

MAXWELL HEDIOUS MOYO

Versus

MARGRET MOYO

and

MADA MOYO

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 25 FEBRUARY AND 13 MAY 2010

N Ndlovu for the applicant

Ms N Ncube for the respondents

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

“Terms of the final order sought:

That the provisional order granted by this honourable court be confirmed in the following manner:

1. The respondents’ act of denying applicant access to the premises being stand number 63067 Tshabalala Township being Gushiri Butchery Tshabalala be declared to be an unlawful act of spoliation.
2. The respondents be ordered to pay costs of suit at an attorney-client scale jointly and severally.

Interim relief sought

Pending the finalization of the matter, the applicant be granted the following relief:

1. The respondents be and are hereby directed to restore stand number 63067 Tshabalala Township being Gushiri Butchery Tshabalala to the applicant, Maxwell Hedious Moyo’s possession pending the finalization of this matter.
2. Failure to paragraph (1) above, the Deputy Sheriff be ordered to reinstate applicant to the premises being Gushiri Butchery pending the finalization of this matter.

3. The respondents be and are hereby interdicted from interfering without a lawful court order with applicant's occupation of the premises pending the finalization of this matter."

The respondents raised three points *in limine*. I propose to deal with them in turn. The first point is whether the applicant had *locus standi* to institute this application? It is common cause or at least beyond material dispute that the respondents had a lease agreement with one Ngonidzashe Ndlovu. It is the latter who entered into a lease agreement with owners of the property in question i.e. the two respondents. After entering into the lease agreement, the said Ngonidzashe Ndlovu invited the applicant to run the butchery business as his partner. Sometime in November 2009 Ngonidzashe Ndlovu decided to be a "dormant partner" leaving the applicant as an "active partner" in their butchery business. From these facts it is clear that the applicant had no agreement of lease with the respondents. He was claiming through his partner in the butchery business, Ngonidzashe Ndlovu. From my reading of the applicant's papers he is relying on the protection given by the *mandament van spolie*. The applicant must, in the circumstances show that:

- (a) He was in peaceful and undisturbed possession of the thing; and
- (b) He was unlawfully deprived of such possession – *Botha & Anor v Barret* 1996 (2) ZLR 73 (S) at 79E-F and *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-op & Ors* 1999 (2) ZLR 19 (5) at 21E-G.

The only valid defences that may be raised are that:

- (a) The applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession;
- (b) The dispossession was not unlawful and therefore did not constitute spoliation;
- (c) Restoration of possession is impossible;
- (d) The respondent acted within the limits of counter-spoliation in regaining possession of the article.

In casu, the parties to the lease, i.e. respondents and Ngonidzashe Ndlovu had reason to discuss its terms on 30 November 2009. This was occasioned by Ngonidzashe Ndlovu's failure to fulfill his obligations in terms of the lease, i.e. he failed to pay rentals and operational costs. They reached an agreement captured in annexure "A" which read:

"I Mr N Ndlovu I.D. 08-751136-B 24 residing at house number 61460 Pelandaba do hereby agree with my landlords names Utete and Mhlanga that I still remain responsible for water and electricity outstanding bills at the shop up to this date and should there be any queries of the shop condition I still remain responsible under any circumstances

this should be maintained. Failure to have this done in 14 (fourteen) days of the signing of this agreement. Proportional measures should be taken against me. This would have clearly indicated my inability to operate within the premises.

Date 31-11-09 [sic]

Signed: M Utete [1st respondent]

Signed: M Mhlanga [2nd respondent]

Witness: N Ndlovu [signed]"

(Emphasis added)

All this signifies that the applicant was not part to the lease agreement with the respondents. He had no contractual relationship with respondents at all. His possession was incidental to the actual possession by Ngonidzashe Ndlovu.

After failing to fulfill his conditions as enshrined in annexure "A" *supra*, Ngonidzashe Ndlovu, was lawfully dispossessed of stand number 63067 i.e. after the 14 days. The lease was lawfully terminated on 31 December 2009. On that day, the *locus standi* of those claiming possession through him ceased. That included the applicant *in casu*. On this basis, the applicant has no legal standing to institute this application for spoliation almost two months after the lease was lawfully terminated and the party to the lease, Ngonidzashe Ndlovu did not challenge the termination. Without considering the other points *in limine* raised and the merits of the case I dismiss the application with costs.

Cheda & Partners, applicant's legal practitioners

Coghlan & Welsh, respondents' legal practitioners