KARORI (PRIVATE) LIMITED
and
CHARLES INGRAM LOCK
versus
BRIGADIER MUJAJI

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 23 FEBRUARY 2007

Urgent Chamber Application

J. Colegrave with A.N.B. Masterson, for the applicants
T.K. Hove, for the respondent

KUDYA J: On 23 February 2007, I delivered a hand written judgment after hearing the parties' submissions in chambers. I made the following order:

"1. The Respondent, his family, workers and agents are hereby ordered to return to the Applicants the keys and locks to all sheds, barns, workshops, residences and pump houses pertaining to the buildings on the 376 hectare piece of land occupied by the Applicants in the Headlands area of the Makoni District (which land is hereinafter called "the farm").

2. The Respondent, his family workers and agents are hereby ordered to restore Tsitsi Musariri and her children to occupation of the house from which she has been evicted.

3. The Respondent, his family workers and agents are hereby ordered to remove all farming equipment and materials that they have on that farm.

4. The Respondent shall forthwith secure the removal from the land of all military personnel presently stationed there together with their tents and belongings.

5. The Respondent, his family workers and agents are hereby interdicted and prohibited from occupying or entering upon the Farm and from utilizing or occupying any improvements thereon.

6. The Respondent shall likewise make no attempt to cultivate plant or introduce farming equipment or materials onto the farm and is hereby interdicted and prohibited from interfering in any way with the Applicants' farming operations on that land or with the Applicants' workers and agents.

7. The Respondent shall make no further attempt to occupy or utilize any equipment and materials belonging to the Applicants or any part of the Farm or any improvements thereon, either directly or indirectly and he shall not attempt to restrain or control the movement of any person or property onto or off the farm unless and until the Applicants are lawfully evicted from the Farm.

8. The Respondent shall pay the costs of this Application."

On 8 March 2007, the parties' legal practitioners of record sought in a joint minute addressed to the Registrar, which came to my desk on 3 April 2004, "to establish whether Mr Justice Kudya considered the second Notice of Eviction issued against Karori (Pvt) Ltd in January 2007 and the effect of that Notice in the light of his order of 23 February 2007." The basis for such a request is not easily comprehendible to me in the light of the reasons I highlighted in the judgment that I delivered in the matter. I reproduce hereunder those reasons:

This is an urgent chamber application for spoliation filed by the applicants against the respondent on 20 February 2007. On 22 February 2007, the respondent filed his opposing affidavit. The applicants then filed their answering affidavit just before the hearing of the application on 23 February 2007.

It seems common cause to me that until 4 February 2007, the applicants were in control and had undisturbed possession of the farm. The 1st applicant was literally in charge of the headquarters of the farm, which were based thereat. Its employees went about their day to day duties carrying out its mandate. That the 2nd applicant also had occupation is clear from paragraph 41 of the opposing affidavit wherein it is stated that Tsitsi Musariri was directed to request him to remove his belongings. It is irrelevant in this application for me to consider the issue of absentee landlords, as prayed by the respondent, as this does not arise in the present case.

On 4 February 2007, the respondent forcibly dispossessed the applicants of the keys to the gate of the security fence to the headquarters complex and the residence of Tsitsi at the farm. This is admitted by the respondent in paragraph 14 of his opposing affidavit.

On 8th February 2007, he commandeered the keys to the storerooms, shed and pump house from the applicants' employees. On 10th February 2007, he placed his own chains and locks. While in his opposing papers the respondent claims that the employees surrendered them to him, it is clear to me that they were intimidated by the detachment of soldiers that he brought to, and which remains at, the farm. He also did not explain why he stationed these soldiers at the farm. There was, in my view, no voluntary surrender of the premises by the applicants.

It is also clear from the papers that from 1st September 2006 until 4th February 2007, the respondent had made his intentions to move over onto the farm, through word and deed, clear. This had triggered a flurry of activities by the applicants in which they sought audience with

various government functionaries who are at the helm of the land acquisition programme. These activities appeared to have the desired outcome, until 4th February 2007.

The applicants launched the present application when it dawned on them that what they required was legal and not political protection. It seems to me that they acted with urgency to reverse what they viewed as the unlawful deprivation of their possessory rights by the respondent. If at all they were required to act earlier than they in fact did, I am satisfied that they have explained that they believed that the political intervention that they were pursuing would bear fruit. These initially promising attempts did not in the end have the desired results.

I also find that an application for spoliation is urgent by its very nature. It exists to preserve law and order and to stop and reverse self- help in the resolution of disputes between parties. Its primary aim is to restore the *status quo ante*. See *Chisveto v Minister of Local Government & Town Planning 1984 (1*) ZLR 248 9H) at 250C. In both form and substance, it is final. It is not temporary in nature and the despoiled must discharge the onus on it on a balance of probabilities. In *Nienaber v Stuckey* 1946 AD 1049 at 1053-4, Greenberg JA observed that:

> *"Although a spoliation order does not decide what, apart from possession, the rights of the parties to the property spoliated were before the act of spoliation and merely orders the* ***status quo*** *be restored, it is to that extend a final order and the same amount of proof is required as for the granting of a final interdict, and not a temporary interdict;……At this stage it is sufficient to say that the appellant must satisfy the Court on the admitted or undisputed facts by the same balance of probabilities as is required in every civil suit, of the facts necessary for his success in his application."*

It does not seem to me that spoliation can be estopped on the basis of the "dirty hands' doctrine, for to do so would be to shield the despoiler from the consequences, and reward him for, his alleged usurpation of the due process. In this connection see *Matimbura v Matimbura* SC 173/1998 at page 4 and *Chisveto's* case, *supra*, at 250D.

It was urged on me by the respondent that the failure by the applicants to join in the acquiring authority in these proceedings was fatal to the application. I do not agree. Firstly, the acquiring authority did not despoil the applicants. It is after all enjoined by the **Gazetted Land (Consequential Provisions) Act [*Chapter 20:28*]** to institute eviction processes if it so desires to remove such persons as the applicants from an acquired property. Secondly, even if it were necessary to cite the acquiring authority, rule 187 of the Rules of Court, permits the court to determine the issues as between the parties before it even where such joinder is required.

While both *Mr Colegrave*, assisted by *Mr Masterson* for the Applicants and *Mr Hove* made interesting submissions on other issues concerning the ownership of the farm I am firmly convinced that it is not necessary for me to resolve them in spoliation proceedings and I will not attempt to do so.

There is a plethora of cases on spoliation. In *Chisveto's* case, *supra*, at 250A-D, REYNOLDS J stated that:

> *"Mr Mafara, for the respondent, argued that an action of spoliation was committed only if a possessor was in lawful possession of the property in question when he was dispossessed of that property. His contention was that as the applicant in the present case had been served with a proper notice of termination, he was, therefore, in unlawful occupation of the house on 16 March, and his forcible eviction on that date did not amount to an act of spoliation. This seems to me to be a somewhat surprising submission for, as I understand it, it is a well-recognized principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing—that* ***spoliatus ante omnia restituendus est (Beckus v Crous and Another*** *1975 (4) SA215 (NC). Lawfulness of possession does not enter into it. The purpose of the* ***mandament van spolie*** *is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the* ***status quo ante*** *to be restored until such time as a competent court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's possession of the property does not fall for consideration at all. In fact the classic generalization is sometimes made that in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property."*

In *Davis v Davis* 1990 (2) ZLR 136 (H) at 141B-142A, ADAM J covered the issue of spoliation by reference to four South African cases. The sum effect of these cases was that two essential elements must be alleged and proved, that is, that the applicant was in peaceful and undisturbed possession and that the respondent deprived him of it forcibly or wrongfully against his consent; it is not necessary for the applicant to show continuous presence, as long as he proves *animus*—the intention of securing some benefit and *dentio*—the holding of the property, but needs to demonstrate benefit and that that benefit has been taken away from him by another against his consent; and that the Court does not decide what their respective rights were before the act of spoliation. At 142B he concluded by observing that:

> "*The requirement that the respondent's act of dispossession was unlawful can be met by showing that the respondent despoiled without recourse to a court of law and without the applicant's consent."*

MUCHECHETERE JA, in *Matimbura v Matimbura*, supra, at page 3-4 of the cyclostyled judgment quoted with approval the sentiments of GUBBAY CJ in *Botha & Another v Barret* 1996 (2) ZLR 73 (S) at 79 that:

> *"It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:*
> *a) That the applicant was in peaceful and undisturbed possession of the property; and*
> *b) That the respondent deprived him of the possession forcibly or wrongfully against his consent.*
>
> **See *Nino Bonino v De Lange1906 TS 120, Kramer v Trustee Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748(C) at 753; Davis v Davis 1990 (2) ZLR 136 (H) at 141C."***

The LEARNED JUDGE OF APPEAL further noted at page 4 that "*even a squatter is generally regarded to be in peaceful possession of the place he is squatting on and a proper eviction order must be taken against him for his removal."*.

The two essential elements of a spoliatory order were also confirmed by KORSAH AJA in *Magadzire v Magadzire* SC 196/1998.

In the present matter, I am satisfied that the applicants were in peaceful and undisturbed possession of the farm until 4th February 2007 when the respondent forcibly dispossessed them of the same without a court order. He therefore despoiled them. The question of ownership does not arise for determination in spoliatory proceedings. In the event that the respondent believes that he has better rights to the farm than the applicants then he would have to follow the due process to get vacant possession. He must not resort to self- help.

In the result the application is granted in terms of the draft order.

Messrs Coghlan, Welsh & Guest, applicants' legal practitioners

Messrs T. K. Hove & Partners, respondent's legal practitioners