

FORRESTER ESTATE (PVT) LIMITED
versus
EDGAR CHIDAVAENZI

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 21 January 2010

Urgent Chamber Application

P C Paul, for the applicant
M Hongwe, for the respondent

MAKONI J: The applicant filed an application for a spoliation order. The basis of the application is that on 9 January 2010 the respondent, together with six other men entered into the applicant's farm and they forcibly dismantled a maize silo. This was without the consent of the applicant neither was there a court order authorizing them to do so.

The application was opposed mainly on the basis that the applicant was not in peaceful and undisturbed possession of the silo. The silo was in the possession of a committee of seven constituted of representatives appointed by A1 farmers settled where the silo is situate.

In an application for spoliation, two allegations must be made and proved:

- (1) That the applicant was in peaceful and undisturbed possession of the property; and
- (2) That the respondent deprived him of such possession forcibly, wrongfully or illicitly. See *Diana Farm (Pvt) Ltd v Mudondo & Anor* 1998 (2) ZLR 410 (H).

The applicant must also establish that the possession was not only physical but that it was accompanied by *animus* (intention of securing a benefit. This point was made in *Bennett Pringle (Pty) Ltd v Adekide Municipality* 1977 (1) SA 230 E at 233 which was quoted by ADAM J in *Davis v Davis* 1990 (2) ZLR 136 (H) at 141 E-F. ADDLESON J observed:

“In terms of all the authority cited, the ‘possession’, in order to be protected by a spoliation remedy, must still consist of the *animus* - the ‘intention of securing some benefit to’ the possessor; and *detentio*, namely the ‘holding’ itself If one has regard to the purpose of the possessory remedy, namely t to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is: (a) making physical use of property to the extent that he

derives a benefit from such use; (b) intends by such use to secure the benefit himself; and (c) is deprived of such use and benefit by a third person.”

In *casu* the applicant, in his founding papers, did not make and prove the two allegations which constitute what can be termed the essential elements for a spoliatory order. The applicant did not aver that it was in peaceful and undisturbed possession of the silo. In my view this is fatal to the applicant’s case.

Further the applicant did not establish, on his papers, that it was making physical use of the property to the extent that it derived a benefit from such use and intends by such use to secure a benefit to itself. The applicant, in para 5 of its answering affidavit, concedes that point. It avers that it has not used the silo since 2002 because of fear of theft of grain from the silo. It intends to use it when the A1 farmers are re-located. There is no time frame given of when the A1 farmers will be re-located.

It is clear from the above that the applicant has failed to establish that it was in peaceful and undisturbed possession of the silo and was making physical use of the property to the extent that it derived a benefit from such use of the silo and intended such use to secure that benefit to itself.

In the result I make the following order:

The application is dismissed with costs.

Wintertons, applicant’s legal practitioners

Hogwe, Dzimirai Partners, respondent’s legal practitioners