CHISUNGO CHEMADZIMAI HOUSING COOPERATIVE
SOCIETY LIMITED
and
NORBERT MATORERA
versus
BRIGHTON CHIBAYA
and
JOHN CHIBAYA

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 1 & 3 October 2018

Urgent Chamber Application

N. Mugiya, for applicants
Ms P. Makurumure & L. Chirenje, for respondents

TAGU J: This is an application made under the *mandament van spolie* for an order for eviction of the respondents and all those acting under or through them from Stand No. 19034 Parkridge, Kuwadzana Township Harare. Further that, an urgent interdict is also made interdicting respondents from interfering with the applicant's activities on the said stand and ancillary relief as provided in the Draft Order. The applicants aver that the application was necessitated by respondents who forcibly took possession of the stand from second applicant.

Background

First applicant is a duly registered housing cooperative and the second applicant is one of its members. On the 23rd June 2015 first applicant was allocated some residential stands by the City of Harare at Kuwadzana Parkridge on Plan No. TYP/WR/542, Kuwadzana Township, Harare. First applicant allocated stand No. 19034 Parkridge Kuwadzana Township, Harare to 1st respondent who was also one of its members. On the 30th October 2017 first respondent was expelled from the cooperative. For some reason it appears first applicant had also allocated the same stand to 2nd applicant on the 23rd June 2015.

On the 20th September 2018 the first respondent brought his building materials to the stand and claims that the stand was vacant. Consequently second applicant claims that he was despoiled of his peaceful and undisturbed possession of the stand and his wooden cabin

which he has erected on the stand was demolished. The applicants filed the present application with this court on the 21st September 2018.

Respondents raised points in *limine* that the matter was not urgent as there was no property on the stand when first respondent placed his building materials on the stand therefore there was no peaceful and undisturbed possession of the stand and that applicants were seeking a final order in an urgent chamber application without making provision for interim relief.

The second applicant claims that he took peaceful and undisturbed possession of the stand upon expulsion of the first respondent by erecting a wooden cabin on the said property. First respondent denies that second applicant was in peaceful possession of the stand, the stand was vacant and there was no wooden cabin simply because the Harare City Council By Laws which govern the first respondent do not allow the wooden cabins on the property but I find this being of no consequence because no direct denial or confirmation was made by the first respondent on demolition of the wooden cabin which means there is a probability that the second applicant was present at the stand as he claims.

First respondent contends that he put his building material on the 12th September 2018 at the property and the applicants took no action on the matter because second applicant was in fact not in peaceful possession of the property. There was no evidence that the second applicant was not present at the stand when the first respondent brought his building material. The first applicant did not deny that there was some dispute between himself and the first applicant and he did in fact take possession of the stand in the midst of all that dispute. This in itself is grounds for a spoliation.

In light of the fact that no contrary evidence has been laid before me supporting the respondents' claim that the stand was vacant and not forcibly occupied, it is crystal clear that second applicant was despoiled from his peaceful and undisturbed occupation of the stand.

In *Diana Farm Private Limited* v *Madondo N.O & Anor* 1998 (2) ZLR 410 @413 the court set out the principles of spoliation as follows:

"The law relating to the basis on which a *mandament van spolie* will be granted is well settled. In Davis v Davis 1990 (2) ZLR 136 (H) at 141 ADAM J quoted with approval the following statement by HERBSTEIN J in *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753:

> "... two allegations must be made and proved, namely (a) that applicant was in peaceful and undisturbed possession of the property, and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent."

The court further stated that:

"The onus is on the applicant to prove the two essential elements set out above. Part of the second element is lack of consent. In Botha & Anor v Barrett 1996 (2) ZLR 73 (S) at 79-80, it was said by GUBBAY CJ

"It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

(a) that the applicant was in peaceful and undisturbed possession of the property; and
(b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.

It was for the respondent to show that he had not consented to being deprived of possession. No onus rested upon the appellants, as the learned judge perceived, to establish the respondent's consent. Consent to the deprivation may be expressly given, as where the possessor is present at the time, is spoken to and gives his permission. Or it may be implied from the conduct of the possessor both before and after the removal of his property… Furthermore, the applicant's possession must not be mere physical possession. Physical possession must be accompanied by requisite animus or intent"

In the present instance the parties had been disputing over the property which first respondent took without any consent from either of the applicants. It is apparent that the applicants to show their displeasure brought the present application at the earliest possible opportunity they had. If they were in agreement with the respondents' actions they would have simply sat back and done nothing about it. The applicants acted expeditiously as set out in n Kuvarega v Registrar General and Another 1998 (1) ZLR 188 (H) at page 193 F, CHATIKOBO, J laid the test for urgency in the following terms:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules…"

As to the point raised that the spoliation order sought by the applicants was in the form of a final order the Supreme Court established in J. C. Conolly & Sons (Pvt) Limited v Ndhlukula & Another SC 22/18 where Garwe JA stated with approval that,

> *"The law is settled that an order of spoliation is final in nature and that it determines the immediate right of possession of a particular res. It is frequently followed by further proceedings between the parties concerning their rights to the property in question – Nienaber v Stuckey 1946 AD 1049, 1053; Malan & Another v Green Valley Farm Portion 7 Holt Hill 434 CC and Others 2007 (5) SA 114 (ECD), 124 A-*

B; Moreover a spoliation order cannot be granted on the evidence of a prima facie right - Blue Range Estates P/L v Muduvisi 2009 (1) ZLR 368, 377D." Therefore, urgent chamber spoliation applications are sui generis so in circumstances where the interim order is the same as the final order the court can grant such applications.

I am satisfied that the applicants meet all the requirements of spoliation and this matter is urgent. Status quo ante has to be restored. The points *in limine* are accordingly without merit and I therefore dismiss them.

In the result, the following order is made:

(1) The application is granted in terms of the draft order.

(2) Respondents to pay the costs of suit.

Mugiya And Macharaga, applicants' legal practitioners
Makuku Law Firm, 1st and 2nd respondents' legal practitioners