

SHAWASHA BUSINESS COMPLEX (PVT) LTD
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 27 May 2020 & 11 June 2020

Urgent Chamber Application

R G Zhuwarara, for the applicant
C Kwaramba., for the respondent

MANZUNZU J: This is an urgent chamber application where the applicant is seeking an order in the following terms:

“TERMS OF FINAL ORDER SOUGHT

1. That it be and is hereby declared that respondent’s dispossession of applicant from Stands 19854, 19855, 19856 and 19857 Harare Township of Salisbury Township Lands otherwise known as the Shawasha grounds which physical dispossession took place on 21 April 2020 is and was unlawful on account that this was done without the consent of the applicant and without following due legal process and therefore in circumstances amounting to spoliation.
2. That it be and is hereby declared that the applicant, his agents, representatives, employees and invitees are entitled to peaceful and undisturbed possession of the property until such time as the respondent obtains an order of ejection against applicant from a competent court.
3. The respondent shall pay costs of suit at an attorney-client scale.

INTERIM RELIEF GRANTED

Pending the return date and determination of this matter, applicant be and is hereby granted the following relief;

1. The respondent be and is hereby ordered to restore vacant possession of Stands 19854, 19855, 19856 and 19857 Harare Township of Salisbury Township Lands otherwise known as the Shawasha grounds to the applicant within forth-eight (48) hours upon service of this order, failing which the Sheriff be and hereby authorized to assist applicant to recover vacant possession thereof.
2. There shall be no order as to costs.

SERVICE OF THIS ORDER

Applicant’s legal practitioners be and are hereby granted leave to effect service of this order on respondent.”

The requirements for a spoliation relief are well known. In the case of *Botha & Another v Barret* 1996 (2) ZLR 73 at 80 GUBBAY CJ stated that:

“It is clear that in order to obtain a spoliation order two allegations must be 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 wrongful against his consent.”

The applicant does not need to show that his possession was lawful.

In *De Jagger and Ors v Farah Nesta* 1947 (4) SA 28 it was held that “no matter how unlawful a person’s possession may be, his possession may not, be interfered with except through due process of law.”

The remedy is derived from the public policy that parties are not allowed to take the law into their own hands.

The applicant has the onus to show prior possession and illicit deprivation. The fact that the spoliator may be lawfully entitled to the property does not render his seizure any the less legal and applicant can still claim his order. See *Donges N.O v Dadoo* 1950 (2) SA 321.

At the hearing of the application the respondent raised two preliminary points, that the matter was not urgent and that there was material non-disclosure by the applicant. After hearing submissions by counsels on these points *in limine* I dismissed them and gave *ex tempore* reasons. I do not intend to make the reasons part of this judgment. The respondent owns stands 19854, 19855, 19856 and 19857 Harare Township of Salisbury Township Lands otherwise known as Shawasha grounds (the property). Respondent had challenges with vendors who unlawfully operated from this property. In an effort to resolve the perennial problem of vendors the respondent entered into a joint venture agreement with Constortio International Zimbabwe (Pvt) Ltd for the construction of a flea market among other things. The applicant was born out of the joint venture agreement whose primary responsibility was the construction of the flea market and other structures at the property.

The dispute between the parties surround whether or not the applicant took possession of the property now allegedly despoiled.

Applicant says following the signing of the shareholders agreement on 13 February 2015 the respondent handed over possession of the property to the applicant in February 2019. Some letters which were correspondence between the parties were relied upon to show that respondent handed over possession of the property to the applicant.

First was the letter of 7 February 2018 from the respondent to the applicant. The letter reads;

“PD/CR/Shawasha Grounds

07 February 2018

Shawasha Business Complex (Pvt) Ltd
21 van Praagh Ave
Milton Park
Harare

**REF: CITY OF HARARE PARTINERINING CONSORTIA ZIMBABWE (PRIVATE)
LIMITED IN THE DEVELOPMENT OF SHAWASHA BUSINESS COMPLEX:
COMMENCEMENT OF WORKS AND VENDORS RELOCATION CONCERNS**

In pursuance of the Joint Venture Memorandum of Agreement signed on the 21st January 2014 between City of Harare and Consortia Zimbabwe Private Limited. The City is pleased to confirm that all the necessary technical requirements have been fulfilled i.e.

- a) Town Planning approvals
- b) Building Plans and Engineering designs approvals
- c) EIA approvals

In light of the above the City of Harare through this letter is instructing SHAWASHA BUSINESS COMPLEX PRIVATE LIMITED the development company to now move on site and commence the development of the Business Complex.

You shall start with Phase 1 of the development comprising of two blocks along Chaminuka Street/Remembrance Drive. The Phase 1 shall be secured and vendors on this site shall be moved to the rest of the site. City of Harare markets office and ward councillor shall help in this regard.

The City looks forward to a quick implementation of this project to alleviate the vendor challenges in Mbare in particular and the City at large.

Yours faithfully

.....

**Acting Town Clerk
Eng H. Chisango”**

Then was the letter of 28 March 2018 from Consortio International Holdings (Pvt) Ltd (Consortio) to respondent. The letter reads;

“28 March 2018
The Acting Town Clerk
Harare City Council
Town House, Julius Nyerere Way
Harare

Att: Eng. H.A. Chisango

Dear Sir

RE: NOTICE TO COMMENCE SHAWASHA CONSTRUCTION OPERATIONS

We refer to a meeting held on 28 March 2018 at the offices of Head Districts Administration (Mbare), regarding the above subject matter.

In the said meeting it was agreed that construction work will commence on 4 April 2018. The first stage of construction will consist of fencing to cordon off construction site, ground levelling and workshop construction.

It was agreed that Harare City will assist with security during the first few weeks, as well as night security arrangements. We also trust Harare City will use the intervening period to inform local political leadership in the form of Councillor and Member of Parliament to avoid unnecessary misunderstanding.

We thank you for your continued support and cooperation.

Yours faithfully

H.C. James Liu (Mr)
(Director: Consortio Zimbabwe (Pvt) Ltd)

Then was a letter of 4 April 2018 by Consortio to respondent which reads;

“The Acting Town Clerk
Harare City Council
Town House, Julius Nyerere Way
Harare

Att: Eng. H.A. Chisango

Dear Sir,

RE: ABORTED SHAWASHA CONSTRUCTION OPERATIONS

We refer to our letter dated 28 March which notified Harare City on construction commencement date for Shawasha Business Complex.

We duly sent our staff on 4 April 2018 to start fencing work as advised. Three security details from Harare City were also on site. The security details did a reconnaissance of the site and they came to brief us about how hostile the vendor community was towards our presence. In the midst of their brief, vendors' community leaders came and soon we were mobbed. We were advised that the community is braced for a fight, even to die, protecting their site. They dared our foreman to bring out our equipment if he wanted to die. We left in a hurry among a shower of obscenities as a bussed in gang was preparing for physical engagement. Despite our pleas for better preparation we were outclassed, outsmarted and outnumbered.

The community leaders demanded to be addressed by Harare City since, according to them, they are Harare citizens and they are now stakeholders trading at Shawasha site. Harare City has advised us time and again that we should not concern ourselves with vendors, but we find ourselves in the forefront.

The vendors also said we are being insensitive to the now highly charged political environment, accusing us of being agents of opposition politics. According to them, any discussion about Shawasha project should be done after elections, and at the moment our project may cause undue anxiety among their potential supporters.

Please advise how Harare City intends to resolve the vendor issue at Shawasha; and we are on stand by for any meeting that will help resolve this matter.

Yours faithfully

H.C James Liu (Mr)
(Director: Consortio Zimbabwe (Private Limited))

There was also attached as Annexure E a newspaper article confirming the agreement between the parties and how Consortio was facing challenges of vendors resisting their occupation of the property.

Applicant says it however, took possession of the property in February 2019. The property was then secured by the applicant's security guards on a 24-hour basis. A fence was erected around the property and other technical requirements were already met.

The applicant alleges that on 21 April 2020 the respondent forcefully took occupation of the property and brought in earth moving equipment to work on the property. Despite protests by its security personnel the occupation did not stop, it was further alleged.

Initially an urgent application in this matter was filed by Messrs C Nhemwa and Associates on 27 April 2020 under HC 2187/20 but the same was withdrawn on 5 May 2020 as applicant felt the lawyers who were handling the matter were conflicted. The present application was filed on 5 May 2020. While there were initial indications that the parties could settle out of court the efforts failed.

The respondent said at no point did it relinquish possession to the applicant. Respondent took the position that applicant never obtained peaceful and undisturbed possession of the property. The respondent cited the ever going disruptions by the vendors. Further it was alleged that the moving into site was conditional as per the letter of 7 February 2018 in its second last paragraph (cited supra). In other words, while the applicant would carry certain of its specific acts on the site vendors would remain on some designate part of the property. Respondent denied dispossessing the applicant as the applicant was never in occupation. The respondent stated in paragraph 7:1 of the opposing affidavit that:

“The fact that the applicant had been allowed to move into the property to start some construction work does not mean that the respondent had relinquished control of the property to the applicant.”

And further in para 7:2 stated

the “At all material times the respondent remained in control of the property primarily because applicant had not yet fulfilled the requirements for it to take full control.”

The argument raised by respondent, to a large extent, shows that it could not have allowed the applicant possession in the face of its failure to meet its contractual obligations, one of which being the failure of the payment of US\$10 million to respondent's account.

Be that as it may, the question still remains as to whether as a matter of fact the applicant had possession of the property. The respondent says even if it is proved that the applicant had possession and was dispossessed, restoration is no longer possible for the same property has now been allocated to vendors. The second leg of defence by the respondent is that restoration is impossible.

This matter was argued at length by both Mr *Zhuwarara* and Mr *Kwaramba* who represented applicant and respondent respectively. The court is indebted to their valued submissions supported by case law authority.

Mr *Zhuwarara* in his submissions raised a very important observation in relation to the issue for determination. He said the issue was whether or not applicant was in peaceful and undisturbed possession and not whether applicant was given a right to possession. Mr *Kwaramba* was quick to equate the applicant's position to that of a builder who could not claim possession of a property by virtue of having been asked to come and build a house on someone's property. He said applicant was invited to do construction work and cannot claim possession. He said possession was not proved and the matter must be dismissed.

I think it will be wrong to blanketly say a builder cannot take possession of the property where he has been asked to do construction. It all depends on the circumstances. In any event the onus will be on such builder to prove possession.

This is a matter in which I am quite satisfied that the applicant proved possession. The applicant has indeed proved not only that he was a *de jure* possessor of the property but that he was actually in *de facto* possession of the property. Why do I say so? Letters were produced to prove that applicant was given green light "to move on site and commence the development of the Business complex.'

The respondent does not dispute that applicant thereafter erected a fence and put 24-hour security guard of the property.

It is neither here nor there, as alleged by respondent, that the joint venture agreement between the parties was terminated on 2 March 2020. Applicant did not relinquish possession as a result of that. The mere presence of some vendors on the other part of the site does not vitiate applicant's possession. When the respondent moved earthmoving equipment on the

site the applicant protested through its security personnel. The respondent did not stop its actions and on 21 April 2020 a letter was emailed to the respondent. The letter reads:

“Dear Sir

The above matter refers. We act for Shawasha Business Complex (Private) Limited. Our client advises us that she has been in occupation of the Shawasha Flea Market and Shopping Centre Complex construction site until Tuesday 21st April 2020 the Harare City Council illegally and without our client’s consent moved earth moving vehicles and occupied the property. Our client is shocked that an organization of the stature of the capital city of Zimbabwe would literally take the law into its hands and without notice proceed to evict by force a person in possession of a piece of land without following the due legal process. It is common cause that our client, subject to the shareholders agreement between the Harare City Council and Consortio International Holdings (Private) Limited has invested a substantial amount of money in the construction of a flea market and shopping mall. Apart from the costs of Architectural Drawings, Environment Impact Assessment, Business Plans, Bills of quantities and other pre-construction expenses our client has spent money on the site by erecting a perimeter of fence, initial ground works and the securing of the premises by security on a daily basis. Nevertheless, despite all this and the protests by our client Harare City Council proceeded to occupy the property.

We are by this letter demanding that Harare City Council withdraws from the property and hands it back to our client within 48 hours from date of this email failing with we have instruction to file an urgent chamber application for a spoliation order. We write this letter to enable the Harare City Council to reverse its illegal act because our client wants to avoid unnecessary legal costs. Our client also wants to avoid burdening the courts with a determination of a matter that is clearly a case of spoliation at a time when the country is under lockdown because of the Covid 19 pandemic. Our client is mindful of the risk of exposing court officials, legal practitioners, the court and all parties involved to Covid 19 and therefore calls upon your good office to do that which is proper and reasonable by withdrawing from the illegal occupation of the property. Nevertheless, if our client’s most reasonable demand is not met with a positive response we unfortunately have instructions to file court process the costs of which will be met by yourselves at an attorney-client scale.

Regards

Claudious Nhemwa
Senior Partner”

Despite the strongly worded letter it is surprising that the respondent chose to keep silent.

The act of dispossession has not been controverted in that the respondent accepted moving on site with earthmoving equipment.

The applicant has therefore proved the requirements for a spoliation order.

This takes us to the respondent’s defence that restoration is no longer possible because the cleared piece of land has been allocated to vendors. A list of names was attached numbering to 2261. There are no further details to the said allocation. Mr *Zhuwarara* argued that respondent has not shown that it was not able to restore as a mere list of names was

exhibited. The list largely remains incomplete as it leaves gaps for a lot of information e.g. I.D. numbers, contact details and physical address. No details are given as to when it was prepared and how the allocation was done and when. A party who claims that restoration is no longer possible has a duty to prove the same. It cannot be done by a mere say so. Evidence must be adduced. The respondent failed to lead evidence to show that it is now impossible to restore possession. The applicant has proved its case and is entitled to the relief sought.

IT IS ORDERED THAT

The application for a provisional order succeeds as follows:

TERMS OF FINAL ORDER SOUGHT

That the respondent should show cause to this honourable court why a final order should not be made in the following terms.

1. That it be and is hereby declared that respondent's dispossession of applicant from Stands 19854, 19855, 19856 and 19857 Harare Township of Salisbury Township Lands otherwise known as the Shawasha grounds which physical dispossession took place on 21 April 2020 is and was unlawful on account that this was done without the consent of the applicant and without following due legal process and therefore in circumstances amounting to spoliation.
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2. There shall be no order as to costs.

SERVICE OF THIS ORDER

Applicant's legal practitioners be and are hereby granted leave to effect service of this order on respondent.

P Makora Commercial Law Chambers, applicant's legal practitioners
Mbidzo Muchadehama & Makoni, respondents' legal practitioners