BLESAN SYSTEMS (PRIVATE) LIMITED t/a AVERY SPORTS BAR
versus
CLEOPAS MABHENA
and
GABRIEL REAL ESTATE

HIGH COURT OF ZIMBABWE
MAXWELL J
HARARE, 16 August & 22 September 2022

Urgent Chamber Application

N F Kambarami, for applicant
A Mugiya, for respondents

MAXWELL J: On 16 August, 2022, I dismissed the applicant's urgent chamber application with costs. On 13 September, 2022, I received a request for the reasons for the judgment. These are they.

FACTS

On 4 August, 2022, Applicant filed an urgent chamber application for spoliation and interim interdict. The founding affidavit was deposed to by the director of the applicant, Ariginero Muzeya (Muzeya). He gave the following factual background. Applicant and the landlord entered into a lease agreement in 2002 for shop number 4 at Patrick Court in which a Sports Bar was operated. Business and popularity increased and space became an issue. In 2014 they entered into an addendum to the lease agreement whereby applicant leased shop number 5 as well. The two shops were combined into one sports bar. Everything was going on well until the Covid-19 disturbances. During the time of lockdown, there was no business at all. After lockdown, business was slow. First respondent approached the applicant seeking permission to store his beers in applicant's shop and he was allowed. When business picked up the arrangement was discontinued even though first respondent would get the same assistance sporadically. In July 2022, first respondent approached applicant requesting to sub-lease shop number 5 but the request was turned down.

On 1 August 2022 applicant was in free and undisturbed possession of both shops numbers 4 and 5 when the respondents arrived and chased away the guard before taking over control of the property and locking it. In the process first respondent took over fridges and stock that was in the very special fridges which are used to keep stock cold. Applicant approached second respondent who indicated that they were now in charge of the property and had allowed first respondent to take control of the property. The offer to settle the matter amicably was spurned.

The application was opposed. Though first respondent was stated as Cleopas Mabhena in the application, the opposing affidavit was deposed to by Cleopas Mahondondo (Cleopas) who stated that he is the first respondent in the matter. He stated that he has known the deponent to the founding affidavit for many years. He is a manager in a saloon and barber shop which are on the same premises which are subject of these proceedings. He operates from shop number 3 and his relationship with Muzeya has always been cordial. Sometime in April 2022 applicant's goods were attached and removed from shop number 4 and 5 by the Messenger of Court. Muzeya told him that he was closing both shops as he did not have funds to pay for arrear rentals. He locked the doors and stopped all operations. In May 2022 Muzeya approached him and advised him that if he had money, he could use shop number 5 and operate it as a bar at a rental of USD 400.00 per month. He paid rentals from May up to July 2022 and took possession and occupation of shop number 5. He was given one Knowledge Mupangami to work with in operating the new bar under the trade name Mascrad Bar.

In July 2022 Muzeya advised him that he had secured some money and wanted to resume operations of the bar that he used to operate. He partitioned shop number 5 into two rooms. Muzeya occupied one room and operated Avery Sports Bar whilst he used the other operating Mascrad Bar. At the end of July, second respondent advised him that he had entered into an invalid lease agreement. He subsequently signed a lease agreement with second respondent which was effective from 1 August 2022. Muzeya asked for July rentals and he advised him of the lease agreement with second respondent. Muzeya was furious and threatened him with eviction. Cleopas disputed breaking some locks to gain access or entry into the other portion of shop number 5. He also disputed stealing fridges and locking applicant out of the other portion of shop number 5. He alleged that applicant never had the keys to the portion of shop 5 he occupied. Cleopas further

disputed chasing away guards or employees of the applicant. He alleged that Muzeya is bitter that rent that was due to him is not coming to him and is lying under oath.

On the merits Cleopas submitted that applicant dismally failed to prove that he took control or possession forcefully on 1 August 2022. He pointed out that no affidavit was attached from the guard that was allegedly chased away on the day in question. He further pointed out that the picture of the broken lock proved nothing as it does not show that it was broken from shop number 5. He prayed that the application be dismissed with costs on a higher scale.

Makanyara Rosemary Munyukwi (Rosemary) deposed to the opposing affidavit for the second respondent. She stated that she was present when applicant's goods were removed by the Messenger of Court after attachment. She further stated that on two occasions thereafter she visited the premises and found shop number 4 and 5 locked and that on her next visit in July 2022 she found two bars open and operating from shop number 5. She met Knowledge Mupangami and Cleopas. She asked Cleopas how he came to be in occupation. He explained how and she advised him that he could get a lease agreement. After signing a lease agreement with Cleopas, Muzeya approached her and demanded the tenant's rent but she declined to release Cleopas' rent to him. Rosemary disputed the events of 1 August as outlined by Muyeza and confirmed what Cleopas stated. She submitted that the application does not meet the requirements of spoliation and prayed for its dismissal with punitive costs.

In the answering affidavits Muzeya disputed subletting either shop 4 or 5 and that all the property was removed by the Messenger of Court. He attached a letter from second respondent dated 20 July 2022 demanding proof of payment of City of Harare bills for shop 5 as proof that applicant was in occupation of that shop as at the date of the letter. He appointed out that in summons second respondent is still claiming holding over damages for shop 5 and if the shop was repossessed, the summons would have been amended. He alleged that the partitioning of shop 5 was done in 2014. He further alleged that his consent should have been sought before a lease was given to Cleopas and since that was not done there was unlawful dispossession. He referred to the supporting affidavit of Witness Patrick as clearly showing that they witnessed the effects of the take over and broken key. In his view there was no need of the affidavit of the security guards. He stated that the lease agreement between the respondents is based on an illegal dispossession and should be paid little regard.

In heads of argument, applicant referred to the case *of Base Mineral Zimbabwe (Pvt) Ltd & Ors* v *Mabwe Minerals (Pvt) Ltd* SC 29/15 in which it is stated that the purpose of spoliation is to preserve law and order and to discourage persons from taking the law into their hands. Applicant submitted that the requirements for spoliation are met in this matter. He further submitted that the respondents have not raised any of the recognized defences.

ANALYSIS

In order to obtain a spoliation order, two allegations must be made and proved. The applicant must allege and prove that; -

1. he was in peaceful and undisturbed possession of the property; and,
2. the respondent deprived him of the possession forcibly or wrongfully against his consent.

See *Botha & Anor* v *Barret* 1996 (2) ZLR 73. Applicant placed the date of 1August 2022 before the court as the day on which he was in free and undisturbed possession of both shops, numbers 4 and 5. This is stated in para 12 of the Founding Affidavit. Muzeya alleged that respondents arrived and chased away the guards. Second respondent is a legal person. He further alleged that guards were chased away before control was taken over. He attached a picture of a broken lock. Rosemary alleged that the events of 1 August 2022 as stated by Muzeya are utter lies cooked up to find a cause of action. She denied that applicant was in possession of shop number 5 and that the shop was broken into. She denied that the guard was chased away. Cleopas denied breaking locks, chasing away the guard or any employees of the applicant and alleged that Muzeya was cooking facts.

Since the fact of undisturbed possession of shop number 5 was put in issue, applicant ought to have attached an affidavit from the guard alleged to have been chased away. This was pointed out by first Respondent. In answer to that, Muzeya stated; -

> " we did not see the need of laboring the Court with affidavits of the Security Guards because if you see broken keys and usurpation of trading space by a third party who will be operating in your business premises, then it should be a simple case of *res ipsa loquitur*, the facts will be standing for themselves."

None of the deponents to the supporting affidavits say they witnessed the incident. Witness Patrick says "we witnessed a broken lock". No one testified as to who broke the lock, where, how and when. The broken lock on its own is not sufficient as no one spoke to when it was broken and by who. Teverai Manatsa says first respondent was aided and abated by second respondent. As

stated above, second respondent is a legal person. He does not mention the person acting on behalf of second respondent. The demand for proof of payment of the rates in respect of shop number 5 as well as the claim for holding over damages does not assist applicant as the respondents' case is that shop number 5 was partitioned with first respondent occupying one partition and applicant occupying the other. Rosemary submitted that breaking in was not necessary as first respondent is in occupation of his own portion which has a separate entrance from the space occupied by applicant. First respondent confirmed that he has occupation of the other door to shop 5 to which he has his own set of keys. Applicant confirmed the partitioning but did not dispute that first respondent had keys to an entrance to shop 5.

The averments in the founding affidavit were challenged. It is trite that he who makes a positive assertion bears the onus of proving the facts so asserted. See *Nyahondo* v *Hokonya* 1997 (2) ZLR 457. Applicant did not discharge the onus. The element of peaceful and undisturbed possession was not established in light of averments in the opposing affidavits. Neither was the element of forceful or wrongful deprivation of possession.

Applicant failed to make a case for spoliation. For the above reasons, the application was dismissed with costs.

L T Muringani Legal Practice, applicant's legal practitioners.
Mugiya and Muvhami Law Chambers, respondents' legal practitioners.