

CITIZENS FOR COALITION CHANGE

Versus

NELSON CHAMISA

IN THE HIGH COURT OF ZIMBABWE
MANGOTA J
BULAWAYO 7 MARCH AND 14 MARCH 2024

Urgent Chamber Application

N. Sithole for the applicant
O. Shava for the respondent

MANGOTA J

The applicant, Citizens for Coalition Change, a political party (“the party”) claims that it was in peaceful and undisturbed possession or occupation of its offices which are situated at Stand 41, Fort Street, Between 2nd and 3rd Avenue, in Bulawayo (“the property”). Its statement is that on or about 30 January, 2024 the respondent, one Nelson Chamisa (“Chamisa”) forcibly took control, occupation and possession of its property. He did so, it insists, through his agents, assignees, proxies and/or employees (“his alleged team”). These, it avers, proceeded to paint the property and its precast wall in blue and black colours. They, it claims, painted Chamisa’s picture or portrait onto the property. It states that, before the alleged spoliation of its property by Chamisa and his alleged team occurred, its property was painted in yellow and black colours. The conduct of Chamisa and his alleged team, it claims, is not only unlawful but it is also prejudicial to its interests. It asserts that the conduct amounts to an act of spoliation. The property, it asserts, is its Bulawayo provincial offices in which it keeps its party documents, holds its meetings, activities and programmes. It moves me to direct Chamisa and his alleged team to revert to the *status quo ante* the spoliation. It, in other words, moves me to restore to it possession, control and occupation of its property as well as to order Chamisa and his alleged team to vacate, cease or interfere with its control, occupation and possession of its property and/or painting, conducting, effecting any structural developments or improvements on the property. Its alternative prayer is that, where Chamisa and his alleged team, fail or refuse to restore its property

to it, I direct the Sheriff for Zimbabwe or his deputy or assistant to enforce my order by evicting Chamisa and his alleged team from the property.

Chamisa opposes the application. He distances himself from any person who may have despoiled the applicant of its property. He denies having despoiled the applicant of its property. He asserts that his offices are nowhere else but in Harare. He denies being in any movement, grouping or political party. He states that he did not direct or encourage any person to take over the applicant's property. He alleges that he resigned as a leader of the applicant. He avers that, from the date of his resignation, he has not physically been to the property. He states that he has nothing to do with the applicant. The applicant, he insists, must not harass him but must, instead, sue those who despoiled it of its property, if ever those exist. He describes the application as an abuse of court process which, according to him, aims at dragging his name into a non-existing dispute. He regards the allegation which is to the effect that he has despoiled the applicant on the basis that the property to which he has no connection has been painted blue and his face painted on its wall as having no merit. He claims that his image and name have been appropriated by many people who are not connected to him. He reiterates that he has no association with any colour, any political organization or any movement. He considers the application as a nuisance and a frivolity of the highest degree. He insists that its aim and object are to drag the court into the deponent's political schemes. He moves me to dismiss the application with costs which are at attorney and client scale which costs should be borne by the deponent of the founding affidavit, one Sengezo Tshabangu.

A person who takes possession of another person's thing without the latter's consent is a dispoliator. He (includes she) is prohibited by law from continuing to hold onto the thing. If he continues to walk the prohibited path, the law allows the despoiled to approach, and move, the court to restore to him possession of the thing which he has been despoiled of. The aggrieved person, in the stated circumstances, has the remedy of what, in legal parlance, is referred to as the remedy of *mandament van spolie*. The relief is open to a person who has been despoiled by the dispoliator.

Mandament van spolie, as a relief, discourages people from resorting to self-help. It prohibits them from resorting to the law of the jungle where muscle is mightier than reason. It does not allow people to take the law into their hands. Its substance lies in the law of possession and not in that of ownership. It encourages the parties to go to the *status quo ante* the deprivation of the thing

so that they start from there and proceed to prove who, between them, owns the thing which is the subject of their dispute.

For the despoiled to succeed in a spoliation application, therefore, all he requires to do is to allege and prove, on a balance of probabilities, that he:

- a) was in peaceful and undisturbed possession of the thing which is the subject of his application- and
- b) was wrongfully or forcibly deprived of possession of it by the respondent.

The principles which have been stated in the foregoing paragraph find support from law text-book writers as well as from decided case authorities. Hahlo, for instance, states, on the matter which is under consideration, that:

“Where one of the spouses is in peaceful and undisturbed possession of the matrimonial home and the other spouse, unlawfully deprives him of such possession, the former may apply for a *mandament van spolie*.”

The above-quoted text appears in the learned author’s *South African Law of Husband and Wife*, 5th edition, page 144. Although the learned author was dealing with the remedy of spoliation from the perspective of the law of husband and wife, the substance of the principles which are reflected in his learned work is the same. The meaning and import of what he is conveying to the mind of the reader is clarified in a number of decided case authorities. These show that spoliation, as a remedy, has withstood the test of times. In *Botha & Anor v Barret*, 1996 (2) ZLR 72 at 74, for instance, the apex court of this country was pleased to consider and define the parameters of the remedy of *mandament van spolie*. It held that:

“To obtain a spoliation order, it must be shown that the applicant was in peaceful and undisturbed possession of the property and that the respondent deprived him of his possession forcibly or wrongfully against his consent”.

The law, it is evident, places the *onus* on the applicant to show that he did not consent to the taking of what he is in peaceful and undisturbed possession of. Because the remedy is of a final, as opposed to a provisional, nature the applicant is enjoined to prove his case on a balance of probabilities. The remedy, once proved, persuades the court to direct the parties to revert to the *status quo ante* the spoliation. The ingredients of this concept were aptly and succinctly stated in *Quicklink Investments (Pvt) Ltd v Cmal (Pvt) Ltd & Anor*, SC 119/23 wherein it was remarked that:

“Spoliation is a wrongful deprivation of another’s right of possession. The purpose of a spoliation order is to prevent self-help. The remedy entitles the wronged party to approach a court of law to obtain an order that he/she/it be returned to the *status quo ante*”.

It is in the context of the law of spoliation, as defined in the foregoing paragraphs, that the present application shall be considered. As a prelude to a consideration of the merits of this application, however, mention of two house-keeping issues and common cause matters is pertinent. In the house-keeping realm is the issue of costs which must be awarded to the applicant in the event that its application succeeds. It moved, in the application, that the same be awarded to it. At the hearing of the application, however, counsel for the applicant advised that it no longer wants Chamisa to pay costs of the application, if it succeeds. The net effect of the advice is that Chamisa shall not be ordered to pay costs in the event of the application succeeding. The second issue is that the parties agreed between them that they shall not dwell on *in limine* matters. They persuaded me to deal with the merits of the application only.

On the area of common-cause matters, it is important to observe and state that:

- i) until his resignation from the party, Chamisa was the leader of the same;
- ii) he resigned from the party on 24 January, 2024;
- iii) as a united party, its colours were yellow and black- and
- iv) a few days or months before Chamisa’s resignation, the party appears to have divided itself into two, if not more, groups.

Whether or not Chamisa despoiled the applicant is a matter of evidence. The applicant does not state that Chamisa himself physically came to the property and deprived it of possession of the same. Its evidence is that persons whom it says were aligned to Chamisa stormed at the property and despoiled it of its occupation of the property in a forcible manner. The deponent to its founding affidavit alleges that he visited the property on his return from Harare where he had been to on business. He states that, when he visited the property on 3 February 2024 he observed that the walls of the property had been painted in blue and black colours. He claims that he made an effort to enter the offices of the property and a group of young persons who were at the property denied him access into the same. The group, he avers, told him that it was acting for, and in the interests of, Chamisa. He alleges that he told the group that Chamisa had resigned from being a member of the applicant but it continued to deny him

entry into the offices of the property and, at times, it issued threats of violence against him as well as shouting obscenities at him.

As proof of the alleged spoliation, the applicant attached to its founding papers some photographs of the property the walls of which are painted in blue and black colours. These appear at pages 31 to 45 of the record. Chamisa's facial pictures are at pages 31, 34, 36, 38, 39 and 43 of the same. The one which is at page 37 of the record has a group of young male persons who appear to guard the property against any intruder who may want to disturb their apparent mission.

A newspaper inscription which is in the photograph which is at page 32 of the record reads:

“ZIMBABWE-POLITICS- CHAMISA

Youth guard the Citizens Coalition for Change (CCC) offices in Bulawayo on January 30, 2024 where youths aligned to Nelson Chamisa, Zimbabwe's main opposition leader, erected a banner and painted the CCC office walls blue in solidarity after Chamisa recently quit his own party (Photo by Zinyange Auntony) (Photo by ZINYANGE AUNTONY) AFP via Getty Images”.

The narrative of the applicant is that the colours of blue and black which are painted on the walls of its property do not belong to it. They, it insists, belong to the persons who despoiled it of its property. It alleges that the colours which were on the walls of its property were yellow and black.

Neither Chamisa nor his alleged team deny that the walls of the property were painted in blue and black colours. Chamisa, in fact, admits the existence of the blue and black colours which appear on the walls of the applicant's property as depicted on the photographs.

Given that the painting of the walls of the property of the applicant was performed without the knowledge and/or consent of the applicant, the painting does, in fact, point to an act of spoliation. It cannot be anything other than that. The painting, it is my view, signifies uninvited change of the outlook of the property. The change is, no doubt, in consonant with the conduct of the spoliators and not with the aspirations of the applicant. It announces to the world, at large, that the property which, until the painting occurred, was in the possession of the applicant, is no longer in the latter's possession but is now in the possession of those who painted its walls with new colours.

The question which begs the answer is whether or not, in conducting themselves as they did, the dispoliators were acting on the instructions of Chamisa. He, on his part, denies having had any connection with them. He insists that they acted on their own accord without him telling them what to do.

The applicant submits, correctly in my view, that, in despoiling it as they did, the dispoliators were acting with, or from, the instructions of Chamisa. It premises its argument on the strength of the application which it served on Chamisa. It submits that, if Chamisa was not connected to those who despoiled it of its property, the probabilities are that he would not have had the opportunity to see, let alone to file a notice of opposition to, its application. It insists that, because he opposed the application which he could not have had sight of if he had no connection with those who despoiled it of its property, the same points to the inescapable conclusion that he is well connected to those who took occupation of its property in a forcible manner. The persons who took occupation of its property, it claims, must have forwarded the application to him. The observed matter, it insists, shows the connection which exists between the persons who despoiled it of its property and Chamisa.

Chamisa, it is observed, does not explain the circumstances under which he came to be in possession of the application which was served at the property in Bulawayo when he was/is in Harare. All he asserts is that he has not physically set foot at the property from the time that he left the applicant to date. He does not deny that he received the application which the applicant filed against him through the urgent chamber book. He, in point of fact, received and reacted to it.

The evidence which the parties placed before me shows that:

- a) the applicant filed this application with the court on 5 February, 2024;
- b) it served the application on Chamisa at its property on 6 February, 2024-
and
- c) Chamisa filed his notice of opposition to the application on 27 February, 2024.

On a proper conspectus of the above-observed facts, therefore, it cannot be denied that Chamisa is in clear association with the persons who despoiled the applicant of its property. The long and short of the observed matter is that one or more of those persons forwarded the application to Chamisa. He or they would not have done so if he or they was/were not communicating with Chamisa. Chamisa, it is my view, did not have to be in Bulawayo to despoil the applicant of its property. The fact that he could have taken advantage of

technological advancements which are currently awash the world-over cannot, in the circumstances of the present case, be ruled out. He must have employed those to achieve his desired end-in view in so far as his despoiling of the applicant is concerned. The old English adage which states that he who acts through another acts himself holds true in so far as this application is concerned.

Chamisa cannot have me believe that the application which was served at the property found its way into his hands through mysterious means. Nor can he assert that the persons who despoiled the applicant acted *mero motu* without him being part of them, if not leading them to act in the manner which they did. The probabilities of the matter are that he was at the forefront of their unlawful conduct. He, it is my view, made up his mind to be smart by distancing himself from the persons who not only sang his name and person in their unlawful enterprise but also drew his face on the walls of the property. The defence which he raises is clearly crafted by him. Its aim and object, it occurs to me, were to raise material disputes of fact with a view to having the application which had been filed against him to be rendered devoid of any leg on which it would stand so that the same would be dismissed.

The applicant, unfortunately for Chamisa, was quick to read through what he wanted to achieve. It established his link with those who acted for him. The *nexus* which it established leads to but only one conclusion. The conclusion is that Chamisa, acting through his team, despoiled it of its property.

The applicant proved its case on a preponderance of probabilities. It is, in the premises, ordered that:

1. The application be and is hereby granted as prayed in the draft order.
2. Each party shall bear its own costs.

Ncube Attorneys applicant's legal practitioners
Shava Law Chambers respondent's legal practitioners