

CMAL PRIVATE LIMITED
and
KUMBIRAI KANGAI
and
QUICKLINK INVESTMENTS PRIVATE LIMITED
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 24 February and 30 March 2022

Urgent Chamber Application

P Chin'ombe, for the applicant
L T Musekiwa, for the 2nd respondent

WAMAMBO J: - The applicant seeks a spoliation order against the first and second respondents. The property at the centre of the dispute is two third shares of the remaining extent of Teviotdale held under Deed of Transfer 8935/90.

The background of the matter is as follows.

Under HC1604/21 the parties were the applicant versus the first respondent in this matter. TSANGA J on 23 April 2021 issued interim relief for applicant as follows: -

“The respondent, his agencies and all those acting through him be and are hereby interdicted from prospecting, claiming extracting any ore or carrying out any activity at applicants private land namely a certain piece of land being two thirds shares of the remaining extent of Teviotdale held under Deed of Transfer 8935/90”

On 26 January 2022 the provisional order granted by TSANGA J as aforesaid was confirmed and a final order granted. This was before MHURI J.

A transcribed record of proceedings of 26 January 2022 before MHURI J has been availed to me to assist me in the determination of this matter.

In the instant case second respondent filed a notice of opposition. In the course of argument however applicant amended her draft order and deleted the first respondent wherever his name

appears on the draft order. This was apparently motivated by the fact that first respondents rights or lack thereof were already determined under HC1604/21 wherein he was the sole respondent.

In applicants founding affidavit it is averred as follows:-

In April 2021, first respondent invaded applicant's farm being two thirds shares of the remaining extent of Teviotdale held under Deed of Transfer 8935/90 (hereinafter referred to as the farm). The invasion invited proceedings under HC1604/21. (The relevant orders under HC1604/21 have already been referred to.

On 9 February 2022, third respondent served a notice of eviction on first respondent's employee one Tongesai Maregere. After some challenges as regards this service first respondent was evicted from the farm which was effected on 14 February 2022. Thereafter, applicant instructed her employees to clear the vacated area by filling up holes and knocking off mortar and stone structures that had been erected by first respondent's employees manning the bulldozer and grader.

The bulldozer operator was blocked from carrying out applicant's instructions as aforesaid by first and second respondent's employees. It came to applicant's attention that second respondent had filed and served an injunction order before the Provincial Mining Director Mashonaland Central. Without awaiting the outcome of the injunction application first and second respondent despoiled applicant from the very piece of land that had been restored to applicant pursuant to the court order under HC1604/21.

Second respondent opposed the application. Her stance is as follows: -

The second respondent possesses a certificate of registration for mining claims on the farm. Second respondent has been on the mine since 2013. The mining certificate has not been cancelled. What appears on the title deed are names established during the colonial era and of importance are the coordinates and not the names Forestview or Teviotdale. I hasten to note at this stage that second respondent's certificate of registration states that the ten gold reefs are situated at Forestview.

Second respondent raised a point *in limine* to the effect that the matter lacks urgency. The reasons given for this point *in limine* are as follows:

Applicant has been aware of second respondent's claims since 2013. Applicant initially proceeded only against first respondent. Applicant now seeks to evict second respondent through the back door.

Applicant resists the point *in limine* primarily on the basis that this application is focused specifically on the area or portion of the farm affected by the order under HC1604/21.

Flowing therefrom so the applicant avers is the fact that within days of the order under HC1604/21 second respondent moved in and occupied the very same piece of land. The second respondent's point *in limine* is based on the averment that since 2013 he has been in occupation of the farm. She has not been evicted lawfully therefrom so why now so many years later.

The occupation of the farm by second respondent since 2013 has not been established before me. On the other hand applicant has established that an extant order was made by this Court under HC1604/21 regarding the very same portion of land from which spoliation is sought in this case. The record reflects that the order under HC1604/21 by MHURI J was issued on 26 January 2022. According to applicants first respondent was evicted on 14 February 2022. On 15 February 2022 second respondent were already in the process of fencing the area. The period between the eviction of first respondent and this application is 3 days. I find that the applicant acted expeditiously when the need to act arose. Urgency is thus established.

On the merits I am mindful that applicant seeks an order for second respondent to return applicant's status *quo ante* prior to spoliation failing which the third respondent should eject and demolish structures established by second respondent. Applicant also seeks costs on a higher scale. Note should be taken that the draft order as it appears on record mentions first and second respondent in the same breath. I note however that after I queried the mention of the first respondent in the draft order in the light of the order under HC1604/21 counsel for applicant successfully applied for the deletion of first respondent wherever he appears on the draft order, In *S. Hwatiringa v Patience Tavaruva* HMA27/21 ZISENGWE J spelt out the following on spoliation as follows:-

“it is an established position however that in spoliation proceedings the lawfulness or otherwise of the possession in dispute does not arise.”

In this regard GWAUNZA JA (as she then was) in *Augustine Banga v Solomon Zawe* and 2 Others SC54/14 had this to say:-

“It is trite that in spoliation proceedings the lawfulness of the possession challenged is not an issue. Spoliation requires that restoration of the status *quo ante* pending the determination of the dispute between the parties. This principle is clearly stated thus by the learned authors *Silberberg and Schoeman* at pages 135-136:-

“The applicant in spoliation proceedings need not even allege that he has a *ius possidendi spoliatus ante Omnia restituendus* est..... all that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession. It is not sufficient to make out only a *prima facie* case.....”

More elaborately the learned authors have this to say in the third edition of the same book at pages 130-131,

“During spoliation proceedings, the applicant only has to prove that he was in possession of the thing and that he was illicitly ousted (despoiled) from such possession. If he succeeds, possession must be restored ante omnia. The rights of the parties do not enter the issue and evaluation thereof is reserved for a following suit on the merits of the dispute. As far as possession is concerned, the existence of *ius possidendi* and thus the lawfulness of his possession is irrelevant.”

What becomes clear is that following the order granted under HC 1067/22 applicant was left in peaceful possession of that portion of the farm. When second respondent occupied that land and fenced it and refused or barred applicant access thereto she effectively despoiled the applicant. By barring the applicant access to the aforesaid land second respondent was forcibly depriving applicant of the portion of the farm.

That second respondent may have been in occupation of a portion of the farm pursuant to a certificate of registration of a mine is a different issue altogether. This has been strongly resisted by the applicant in any case.

I find on the probabilities that this co-existence has not been proven. The certificate of registration itself relates to a different farm and not the farm at the center of this matter. The certificate of registration is for a mine named Forest K situated on Forestview.

It would appear to me that second respondent realizing that first respondent had been lawfully evicted in his personal capacity decided to occupy the same piece of land as there was no clear link established between first and second respondent in HC 1604/21.

Although first respondent made averments under HC1604/21 that he was a director of second respondent the Court found that he did not establish such a link. The Court also found that Forest View and Teviotdale clearly appear to be separate and distinct farms.

I find in the circumstances of this case that applicant has established that she was despoiled of a portion of two thirds shares of the Remaining Extent of Teviotdale (commonly called Teviotdale Farm) by second respondent.

Applicant seeks costs on a higher scale. I am not convinced that I should order costs on a higher scale. The reason is that applicant appears to have sued the parties' piece meal. The

applicant proceeded only against first respondent in HC1604/21 when it could have proceeded against both first and second respondent. The general rule provides that the successful party is entitled to costs. I find no reason in the instant case to depart from such a rule.

I will order costs on the ordinary scale.

To that end I order as follows:

IT IS ORDERED THAT:

1. The second respondent be and are hereby ordered to forthwith return applicant's status *quo ante* prior to spoliation such that applicant is returned peaceful, quiet, undisturbed possession, occupation and use of a certain piece of land being two third shares of the Remaining extent of Teviotdale held under Deed of Transfer 8935/90.
2. Failing compliance, the third respondent be and is hereby authorized to eject, demolish any structures and raze down and fencing erected by the second respondent and all those claiming occupation through them from a certain piece of land being two third shares of the Remaining extent of Teviotdale held under Deed of Transfer 8935/90.
3. The second respondent be and is hereby ordered to bear costs of this application.

Jarvis Palframan, applicant's legal practitioners
Musekiwa and Associates, second respondent's legal practitioners.