

OJEI VENTURES (PRIVATE) LIMITED
and
REDEEMED HOUSE OF GOD
versus
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 12 January & 2 February 2024

Urgent chamber application

B Hwachi, for applicants
G R Sithole, for respondent

TSANGA J:

This matter was brought as an urgent chamber application seeking a spoliation order following what applicants alleged was forced eviction from premises known as Stand 14432 Salisbury Township which they were letting from the respondent, the National Railways of Zimbabwe, a parastatal. I heard the matter on the merits having made a decision at the hearing that the argument that the matter was not urgent because the applicants had failed to take action between the 29th of December and the re-filing of the application was not sustainable. This was because the period in question essentially encompassed the Christmas and New Year holidays. An urgent chamber application had been filed on 8 December 2023 but when the matter was heard on 29 December 2023 the applicants had been non-suited on the basis that there was no resolution confirming that the applicant's representative was authorised to represent the applicants. It was upon such resolution having been obtained that this urgent application had been re-filed.

It was not in dispute that on 4 September 2023 the respondent wrote to the applicant giving them three months' notice to vacate the premises on the basis that the respondent wished to use the premises itself.

On the merits, Mr Hwachi for the applicants submitted that they had been in possession of the land they were evicted from and upon which they had set up business

premise and a church for at least a decade. On 6 December 2023, the respondent was said to have taken the law into its own hands and evicted them forcibly from the premises without a court order.

The applicants argued that the court ought to protect them in retaining physical control and regaining the premises in question given the circumstances of their eviction. A video, of the eviction having said to be available, I requested that it be placed before me for me in order to make an informed decision on the alleged forceful eviction. The video was viewed. Unfortunately it took the matter no further as it was soundless and showed still pictures of a van and people with tyres which were presumably to be loaded into the van. The actions did not speak to any forceful eviction particularly given that the notice had been given that tenants were to leave that day.

Indeed Mr Sithole, who represented the respondent, had opposed the application for spoliation on the basis that the applicants had been given notice as way back as September 2023 and had not objected. He said that on 6 December 2023 when the eviction took place, it had been the founding pastor who had wilfully handed over the keys to the church. Regarding the commercial premises, the subtenants were said to have been advised and were well aware that they were supposed to leave. Some businesses whose owners were in China at the time, were said to have been left intact, further pointing to no forceful eviction. The sequence of events was therefore said to demonstrate individuals who voluntarily vacated the premises or lost physical possession. As such it is said they were not at all in peaceful possession. Furthermore, the premises are said to be already occupied by others meaning that restoration cannot be effected. Artificial persons having been occupying through natural persons, between twenty to thirty tenants were said to have already left. He further argued that in any event if their claim is that they were in peaceful session then this would mean there are material dispute of facts as to whether possession was lost voluntarily or forcibly and that this would require that the matter be dealt with by way of action. Materially, he stated that the letter of eviction was not respondent to.

Whilst Mr *Hwachi* for the applicants stated that it had been responded to and that the response was contained on p 79 of their application, what was on that page was in fact a letter from the respondent's lawyers. Indeed it made reference to a letter dated 18th October 2023 which had been addressed by applicants according to the respondent's lawyers, to the Acting Real Estate Manager. That letter in fact reiterated that the respondent would not be renewing the lease and that the premises were to be surrendered on 5 December 2023. It also referred to

the fact that issues of negotiations on arrear rentals and rent increase were no longer on the table as premises were required by the respondent for its own use.

Mr Hwachi also drew attention to the fact that one Felix Makamba who had deposed to an affidavit in favour of respondent had also deposed to an earlier affidavit saying he was dispossessed on 6 December 2023. Another of respondent's deponents was said to have been evicted as far back as September and yet now claimed to have left on 6 December 2023. One Chengetai Ndudzo, was said to have paid applicant three months' rent in advance which, it was said, she would not have done if she knew she was going to vacate the premises. He also stated that the business premises are in fact empty.

Analysis

Whatever the anomalies in the said supporting affidavits they do not take the issue of spoliation any further. The time honoured principles are straight forward and a party seeking to rely on the *mandamus van spoile* must prove:

- (a) That he was in peaceful and undisturbed possession of the property; and
- (b) That he was forcibly, or by stealth, wrongfully deprived without his consent or without a lawful order.

See *Banga & Anor v Zawe & Ors* 2014 (2) ZLR 288 (S); *Mutanga v Mutanga* 2013 (2) ZLR 103 (H)

The valid defences against a spoliation claim include: (a) that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of dispossession, and (b) the dispossession was not unlawful and therefore did not constitute spoliation. In this instance the respondent emphasises that the claim was not unlawful as the eviction was pursuant to a full three months' notice that they should depart and that applicants' own director a Mr Chizu had gone around advising tenants of the eviction letter when it was received. Also already stated the keys to the church were said to have been surrendered voluntarily which was not denied. Whilst the applicant says the business premises are empty, one cannot say that the individuals who were occupying them did not for sure leave of their own accord when the day came given that notices had been given. Furthermore, the fact that they were rent areas points more likely than not, to parties leaving of their own accord even if it may not have been all of them who left on that day.

In my view having read the application and the notice of opposition, heard the parties and watched the video in question, I am not satisfied that there was forceful dispossession of the applicants from the premises warranting a spoliation order. The response to the eviction letter was in my view also material to the settlement of this matter as to whether a spoliation order should be granted. This is more so against the backdrop that a notice period of three months had been given and if anything the applicants seemed in October 2023 to have been negotiating arrear rentals and possible rent increase. They had been advised categorically that they would not be any farther renewal.

In the premises, the application for spoliation is dismissed with costs.

Nyikadzino, Simango & Associates, applicant's legal practitioners
Muza & Nyapadi, respondent's legal practitioners