

CRANRID INVESTMENTS (PRIVATE) LIMITED
versus
MACSHERP (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUREMBA J

HARARE, 11 October 2021 and 3 May 2022

Urgent Chamber Application

M Ndhlovu with *J Mutevedzi*, for the applicant

C Kwirira, for the respondent

MUREMBA J: On 11 October 2021 I heard this urgent chamber application and dismissed it with costs. I have been asked for the written reasons and these are they. The application was for a spoliation order. On 1 May 2021, the parties entered into a lease agreement in respect of the following three immovable properties: Stand No. 10 Chimoio Road, Kadoma, Twyford Farm, Chegutu and Stand No. 7173 Gokwe South Town Council. These properties are all service stations and they belong to the respondent. It leased them to the applicant for purposes of operating service stations for 5 years with effect from 1 May 2021.

On 5 October 2021 the applicant filed the present application alleging that on 2 October 2021, The respondent's director one Mr *Muduvuri* advised the applicant that he had terminated the lease agreement between the parties and consequently demanded that applicant and its employees vacate the premises to make way for his own operations. It was averred that the applicant refused to accede to the sad termination of the lease agreement and continued with its operations. The respondent proceeded to deploy two unknown persons a male and a female at the Gokwe premises and these two took up residence at the service station. Further, some individuals who only identified themselves as Georgia petroleum also took occupation of the Kadoma premises and were putting pressure on the applicant's employees to wind up operations so that they can bring their own fuel. The said George Petroleum also turned up at the Chegutu premises and claimed to be the new tenant. The applicant averred that it had to employ extra security guards to stop the invaders from forcibly offloading their fuel in the fuel

reservoirs at the premises in question. The applicant averred that it had been in peaceful and undisturbed possession of the three premises since 1 May 2021 and looked to the same for the next 5 years. The applicant averred that even if the respondent had validly cancelled the lease agreement, there was no justification for the forcible manner in which the respondent invaded the premises.

In response to the application the respondent confirmed that on 7 April 2021 the parties entered into a lease agreement as averred by the applicant. However, the respondent averred that the applicant then failed or refused to pay rentals in the sum of US\$2 000 per month for a period of 5 months from May 2021 to September 2021 in respect of the Chegutu Service Station. It is this material breach of the contract that resulted in the respondent terminating the lease agreement and the applicant was given the necessary notice to that effect on 4 September 2021 which its legal practitioners acknowledged receipt of on 6 September 2021. Although the applicant's legal practitioners asked for a dialogue instead of termination of the lease agreement, the respondent insisted on terminating the lease agreement because of the material breach and demanded vacant possession of the properties as from 30 September 2021. A letter dated 14 September 2021 to that effect was attached. However, the applicant refused or failed to give vacant possession of the properties and instead on 4 October 2021 through its lawyers wrote a letter to the respondent's lawyers raising false allegations to the effect that the respondent had invaded the premises in question. The respondent averred that it now realized that that letter was written to prepare a ground to build a case of spoliation when in actual fact there was no spoliatory act that was done by the respondent. The respondent averred that it would have no reason to invade the premises as alleged when it is resorting to the law to seek the applicant's eviction. The respondent went on to attach a copy of the summons and the declaration. These were both issued on 7 October 2021. The respondent averred that the documents were prepared on 5 October 2021 before the applicant had served it with the present application. The respondent averred that despite the legal wrangle between the parties, the applicant remained in peaceful and undisturbed occupation and carrying on business. The respondent went on to attach receipts for fuel purchased at the Kadoma and Gokwe service stations after the present application had been issued and served on the respondent.

The respondent's deponent Mr *Muduvuri* admitted that on 2 October 2021 he

approached the applicant's staff, but he averred that the purpose was to find out if the applicant intended to vacate the premises in accordance with the notices given. Mr *Muduvuri* averred that that was not an invasion as claimed by the applicant's deponent. He further averred that the Kadoma service station has within the same premises various shops that are owned and operated by the respondent. All the shops are not subject to the lease agreement between the parties. These businesses have always been run independently from the service station and the respondent's staff would always walk across the service station to these shops. At the Gokwe service station there is a house that the deponent owns which is close to the service station and within the same premises. The deponent averred that he sleeps in that house when he visits Gokwe and as such his presence or that of the respondent's staff cannot be treated as invasion as the house in question is not subject to the lease agreement. The respondent disputed that there was an attempt to offload any fuel stocks at the Chegutu service station. Mr *Muduvuri* averred that if there were any third parties involved the applicant ought to have cited them as co-respondents. The respondent contended that the allegations of spoliation made by the applicant are false and imaginary. It contended that the present application was made in order to pre-empt the eviction process which the applicant knew was on its way. The respondent contended that the applicant had not placed any evidence before the court to show that it was despoiled of the premises.

I dismissed the application for the following reasons. The relief of a spoliation order being a final one, the applicant needed to prove his case on a balance of probabilities. It needed to adduce evidence which showed that it was dispossessed of the premises by the respondent. A *prima facie* case is not enough. The respondent denied having taken occupation of the premises indicating that it had already instituted legal proceedings for the eviction of the applicant. With the respondent having taken the legal route, the applicant needed to adduce evidence to show that the respondent had also resorted to self-help. Averments that are bold and unsubstantiated are not enough. The applicant needed to adduce evidence which showed that it was no longer in occupation of the premises. In its founding affidavit it averred that it refused to accede to the summary termination of the lease agreement by the respondent and continued with its operations. Whilst it stated that the respondent then deployed two persons who took up residence at the Gokwe service station, it did not rebut the averment that

was made by the respondent's deponent that the house at Gokwe does not form part of the lease agreement and that it is for the exclusive use of the respondent's deponent. This coupled with the fact that the respondent attached proof of receipts that showed that the applicant was still selling fuel at the Gokwe and Kadoma service stations even after it had filed this application showed that the applicant was still in possession of these service stations. These receipts were dated 7 October 2021 yet this application had been filed on 5 October 2021.

With regards to the Kadoma premises, the applicant did not make it clear how Georgia Petroleum had occupied the premises. It averred that Georgia petroleum had occupied the premises and was now pressurizing its employees to wind up operations so that it can bring in its own fuel. If the applicant's employees were being pressurized to wind up operations, it means that the applicant was still in occupation of the premises and thus had physical control of the property. Besides, proof was also tendered by the respondent showing that the applicant was still selling fuel at the Kadoma service station even after it had filed the present application. Receipts dated 7 October 2021 were tendered. At the Chegutu service station the applicant averred that it had beefed up security by employing extra security guards to stop Georgia Petroleum from forcibly offloading its own fuel at the fuel reservoirs at the premises. This can only be done by a person who is still in occupation and has physical control of the premises. By its own averments in the founding affidavit, the applicant thus made it clear that it still had physical possession of all the three premises: Gokwe, Chegutu and Kadoma.

In an application for a spoliation order, the applicant must prove that it was in peaceful and undisturbed possession of the property and that it was unlawfully deprived of such possession. See *Banga & Anor v Zawe & 2 Ors* SC 54/14. *In casu* the applicant failed to prove an on a balance of probabilities that it was deprived of possession of the three premises. It is for this reason that I dismissed the application with costs.