

ALTAF HUSSEIN BHADELLA
versus
HASSAM ABDUL GAFFAR BHADELLA
and
ABOOBAKER BHADELLA

HIGH COURT OF ZIMBABWE
MANZUNZU J
HARARE, 26 & 29 October 2021

Urgent Chamber Application

T A Chiyengerere, for the applicant
E Samukange, for the respondents

MANZUNZU J This is an urgent chamber application for *mandament van spolie*.
The applicant seeks an order in the following terms:

“IT IS ORDERED THAT

1. The 1st and 2nd respondents and all other persons acting through them and on their instructions, be and are hereby ordered to restore to the applicant the undisturbed and peaceful possession of No. 12 Greenwood Lodges, 183 Josiah Chinamano Avenue, corner 8th street, Harare.
2. The 1st and 2nd respondents and all other persons acting through them or on their instructions, are interdicted from interfering with the Applicant’s possession and use of the property without a court order.
3. Leave be and is hereby granted to the applicant’s legal practitioners or the sheriff to attend to the service of this order forthwith upon the respondents in accordance with the rules of the High Court.
4. The respondents are to pay costs of suit on a legal practitioner and client scale.”

MANDAMENT VAN SPOLIE

The requirements for a spoliation order are settled. In *Botha and Another v Barrett* 1996 (2) ZLR 73 @ 80 the court had this to say; “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 wrongfully against his consent.”

A relief for spoliation is final in nature and cannot be sought on an interim basis; see *Everton Masau v Sheila Mabasa & Anor* HH 393-17. The applicant must therefore prove a clear right in order to succeed as opposed to a *prima facie* right.

The applicant's case is that he was in possession of No. 12 Greenwood Lodges, 183 Josiah Chinamano Avenue, corner 8th street, Harare (the property) since January 2021 as his primary place of residence. He claimed that possession was peaceful and undisturbed until 19 October 2021 when the first respondent changed the locks to block him access. He further alleged that dispossession was unlawful and against his consent.

What emerges from the parties' evidence is that they are brothers. Their relationship is not cordial as they allege against each other of wrong doings. There is a deep seated conflict between the applicant and his brothers, the respondents.

In opposition the respondents' contention is that the applicant was not in peaceful and undisturbed possession of the property at the time they changed locks to the property. They alleged that in January, 2021 the time when the applicant was supposed to go to a rehabilitation centre in South Africa, he contracted Covid-19. As a result, through a family arrangement, he was conditionally availed the property as his quarantine place up to the time of his recovery. Respondents said applicant moved out of the property in February 2021 but returned in June 2021. They said he failed to live peacefully with the neighbouring tenants as he engaged in unruly behaviour which was also contrary to their religion as a family. Efforts to mend him failed, so they alleged.

The respondents' defence is that the applicant was not in peaceful and undisturbed possession of the property because he voluntarily moved out in September 2021. The basis for saying so was because on 19 October 2021 when they changed locks he was not there and he had to be informed of this move through a whatsapp message by the first respondent. Furthermore, respondents relied on a printout of some whatsapp conversation which they said was between applicant and a third party. The third party did not depose to a supporting affidavit. However, throughout their evidence the respondents remained adamant that the applicant abandoned the property by choice.

The issue for determination is whether the applicant was in peaceful and undisturbed possession of the property. The applicant says he was and the respondents say he was not. An analysis of the evidence shows that the applicant was in peaceful and undisturbed possession of the property. The respondents have gone to length to show how uncouth the applicant's

character is. That of course is not relevant to the requirements of spoliation as stated *supra*. In *De Jagger and Ors v Farah Nesta* 1947 (4) SA 28 the court said;

“no matter how unlawful a person’s possession may be, his possession may not be interfered with except through due process of law.”

In recognition that applicant was still in occupation of the property, the respondents said when they failed to locate the room keys they had to phone him to ask where the keys were. After changing the locks first respondent sent him a message to that effect. Not only that first respondent asked applicant to consult with him in the event applicant wanted to collect part of his remaining items. Respondents confirm in their evidence that the applicant had become homeless after selling family house and leaving his family’s rented accommodation in Harare. This explains, one can assume reasonably so, why the family decided to accommodate him at this property pending his recovery from Covid-19. Respondents do not say where applicant went to live after “abandoning” the property. There is no evidence of abandonment. A mere absence from the property without more cannot draw the conclusion that one is not in possession. The applicant has therefore made a case for spoliation relief.

FINAL INTERDICT

The requirements for a final interdict to be granted are settled. These are;

- (a) A clear right
- (b) Irreparable injury actually committed or reasonably apprehended
- (c) Absence of a similar protection by any other remedy;

See: *Setlogelo v Setlogelo* 1914 AD 221

Pauline Mutsa Makoni v Julius Tawona Makoni & Anor HH -820-15

Econet Wireless Holdings v Minister of Information 2001 (1) ZLR 373 at 374 B

Airfield Investments (Pvt) Ltd v Minister of Lands & Ors 2004 (1) ZLR at 511

The applicant seeks a final prohibitory interdict against the respondents against future spoliation on the basis that he occupies the property in his capacity as a director and shareholder of some unnamed family businesses. This position was disputed by the respondents. The applicant failed to prove any of the requirements for a final interdict.

In respect to costs, the circumstances of this case are such that each party must bear its own costs.

DISPOSITION:

IT IS ORDERED THAT

1. The application for a spoliation order succeeds.
2. The 1st and 2nd respondents and all other persons acting through them or on their instructions, be and are hereby ordered to restore to the applicant the undisturbed and peaceful possession of No. 12 Greenwood Lodges, 183 Josiah Chinamano Avenue, corner 8th street, Harare.
3. The relief for a final interdict be and is hereby dismissed.
4. Leave be and is hereby granted to the applicant's legal practitioners or the sheriff to attend to the service of this order forthwith upon the respondents in accordance with the rules of the High Court.
5. Each party shall bear its own costs.

D V Gapare Attorneys, applicant's legal practitioners

Samukange Hungwe Attorneys, respondents' legal practitioners