SHIRIYEKUTANGA BUS SERVICES P/L
versus
TOTAL ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 3 and 30 July 2008

OPPOSED APPLICATION

Mr T Magwaliba for applicant
Adv Y Philips for respondent.

MAKARAU JP: On 16 November 2007, the applicant approached this court on a certificate of urgency and obtained a provisional order compelling the respondent to return to it six fuel pumps and other accessories that it had dismantled and removed on 10 November 2007. The provisional order also restrained the first respondent from removing any further equipment from its business premises pending its confirmation or discharge.

In obtaining the provisional order, the applicant alleged in its founding affidavit that it had a dealership agreement with the respondent's predecessor in terms of which it borrowed a certain sum of money to upgrade its service station equipment and accessories on certain terms and conditions. One of the terms was that the applicant would only sell the fuel and oil products of the respondent. In time, the respondent was failing to meet the demands of the applicant in terms of supplying fuel and oil products. In view of the erratic supply of products, the applicant proposed to purchase the equipment that the respondent had installed at applicant's premises and thereby terminate the agreement between the parties. At a meeting held between the parties, the offer to purchase the equipment was repeated. No conclusion was reached on the issue.

In September 2007, the applicant wrote to the respondent citing the inability of the respondent to keep the applicant supplied with products for resale and advising the respondent that it was paying up the balance of the loan and terminating the dealership agreement. The amount of the balance of the loan was transferred electronically into the account of the respondent. In response, the respondent declined to accept the tender of the balance of the loan and threatened to take legal action against the applicant. Without taking any such action and without any prior notice, it visited the premises of the applicant and without notice, removed

six pumps and other equipment accessory to the pumps, prompting the applicant to approach this court on the certificate of urgency as detailed above.

The respondent opposed the confirmation of the provisional order and filed an opposing affidavit.

In the opposing affidavit, the respondent denied that it had advanced a loan to the applicant for the purposes of procuring pumps and other associated equipment and averred that in terms of the agreements between the parties, the pumps and allied equipment would remain the property of the respondent. The respondent further averred that the pumps and equipment were the subject of a separate agreement in terms of which the respondent reserved unto itself the right to remove its equipment at any time that it deemed fit and this would effectively terminate the dealership agreement. The respondent also alleged that by allowing third party products into the respondent's tanks without consent, the applicant was breaching the agreement between the parties. Further and more compelling in my view, the respondent made the point that the applicant terminated the dealership agreement, thereby triggering the return of the equipment to the respondent. It was clearly understood between the parties that the respondent would be entitled to return the equipment once the dealership agreement had been terminated. In this instance, the dealership agreement was terminated by the applicant itself, leaving the applicant with no basis for retaining the equipment, so the arguments proceeds.

It is common cause that the application brought by the applicant was for relief under the *mandament van spolie*. That the respondent was in peaceful possession of the pumps and accessories is not in dispute. Further, that the respondent, acting under the dealership agreement, took possession of the pumps and equipment without first obtaining a court order is also not in dispute.

On the authority of *Botha and Another v Bannet* 1996 (2) ZLR 73 (S), the applicant argued that the respondent had no defence to defeat the possessory remedy that it was seeking.

In *Botha and Another v Bannet* (supra), Gubbay C J (as he then was) set out the two requirements that an applicant for a spoliation order has to set up and prove. These are that he was in peaceful and undisturbed possession of the property and that the respondent deprived him of such possession. In this regard, the learned judge was relying on the decisions in *Nino Bonino v de Lange* 1906 T S 120; *Kramer v Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 C and *Davis v Davis* 1990 (2) ZLR 136 (H).

Applying the principles emanating from these authorities, the learned judge found that the respondents before him had failed to prove that the dispossession was without his consent and on that basis, discharged the provisional order that had restored possession to him.

In response, Advocate Phillips for the respondent placed much reliance on the decision in *Parker v Mobil Oil of SA 1979 (4) SA 250 (NC*), where it was held that the rule that goods dispossessed against the will of the possessor must be restored forthwith, is not an absolute one.

The facts in the *Parker v Mobil Oil of South Africa* (supra) are in my view not very dissimilar to the facts of the application before me. They may be summarized as follows:

The applicant and the respondents entered into two agreements in terms of which the applicant was the aviation agent of the respondent at two airfields. The two agreements were both cancelled by the respondent. After the cancellation, the respondent took possession of the equipment used to refuel aeroplanes at both aerodromes. A month later, the applicant approached court for a spoliation order against the respondent to return all the equipment to the aerodromes and for and order compelling the respondent to sell applicant's aviation fuel at the two aerodromes in terms of the cancelled agreements.

After examining the reason behind the possessory remedy, VAN DEN HEEVER J, had this to say at page 255:

"The reason for the rule is, according to the authorities, certainly not because the fact of possession is elevated to a right stronger than *plenum dominium*, but to discourage breaches of the peace by self-help in the case of dispute. Despite generalizations that even the thief of robber is entitled to be restored to possession, I know of no instance where our Courts, which disapprove of metaphorical grubby hands, have come to the assistance of an applicant who admits that he has no right vis-à-vis the respondent to the possession he seeks to have restored to him.

(Cf Judelman v Colonial Government 3 BAC 446 (19 CTR 442 at 444).)".

In dismissing the application, the learned judge was of the view that the concession that possession of the equipment would be of no use whatever to Parker (and being deprived of possession at least inconvenient for Mobil) and the termination of the agreements between the parties militated against the grant of a spoliation order, where the spoliation order was sought not to regain possession of the equipment, but merely as necessarily inherent in seeking specific performance of the contracts. The court was quite clear that the return of the pumps to Parker would have had the effect of granting specific performance of the cancelled contracts.

The finding in Parkers case (supra) to the effect that the rule that goods dispossessed against the will of the possessor must be restored forth with, is not an absolute one was recently followed in the rule that goods dispossessed against the will of the possessor must be restored forth with, is not an absolute one was approved of in *Coetzee v Coetzee* 1982 (1) SA 933 (C). (This is the only case that I have come across where the decision in *Parker* was referred to. It is also worth noting that the two cases were both decided by the same judge.)

Coetzee v Coetzee (supra) was a matrimonial dispute involving a motor vehicle registered in the name of the husband but in the possession of his "irresponsible" and estranged wife who was accumulating parking tickets in his name and reported to him that the vehicle had been stolen after she had left it in parking garage. He found the car and took it away, offering to have it registered in her name pending the determination of the divorce proceedings he had commenced earlier. The offer was rejected with the wife insisting on her right to restoration of possession, *ante omnia*. At page 935 VAN DEN HEEVER again had this to say:

"There are limits to the scope of the remedy (*Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (NC)). The cases seem to suggest that, despite lip service to the sweeping statement by Voet 41.2.16 that even the despoiled robber will be assisted, possession will not be restored if the applicant has no vestige of a 'reasonable or plausible claim' (Price Possessory Remedies at 107), and the respondent conclusive proof of his ownership of the article in question. On the other hand the cases also indicate that, once the applicant satisfies the Court that he was in possession, and was dispossessed by respondent without recourse to law nor by consent of respondent, the applicant is entitled to have possession restored to him if he merely alleges some such 'reasonable or plausible claim'.

The Court does not at this stage 'look too closely into the juridical nature of the possession claimed'. (Price (ubi cit).)."

It is quite clear that the leaned judge who decided both case is of the firm belief that the possessory remedy of *mandament van spolie* is not there for the taking and that the rule that even a thief can be despoiled finds no favour with him. In his view, the applicant seeking to have possession restored to him must allege and prove some reasonable or plausible claim to the property.

With respect, the weight of authority appears to be against the learned judge. It has not been established as part of our law in any other decided case that an applicant for spoliation order has to show some reasonable or plausible claim to the property despoiled.

The learned judge seems to suggest that the court determining an application for a spoliation order will look into but not closely, the juridical nature of the possession of the

applicant. (See *Coetzee v Coetzee*, (supra)). I hold a different opinion and do so with the greatest of respect and due deference to the learned judge. The decided cases referred to by GUBBAY C J in *Botha and Another v Bennet* (supra) are quite clear that the court does not at all look into the juridical nature of the possession claimed.

The doctrine of stare *decisis binds* me to follow the decision in *Botha and Another v Bennnet* (supra) and not to follow *Mobil v Parker* (supra) and *Coetzee v Coetzee (supra).*

On the basis of the foregoing, I am compelled to confirm the provisional order.

Regarding costs, I note that after obtaining the provisional order in its favour, the applicant took no steps to set the matter down. It was the respondent who had the matter enrolled by filing its heads of argument. Further in view of the confusion in the law trhat may have been created by the decision in *Parker's* case, I do not view the opposition by the respondents to have been unreasonable in the circumstances. While the argument advance by the respondent does not succeed, I do not perceive it as being frivolous.

Accordingly, I make the following order:

1. The respondent is hereby restrained from removing from the applicant's premises at Lot 3 Block HH Ardbennie, Harare any equipment including the following:

1.1. one compressor
1.2. one underground blend tank (25 000L);
1.3. one underground diesel tank (25 000L);
1.4. one underground IP tank (15 000L);
1.5. two dual wayne pumps /IP
1.6. one dual pump off canopy (diesel)
1.7. one commercial pump by skid tank
1.8. one canopy
1.9. one total monolith
1.10. two direction arrows.

2. Each party shall bear its own costs.

Gill,Godlonton & Gerrans, applicant's legal practitioners.

Magwaliba and Kwirira, respondent's legal practitioners.