossession by the respondent”

In para 3 of the supporting affidavit aforesaid, Mr Lamb stated-

“3 I can confirm that applicant was in peaceful and undisturbed possession of the property once I had given Mr Tonodzai keys to the property. Respondent arrived once I had handed over the farm house to the applicants' representative, Mr Tondozai-.”

The law of spoliation is a tried and tested area of law. It does not require debate. It is settled. It derives from the need to stop or discourage aggrieved persons from taking the law into their own hands by resorting to self-help to dispossess another of their peaceful and undisturbed possession of a thing. A thing being something capable of being possessed. To succeed in getting an order of spoliation, the applicant must establish two requirements on a balance of probabilities. These are firstly that the applicant was in peaceful and undisturbed possession of the thing. *In casu*, the farm house and secondly that the respondent deprived the applicant of such possession unlawfully without the applicants or possessors' consent. See *Mutsahuni and Mutsahuni v*

*Minister of Lands Agriculture Fisheries, Water and Rural Settlement and Anor* HH 407/21 wherein MUZOFA J quoted various decided cases to explain spoliation.

*In casu*, there was disagreement on whether or not the applicant was in peaceful and undisturbed possession of the farm house. The applicants' account was corroborated by the Mr Lamp who had been in possession of the farm house immediately prior to the alleged spoliation. He had no reason to favour the account of the applicants' deponent to the founding affidavit nor did he have reason to give false evidence against the respondent. The account of the applicant's representative to the effect that by the time that the respondent arrived at the farm house, the representative had disconnected all electrical gadgets in preparation of moving his property into house was not expressly disputed by the respondent. Mr Lamp deposed that the respondent arrived after the handover of the farm house and keys thereto the applicants' representative. Mr Lamp denied that he handed the keys to the respondent. The totality of the circumstances reveal that the respondent was not inclined to allow the occupation of the farm house other than by himself. He deposed to ongoing disputes involving the wife of the late John Chiweshe and the deceased's children over rights to the farm and of criminal cases pending in the Magistrates court over forged company papers. He deposed to illegal parceling out of farm land by persons without authority. He was determined that the applicant's representative would not occupy the farm house. He took possession of the farm house keys locked the applicants' representative and Mr Lamp out of the farm house after the handover of the farm house to the applicants' representative by Mr Lamb. I was satisfied that on the balance of probabilities the account of the applicant's representative as corroborated by Mr Lamb was what was more likely to have occurred than the respondent's account.

The issue which became the point of argument was the nature of the peaceful and disturbed possession which the applicant through its representative was exercising at the time of the alleged spoliation. It is trite that the circumstances of possession are not an issue in determining spoliation proceedings. In the case *Banga and Anor v Zawe and Ors* SC 74/12 it was held that the applicant only needs to show that he was deprived of possession forcibly and wrongfully against his consent. Spoliation requires that the *status quo* at the time of spoliation is restored. The deponent to the applicant's affidavit had been handed over the farm house and the keys thereto before the respondent challenged the possession, took the keys from the kitchen door and locked the farm

house. The applicant through its representative therefore lost possession of the farm house through the unlawful actions of the respondent and they did not consent to the taking of possession. The respondent despoiled the applicant. This is my finding.

In relation to costs, it is trite that costs are in the discretion of the court. Generally, costs follow the event. *In casu*, the applicant prayed for costs on the higher scale. I did not find any justification for that nor did the applicant point to any special factors to justify a punitive award. In the circumstance costs will be granted on the ordinary scale. The following order shall issue.

IT IS ORDERD THAT

1. Judgment for the applicant in terms of the draft order subject to the amendment in para which shall read that:
5. "Respondent shall pay costs of suit".

*Nyahuma's Law*, applicant legal practitioners  
*R Murambatsvina Law Chambers*, respondent's legal practitioners