

HB 212-15
HC 2571-15
XREF HC 3280-11
XREF HC 470-13

COSMAS CHIVANDIRE
and
NIGEL CHIVANDIRE
versus
DAVID CHIVANDIRE

HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 15 OCTOBER AND 29 OCTOBER 2015

Urgent Chamber Application

G. Sengweni for applicants
Mrs Mlambo for respondent

MAKONESE J: On 30 September 2015 applicants filed an urgent chamber application seeking the following relief:

“INTERIM RELIEF SOUGHT

1. Respondent be and is hereby evicted from number 28 Britton Avenue, Paddenhurst, Bulawayo and the officer in charge, ZRP, Bulawayo Central is ordered to assist the Sheriff to evict the respondent therefrom.
2. Respondent be and is hereby ordered to stop forthwith interfering with tenants at No. 5 Ebon Street, Masvingo.”

Respondent is the father to both applicants. Respondent is locked in divorce proceedings pending in this court under case number HC 3280/11. Respondent and applicant’s mother have disputes over division of matrimonial assets. The property which is the subject of this urgent application is subject to a dispute under case number HC 470/13 also pending in this court. Applicants allege that amongst other things, respondent donated the property situate at 28 Britton Avenue, Paddenhurst, Bulawayo to Cosmas Chivandire (first applicant). Applicant further alleges that respondent donated the property known as 5 Ebony Street, Rhodene, Masvingo to Nigel Chivandire (second applicant). Nigel avers that he had been residing at 28 Britton

Avenue, Paddohurst Bulawayo since January 2015, through an arrangement with his brother Cosmas. Nigel states that on 29 September 2015 he received a telephone call from his maid to the effect that she had been evicted from 28 Britton Avenue, Paddohurst, by respondent. Nigel avers in his founding affidavit that he has nowhere to go as respondent has ringfenced his residence with security details. It is further contended that respondent has evicted Nigel's tenants at 5 Ebony Street, Rhodene, Masvingo. By this conduct, Nigel avers that respondent has shown that he has no respect for this Honourable Court as the matter dealing with the distribution of the property is pending in this court. He states that it is only the intervention of this court that can save the situation as he has no other home to go to. It is for these reasons that applicants sought an order on an urgent basis.

The application was strenuously resisted by respondent who indicated that Nigel has never at any given time resided at 28 Britton Avenue, Paddohurst, Bulawayo. Respondent stated that the correct position is that Nigel has been living with his mother at number 25 Baxendale Street, Khumalo, Bulawayo, since his return from Australia in March 2012. Respondent points out that in 2010 Nigel was in Australia and could not have taken possession of the property. On his return from Australia, Nigel has always lived with his mother at number 25 Baxendale Street in Khumalo, the home he grew up at since he was aged 12 years. The issue of destitution is therefore a fabrication. Respondent contends that the donations referred to by applicants were made in broad proposals for a divorce settlement but that nothing conclusive had been agreed. The division of the matrimonial property is still to be determined by this court in separate proceedings. I am not privy to the details of those proceedings, suffice to say that the parties did confirm that there is a dispute regarding the alleged donations and the division of the matrimonial assets. In case number HC 3280/11 the court still has to make a ruling on whether the donations are valid and ought to be enforced.

It is clear that by launching this application on an urgent basis the applicants are asking the court to make a finding and pronouncement on a point of law another judge is currently seized with. This is not desirable and there is an element of *mala fides* on the part of the applicants.

Respondent states in his opposing affidavit that number 28 Britton Avenue is a six bed lodge. Nigel has not specified which room he was occupying. Respondent sent his agent to the property on 24 September 2015 who confirmed that Nigel was not living at this property. Respondent also tendered a CR 14 Form which shows that applicants are directors of a company known as Ligen-Mas Properties (Pvt) Ltd. The applicants indicate on that form that their residential address is 25 Baxendale Street, Khumalo, Bulawayo. Respondent denies taking over the properties by force and indicates that applicants are being sucked into the matrimonial dispute between him and his wife. Respondent contends that Nigel has never been in occupation of 28 Britton Avenue, Paddohurst. He has always lived with his mother in Khumalo. He has a home and he can never be destitute. It is the respondent's argument that applicants have taken sides in the divorce, and have thrown their lot with their mother. All they are doing is fighting for their mother, who during the marriage was the recipient of rentals for the house in Masvingo and beneficiary from the proceeds of the lodges at 28 Britton Avenue, Paddohurst, Bulawayo.

I am not satisfied, that applicants have established that they were indeed in possession of the properties in question and that they were despoiled of such possession. What I am certain of is that the applicants are very much aware of the bitter fight over division of matrimonial assets between the respondent and their mother. It is common cause that the proceedings relating to the division of matrimonial property are yet to be finalized.

In the circumstances, the applicants have not met the requirements of the law, for the relief they seek. The remedy of spoliation has been recognized in our jurisdiction and beyond and the requirements are fairly settled.

The general principle was stated by INNES CJ in the case of *Nino Bonino v De Lange* 1906 TS 120 at page 120 as follows:

“It is a fundamental principle that no man is allowed to take the law into his own hands, no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the court will summarily restore the *status quo ante*, and will do that as a preliminary to an inquiry or investigation into the merits of the dispute.”

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The applicants have not established that they were in undisturbed possession and that they were unlawfully dispossessed. See the case of *Mutsotso and others v Commissioner of Police and others* 1993 (2) ZLR 329.

In the result, after hearing argument by counsel, I accordingly dismissed the application.

Messrs T. Hara and Partners, applicant's legal practitioners
Messrs Majoko and Majoko, respondent's legal practitioners