

NGONI MANYIKA
and
GOSHIA CHIBEZA
and
ABIGAIL ZIYENGE
versus
FUNGAI FREDY
and
WANISA MAKAZHU
and
LITEMWE MUSUSA
and
CLEVER KANYEMBA
and
EMMANUEL KONJE
and
FARAI MWAUDZENI
and
FUNGAI CHAVHUNDUKA

HIGH COURT OF ZIMBABWE
TSANGA & MAXWELL JJ
HARARE, 30 June & 24 August 2022

Civil Appeal

F Mahere, for the appellant
CW Gumiro for the respondent

TSANGA J: This is an appeal against the granting of a spoliation order in favour of the respondents. The appeal succeeds in that spoliation is about possession and not access. The order having been granted on the basis of the respondents accessing the premises in furtherance of the right to worship as opposed to having been despoiled of possession which was not at all in their hands, the order for spoliation by the court below was improperly granted against the backdrop of the totality of the facts of the matter.

The back ground facts

In the court below, the respondents applied for a spoliation order as members of the AFM church who averred that they had been attending services at AFM; The Lord's Sanctuary, 14989 Sinini Road Old Tafara, Harare, being the parish where they worshipped since its inception. The appellants were said to have locked them out in November 2021 by locking access gates to church premises in particular. As such their allegation was that attendance of church services which had hitherto been peaceful and undisturbed had been interfered with. The application for spoliation had been made on 7 December 2021. They had sought that the respondents be ordered not to unlawfully deny then access to the said assembly. They had also sought that the appellants should not interfere with their access to the premises without a court order.

The Magistrate granted the order as follows:

"It is ordered that:

- a) The respondent be and are hereby ordered not to unlawfully deny Applicant access to AFM: The Lord's Sanctuary 14989 Sinini Road, Old Tafara, Harare.
- b) That the respondents be and are hereby ordered to open for the Applicants and allow their access to AFM: The Lord's Sanctuary Assembly and allow them to worship with other congregants.
- c) Those respondents shall not interfere with Applicant's use and access of same without a court's order.
- d) That the respondents pay costs on an ordinary scale."

In terms of the context for its reasons, having observed that the parties involved have an ongoing dispute emanating from factionalisms in the church, which leadership wrangle had been resolved by the Supreme Court, (*See Cossam Chiangwa & Ors v Apostolic Faith Mission & Ors* SC 67 /21), the lower court also highlighted that since the resolution of the dispute by the courts the parties have continued to wrangle. He, however, emphasized in his judgment that what was before him was not a leadership wrangle but an application for spoliation. He also highlighted that the respondents (applicants in the court below) had been denied access to the church for fear that they would form their own new organization referred to as AFM Church. He decried the resort to self-help by denying them access instead of following the proper channels of interdicting them from doing so. His finding therefore in granting the order was that a proper case for spoliation had

been made out in that the respondents were denied access to the church premises through locking of access doors.

Grounds of appeal

The grounds of appeal by the appellants who were the respondents to the application for spoliation were that the court erred and misdirected itself in the following manner:

1. Granting a spoliation order when the Respondents had not pleaded and met the requirements for the granting of a spoliation order.
2. Granting a spoliation order in favour of the respondents without making a definitive finding of fact that the respondents were in possession of the property and are members of the Apostolic Faith Mission in Zimbabwe.
3. As an alternative to 2 above, the court *a quo*'s finding that it was the Respondents who were in possession of the property in question and not the church through its appointed leadership, being the Appellants herein, as grossly irrational in that no reasonable court applying its mind to the disputed facts would have reached such a conclusion.
4. Granting a spoliation on the basis of equating access to a church building to possession in the process conflating the requirements for the granting of a spoliation order.
5. In granting the Respondents un-interrupted use and access to the church premises, such order is a clear breach of the independence of the institution and no ordinary member of the church in their personal capacities can be granted uncontrolled use and access to the church premises.

The order sought was that the appeal succeeds with costs and that the whole judgment of the court *a quo* be set aside and substituted with an order dismissing the application with costs.

The submissions

Against the backdrop of the facts and the above grounds of appeal, counsel for the appellants, Ms Mahere, therefore emphasized in argument that what was apparent from the order was that it related to access to the property and yet spoliation concerns itself with possession and not access. The two requirements of spoliation being peaceful and undisturbed possession and unlawful deprivation were highlighted with reference to case law. The respondents were said not

to have argued possession anywhere in their affidavits and it having been an application for spoliation, the essence of her argument was that the magistrate should have confined himself to possession.

Mr. Gumiro who appeared for the respondents argued in essence that there is now a wider interpretation of the word possession and that it includes access. He submitted that the purpose of the relief sought was to protect possession and guard against unlawful deprivation of possession. He also argued that the respondents are holders of the premises and as they belong to the assembly they regard it as their own. Their attendance of church services was said to establish possession. He further argued in his heads of argument which he stood by that their affidavit had struck to facts only as is required.

Law and legal Analysis

The first ground of appeal is that the respondents did not plead and meet the requirements for the granting of a spoliation order. The law is clear that at the heart of a *mandament van spolie* is that one must have been in peaceful and undisturbed possession of the property; and (b) that the party or person was forcibly, or wrongfully deprived without his consent or without a lawful order. See *Banga v Zawe* SC 54//15. *Redan Petroleum (Pvt) Ltd v Bioline Petroleum (Pvt) Ltd & Ors* HH-463-12 *Mutanga v Mutanga* HH-247-13; *Trustees, SOS Children's Village Assn v Bindura University & Ors* HH-349-14. What was averred in the applicants' affidavits in the court below was that they had been attending church service and that what the appellants had done was to lock access gates to the church premises. It was the locking of the church premises which was said to have the effect of barring them together with others from the church premises. The application was not based on possession or forceful dispossession but on the right and freedom to worship. It was the locking of access gates which was said to interfere with this right to worship. This is indeed a different issue from spoliatory dispossession.

In *Diocese of Harare v Church of The Province of Central Africa & Anor* HH 8-2008 this issue of possession versus access was captured as follows:

“What is being complained of is access by the respondents to the church premises, not possession in the sense that meets the criteria required to qualify for the grant of the mandament. Civil possession, which is physical possession, *detentio*, accompanied by intention to hold such possession to the exclusion of everyone else, *animus possidendi*, would certainly qualify an applicant for the mandament. An applicant for the mandament must demonstrate that he was in

exclusive possession of the property before he is entitled to the mandament. It should be recalled that the real purpose of the mandament was to prevent breaches of the peace. It was intended to protect possession not access. I am unable to find that, assuming for once that applicant was in possession of the church premises in issue, a church organ, such as applicant, could possess church premises to the total exclusion of other church organs and its membership, such as respondents. By their very nature, it seems to me, it is inconceivable that applicant and first respondent could competently claim the mandament over church premises as neither can possess a church building to the total exclusion of the other.”

Furthermore in the South African case of *De Beer v Zimbali Estate Management Association (Pty) Ltd And Another* 2007 (3) SA 254 (N) a persuasive authority which both sides herein drew on the judge commented in relation to various authorities placed before him that cases would seem to me to indicate that the *mandament* is there to protect possession, not access. The judge therein further observed that no such breach of rights “would in the ordinary course of events take place where a large number of persons have access, rather than possession, of the property in question. Contrary to submissions and interpretation by counsel for the respondents the case in fact draws a clear distinction between access and possession.

Looking at all of the above in context, this court agrees that nowhere in the plea did they actually plead the requirements of spoliation and neither did the magistrate apply these requirements to the facts that were placed before him. The first ground of appeal therefore holds merit that the facts did not point to possession or unlawful dispossession but a complaint against interference with the right to worship there an issue which cannot be divorced from their leadership dispute which was in fact resolved by the Supreme Court as the Magistrate alluded to as being the underlying context of the dispute.

The second ground of appeal that the court did not make any definitive finding of fact that the respondents were in possession of the property and are members of the Apostolic Faith Mission in Zimbabwe is closely linked to the first ground. Critically the elements of possession, as discussed in the *Mutanga* case *supra*, centre on two elements namely a physical element (*corpus*) on the one hand, and, a mental element (*animus*), being the intention to exercise control for one’s own purpose or benefit on the other. Also as highlighted therein is that physical possession may be exercised either personally or by a representative. Furthermore, physical control of a thing need not be exercised personally but may be exercised indirectly by a representative or a servant of a possessor.

Against this backdrop of these fundamental principles of possession, there is absolutely no doubt that this being a church the possessors of the premises is the church through its leadership as opposed to the respondents as individuals. The argument by the respondent's counsel that the respondents as mere attendants of the church become the possessors and therefore are entitled to spoliation cannot hold. The alternative ground of appeal to the second ground is even more apt in disposing of their argument in that when the case is looked at against the Supreme Court judgment on the church's leadership, the finding that the respondents should be granted access under a guise of spoliation does continue to stoke the fires in that it is indeed the Church's leadership and not respondent's as individuals who possess the property. In this instance, it is indeed common cause that the Supreme Court long since made its determination on the real cause of the continuing dispute spawned by a leadership dispute and settled that matter which has a bearing on the possession and control of the church's assets.

The appellants are therefore absolutely correct in their submission that the property in question is owned by the Apostolic Faith Mission in Zimbabwe Church and that the church (through its leadership), is the rightful person who has possession of the property and allows its members access. They are also correct that access cannot be obtained through spoliation and that access is subject to the possessor or owner's consent. As such this court is inclined to agree that the decision granting spoliation is grossly irrational in that no reasonable court applying its mind to the disputed facts would have reached such a conclusion that the respondents should be granted access disguised as spoliation. The court below did indeed conflate access and possession and therefore the fourth ground of appeal is a valid one in this regard. This court also agrees that in granting the Respondents un-interrupted use and access to the church premises, such order is a clear breach of the independence of the institution as no ordinary member of the church in their personal capacities can be granted uncontrolled use and access to the church premises. Accordingly:

1. The appeal is upheld with costs.
2. The order of the court below is substituted to read as follows:
 - a. The application is dismissed with costs.

MAXWELL J.....Agrees

Dube Tachiona & Tsvangirai, appellant's legal practitioners
Moyo Chikono and Gumiro, respondents' legal practitioners