

CHROME MEDIA INVESTMENTS (PVT) LTD
versus
HOPSCIK INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 25 & 31 March 2020

Urgent Chamber Application

R. Mabwe, for applicant
T. T. Makaya, for respondent

MUSAKWA J: In this matter the applicant seeks spoliatory relief in respect of number 3 Tyward Close Ballantyne Park, Harare.

The applicant claims to have been forcefully removed from the property in question. It is claimed that the applicant operates various businesses at the address. The property is owned by the respondent. It is acknowledged that there has been previous litigation concerning the property between the respondent and the applicant's former director Priscilla Chigariro. Priscilla Chigariro was said to have been incarcerated for contempt of court for failing to relinquish possession the property to the respondent.

The nature of the spoliation that is claimed is that on 21st March 2020 a company that was offering security services, Tigerswift Security Services is said to have been instructed by the applicant (sic) to stop offering those services. Tigerswift Security Services is said to have then locked the premises and denied access to the applicant's employee. Possession of the property is said to have been handed to a security company that is linked to the respondent.

It is also averred on behalf of the applicant that on two unspecified occasions in the past it mounted unsuccessful applications relating to spoliation of some movables.

In opposing the application, the respondent raised several points in *limine*. The first such point in *limine* is that there is material non-disclosure bordering on abuse of process. It is averred that the urgent application was filed notwithstanding that the parties' legal practitioners have been communicating on the matter. A day after the filing of the urgent chamber application the respondent's legal practitioners had instructed the Messenger of Court to release Priscilla Chigariro from prison.

The respondent contends that on 24th July 2019 the applicant's application for a spoliation order (HC 6036/19) in respect of the same property was struck off the roll for lack of urgency. The application has never been prosecuted. Another application, HC 9012/19 suffered the same fate and has never been prosecuted. Thus it is contended that the respondent pleads *lis pendens*.

The respondent also contends that the application is frivolous and vexatious. This is on account of the fact that the circumstances under which spoliation is said to have occurred are vague. It is further contended that in December 2019 the Magistrates Court ordered that Priscilla Chigariro and all those claiming occupation through her to restore vacant possession of the property to the respondent. On 31st January 2020 Priscilla Chigariro was held in contempt of court and committed to prison. In HC 1906/20 Priscilla Chigariro unsuccessfully sought her release from prison. The respondent engaged Tigerswift Security Services which voluntarily left the premises. Thereafter the respondent instructed the Messenger of Court to have Priscilla Chigariro released from prison. The applicant's claim that it leases the premises is a fallacy.

The respondent also contends that the applicant has not properly pleaded urgency. This is because since 2019 the applicant has been litigating over the same issue. The matter cannot now be urgent if it failed to be upheld as urgent in 2019.

I directed that counsels address me both on the preliminary points as well as on the merits.

Regarding urgency Ms *Mabwe* submitted that the applicant did not delay in instituting proceedings after spoliation occurred. I did not hear her say much regarding the issue of irreparable harm. On *lis pendens* she submitted that case number HC 6036/19 related to spoliation of movables and had nothing to do with possession of the premises. Since the matter was struck off the roll, there would have been no basis to prosecute or withdraw it. She advanced similar arguments in respect of case number HC 9012/19. She also submitted that the proceedings in the Magistrates Court pertained to an individual, Priscilla Chigariro and not the applicant. The premises constitute matrimonial property. If the respondent is desirous of executing a court order this should be done in accordance with the rules.

Mr *Makaya* submitted that previous applications before this court were struck off. Then in November 2019 the applicant's director despoiled the respondent. Hence the order restoring possession to the respondent that was granted by the Magistrates Court. The

decision by the Magistrates Court has not been set aside. He submitted that there is a nexus between the applicant and Priscilla Chigariro.

Mr *Makaya* also submitted that a matter that is struck off the roll remains pending until it is withdrawn. This is what befell case number HC 6036/19. In respect of case number HC 9012/19 he submitted that the matter was held not to be urgent. In that vein, he thus submitted that the applicant was then not in possession of the premises.

Regarding abuse of process Mr *Makaya* submitted that there is an admission that Tigerswift Security Services was contracted to the applicant. The respondent wrote to Tigerswift Security Services on the need to uphold the Magistrates Court order. Hence the voluntary surrender of the premises by Tigerswift Security Services. The applicant did not attach a supporting affidavit from Tigerswift Security Services. Mr *Makaya* also submitted that there was material non-disclosure by the applicant regarding the litigation filed under case number HC 1906/20. In that application the applicant sought to contend that there was no link between it and Priscilla Chigariro whereas the Magistrates Court had made a finding of such a nexus. He further submitted that the matter cannot now be urgent as the order of the Magistrates Court has been executed. From the time Priscilla Chigariro was committed for contempt of court on 31st January 2020 it was evident that the respondent was entitled to vacant possession of the premises.

I have had no opportunity to peruse the files that have been referred to in this application. This is on account of the national lockdown that was announced in the wake of the coronavirus pandemic. There is unanimity between counsels regarding the outcome of case number HC6036/19. If the case was struck off the roll there is no question about it still pending. However, just as HC 9012/19, if it was removed from the roll, as opposed to being struck off then such matter would still be pending. Even assuming the matters are still pending the defence of *lis pendens* would not be available. This is because the applicant was not a party in those proceedings.

Nonetheless there is a critical issue that the applicant's counsel overlooked. This relates to the order that was granted by the Magistrates Court. It is not disputed that the Magistrates Court ordered Priscilla Chigariro and all those claiming occupation through her to restore vacant possession of the property to the respondent. Therefore the applicant's claim to have been in peaceful occupation of the property was extinguished by the Magistrates Court order. In such a scenario there is no question of the applicant having been despoiled. Therefore, there is no basis for the urgency that is claimed by the applicant.

Even on the merits, the applicant has not made a case entitling it to the relief sought. As held in *Trustees, SOS Children's Village Association of Zimbabwe v Bindura University And Others* 2014 (2) ZLR 36 (H), a party seeking a spoliation order must on a balance of probabilities prove peaceful and undisturbed possession and unlawful deprivation of such possession. It is a tall order for the applicant to prove unlawful deprivation of possession in the face of the Magistrates Court order. The other handicap is that the applicant did not file a supporting affidavit from Tigerswift Security Services who are said to have been unlawfully prevailed upon by the respondent's agents. Without a supporting affidavit from Tigerswift Security Services the averments by the applicant about unlawful deprivation of possession remain hearsay. The applicant did also not file a supporting affidavit from its own employee. This has left the applicant's case woefully inadequate.

In the result, the application is dismissed with costs on a legal practitioner and client scale.

Tendai Biti Law, applicant's legal practitioners
Mambosasa, respondent's legal practitioners