

S. HWATIRINDA
versus
PATIENCE TAVARUVA

HIGH COURT OF ZIMBABWE
WAMAMBO J & ZISENGWE J.
MASVINGO, 18 November, 2020 and 26 May, 2021

Civil Appeal

R.C. Chakauya, for the appellant
C. Mtshitshwa for the respondent

ZISENGWE J: This is an appeal against the decision of the Magistrates Court sitting at Chiredzi wherein it granted respondent's application for spoliation in respect of a piece of land situate in the Lowveld district of Chiredzi, namely subdivision 111 of Mkwesine Central, Chiredzi ("the piece of land"). The appellant attacks the decision of the court *a quo* on two broad grounds namely that it (i.e. court *a quo*) ought to have declined to entertain the application for spoliation as essentially the same dispute pitting the same parties was pending in a different court case. The argument therefore is that the court below should have upheld the special plea of *lis alibi pendens* which she raised then. Secondly, and perhaps more importantly, the appellant contends that the court below erred in granting the application for spoliation when the respondent had failed to satisfy the pre-requisites thereof.

The facts leading up to the application for spoliation in the court below are these: The respondent was a beneficiary of the government's land reform programme in the course of which the piece of land was originally allocated to her through an offer letter to that effect. However, that offer letter was subsequently withdrawn by the then Minister of Lands, Agriculture, Water,

Climate and Rural Resettlement on 31 July, 2019. It would appear the respondent made representations to the said Minister pleading for a reconsideration of the withdrawal but these were turned down as shown by Annexure 'B' of the proceedings *a quo*. In the wake of the revocation of the offer letter to respondent, the piece of land was allocated to the appellant as shown by Annexure 'A' of record.

It is the events that unfolded thereafter that are hotly contested as between the parties and which gave rise to the application for spoliation. Whereas the respondent averred in the proceedings *a quo* (as she persists in this appeal) that the appellant resorted to self-help and unlawfully despoiled her of the piece of land by forcibly taking occupation thereof and ejecting her therefrom, the appellant averred contrariwise. She averred then as she maintains to date that she took occupation of the piece of land following the withdrawal of the offer letter in respondent's favour and its subsequent allocation to her.

At the conclusion of the hearing the court *a quo* made the following findings – firstly that the respondent was in peaceful and undisturbed possession of the plot and that no attempt had been made by the Ministry of Lands to evict her. Secondly, that the appellant had forcibly evicted the applicant without a court order – conduct which in its view amounted to despoilment. It therefore granted the application.

Dissatisfied with this outcome, the appellant approached this court seeking to have it set aside.

The grounds of appeal are couched in the following terms;

1. *The court a quo erred by dismissing the point in limine of lis pendens raised by the appellant.*
2. *The Honourable Court a quo erred and grossly misdirected itself in making a finding that the respondent was entitled to the relief of a spoliation order.*
3. *The court a quo erred by making a finding that the respondent used self-help to occupy plot number 111 Mkwesine, Chiredzi.*
4. *The court a quo erred by not considering that the respondent's offer letter on plot 111, Mkwesine Estates was withdrawn and was given notice by the Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement to vacate the piece of land after she winds up the operation on the piece of land.*

5. *The court a quo erred by not considering that the appellant was given such authority to occupy the piece of and after the respondent was ordered by the allocating authority to vacate Plot 111 Mkwesine Estate, Chiredzi after she winds up her operations thereon.*

Wherefore appellant prays that the appeal be allowed and that the order by the court *a quo* be quashed and set aside and substituted with the following;

“The application for spoliation order is hereby dismissed with costs.”

The appeal is resisted by the respondent who argues that there was no misdirection on the part of the court below in granting the application. Her main contention then as now being that the appellant unlawfully resorted to self-help in taking over the piece of land in question thereby entitling her to seek and obtain restoration thereof.

The point in limine

The respondent raises the preliminary point questioning the validity of the appeal in view of the inclusion by the appellant of what the latter termed “the background” and “details” of the appeal in its notice of appeal. According to the respondent such inclusion not being provided for in the rules of court renders the appeal fatally defective.

The impugned paragraphs read as follows;

Background

The respondent approached the court at Chiredzi Magistrates Court with a court application for spoliation order. The court granted an application for spoliation ordering the appellant and her family members interdicted upon entering Plot 111 Mkwesine, Chiredzi.

Details of matter

1. *The appellant hereby places respondent in terms to indicate whether it is waiving security (sic)*
2. *If the respondent is not waiving security to indicate the amounts it considers good and sufficient by the rules.*

Thereafter the applicant proceeded to set out its grounds of appeal.

According to the respondent the inclusion of the above paragraph runs afoul Order 31 Rule 4(4)(a) – (d) of the Magistrates Court (Civil) Rules, 2018 as read with Rule 7(1)(a) – (e) of

the High Court (Miscellaneous Appeals and Reviews), 1975 for the reason that those introductory paragraphs are simply not provided for in the aforementioned Rules.

Reliance was placed on the Supreme Court decision in *Christopher Sambaza v AL Shams Global BV1 Limited* SC 03/18. The court in that matter held that the appeal was fatally defective in that the relief sought was wrongly and slovenly framed and therefore incompetent in that it prayed for remedies which could not have been granted by the court *a quo*. The court found that the nature of the relief sought did not comply with the requirements of Rule 29(1) (e) of the Supreme Court Rules in that it failed to disclose the exact nature of the relief sought.

Rule 7(1) of the High Court (Miscellaneous Appeals and Reviews) Rules, 1975 lists what must be contained in a notice of appeal. It provides as follows;

7. *Contents of Notice of Appeal*

1. *A notice of instituting an appeal shall state –*

- (a) the Tribunal or officer whose decision is appealed against; and*
- (b) the date on which the decision was given, and*
- (c) the grounds of appeal; and*
- (d) the exact nature of the relief sought; and*
- (e) the address of the appellant or his legal representative*

Meanwhile Order 31 Rule 4(4) provides as follows;

(4) A notice of appeal or cross – appeal shall state -

- (a) whether the whole or part only of the judgment or order is appealed against and, if part only, then what part; and*
- (b) in the ground of appeal, concisely and clearly the findings of fact or rulings of law appealed against; and*
- (c) the nature of the relief sought; and*
- (d) the date of judgment and the name of the court against whose judgment the appeal is noted.*

The inclusion of the “background” and details of the matter was therefore irregular and superfluous. The only question that arises is whether such inclusion renders the appeal fatally

defective. My view is that it does not. As long as all the other requirements for a valid appeal are present, the court can always disregard unnecessary or superfluous content.

Not every infraction, no matter how slight, of the of the rules relating to the form of appeal is fatal. In the context of this matter, I hold the view that the inclusion of unnecessary material does not serve to invalidate the appeal and the point *in limine* is hereby dismissed.

On the merits

First ground of appeal: *Lis pendens*

As indicated earlier the appellant avers in this appeal that the court *a quo* misdirected itself in failing to uphold the preliminary point of *lis pendens* it raised at the onset of that application. In this respect, the appellant (then as respondent) had argued that the application for spoliation was essentially the same as the one in a parallel record namely GL 221/19 and was between the same parties.

The respondent, on the other hand, while confirming that GL 221/19 was between the same parties contends however that the applications are different in that whereas the application in GL 221/19 was one for an interdict, in the present one, it is one for spoliatory relief.

A perusal of GL 221/19 instituted by the respondent shows that the latter sought to have the appellant interdicted from carrying out any farming activities on the very plot that constitutes the subject matter of the current appeal. Her major complaint then was that an offer letter had been granted by the Ministry of Lands without her own offer letter having been withdrawn first.

There is merit in the appellant's argument that the dispute in GL 221/19 was essentially the same as in the GL 44/20 the latter which culminated in this appeal. What is critical in my view is not necessarily the form of the application but the substantial nature of the dispute or cause of action. In Erasmus "Superior Court Practice 2nd Edition at pp 280 – 281 the following is stated regarding this requirement of the defence of *lis pendens*;

"The two actions need not be identical in form. The requirement of the same cause of action is satisfied if the other case necessarily involves a determination of some point of law which will be res judicata in the action sought to be stayed [see Marks and Kantor v Van Diggelen 1935 TPD 29 at 37]"

In the present matter the quarrel is basically over control of the plot and in both instances the respondent endeavoured to have the appellant barred from interfering with her (i.e.

respondent's) farming activities on it. In short therefore, at the time of instituting the application for spoliation, the same dispute was pending before the same court.

Regrettably however, the court *a quo* skirted addressing that point *in limine* opting instead to write as follows;

“I have not bothered to consider the points in limine raised because it was very clear to me that the law on the merits is clearly in favour of the applicant.”

That kind of approach is clearly untenable and cannot escape censure. A court seized with a matter wherein points in *limine* are raised is enjoined to address them and after due consideration, to either uphold or dismiss them. He cannot perfunctorily disregard or ignore those preliminary objections supposedly on the basis that the merits appear to weigh heavily in favour of either party.

Be that as it may, the defence of *lis pendens* even where it succeeds does not result in the dismissal of the subsequent action. The court has the discretion to either proceed with the second or subsequent application despite the pendency of the earlier action(s) or to stay the former pending the outcome of the latter.

In *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) Mc NALLY JA had this to say;

‘The defence raised by this allegation is the defence of lis pendens, sometimes known as lis alibi pendens. Herbstein and Van Winsen in the Civil Practice of Superior Courts in South Africa 3rd ed at pp 269 et seq say, at page 269 – 270;

*“if an action is already pending between parties and the plaintiff there brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of lis pendens, that is, another action respecting the identical subject matter has already been instituted, **whereupon the court, in its discretion, may stay the second action pending the decision in the first action.**” {emphasis added}*

Similarly, in Erasmus, op cit at page D1 – 279 – 281 the following is stated:

“Lis pendens: The plea that there is pending litigation between the same parties on the same cause of action may be raised by special plea, but in appropriate circumstances also by way of application for a stay of the action.

The court may stay an action on the ground that there is already an action pending between the same parties or their successors in the title, based on the same cause of action, and in respect of the same subject matter. The defendant is not entitled as

*of right to a stay in such circumstances. **The court has a discretion whether to order a stay or not, and may decide to allow the action to proceed if it deems it just and equitable to do so ...*** {emphasis added}

In the present matter, the failure on the part of the court *a quo* to deal with this preliminary point cannot *ipso facto* lead to the upholding of the appeal precisely for the reason that it (i.e. the objection) was not potentially dispositive of the matter. At best appellant's success on that point would have entitled her to a stay of the proceedings pending the outcome of the application in GL 221/19.

Grounds 2-5 of the appeal: The spoliation order

I will now proceed to address the substantive issues relating to the appeal against the granting of the spoliation order. Whereas grounds 2 and 3 attack the decision of the court *a quo* on the basis that respondent failed to satisfy the requirements for granting of a spoliation order, Grounds 4 and 5 on the other hand relate to the question of lawfulness of the possession of the piece of land. It is to the latter two that I will first turn.

As earlier stated the appellant in grounds 4 and 5 of the appeal states that the court *a quo* “...erred by not considering that the respondent's offer letter on plot 111, Mkwesine Estates was withdrawn and was given notice by the Ministry of Lands, Agriculture, Water, Climate and Rural Resettlement to vacate the piece of land after she wound up her operations on the piece of land” and further that court *a quo* erred “... by not considering that the appellant was given such authority to occupy the piece of and after the respondent [had been] ordered by the allocating authority to vacate Plot 111 Mkwesine Estate, Chiredzi after she wound up her operations thereon.” It is clear therefore that these two grounds of appeal relate to the question of the lawfulness or otherwise of the parties' possession of the piece of land.

It is an established position, however, that in spoliation proceedings the lawfulness or otherwise of the possession in dispute does not arise. In this regard GWAUNZA JA (as she then was) in *Augustine Banga and Anor v Solomon Zawe and 2 Others* SC 54/14 had this to say:

“It is trite that in spoliation proceedings the lawfulness of the possession challenged is not an issue. Spoliation requires the restoration of the status quo ante

pending the determination of the dispute between the parties. This principle is clearly stated thus by the learned authors Silberberg and Schoeman at pages 135 – 136;

“.... the applicant in spoliation proceedings need not even allege that he has a ius possidendi: spoliatus ante omnia restituendus est All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession It is not sufficient to make out only a prima facie case ...”

More elaborately, the learned authors have this to say in the third edition of the same book at pages 130-131

*“During spoliation proceedings, the applicant only has to prove that he was in possession of the thing and that he was illicitly ousted (despoiled) from such possession. If he succeeds, possession must be restored ante omnia. The rights of the parties do not enter the issue and evaluation thereof is reserved for a following suit on the merits of the dispute... As far as possession is concerned, the applicant need not prove the existence of a ius possidendi and **thus the lawfulness of his possession is irrelevant**”*

In the context of this case therefore, grounds 4 and 5 of the appeal premised as they are supposedly on appellant’s right of ownership of the piece of land and the alleged absence of the respondent of such right are irrelevant.

In grounds 2 and 3 of the appeal, the overarching argument by the appellant is that the respondent was not entitled to the granting of the spoliation order as he had failed to satisfy the essential pre-requisites of the same. One of the leading cases on spoliation in this jurisdiction is that of *Kama Construction (Private) Limited v Cold Comfort Co-operative and Others* 1999 (2) ZLR 19 (SC) where the legal requirement for a *mandament van spolie* were set out which the applicant must prove on a balance of probabilities. These are that;

- (1) The applicant was in peaceful and undisturbed possession of the thing; and
- (2) he was unlawfully deprived of such possession

In the proceedings *a quo* the appellant in her opposing affidavit, chronicled the events leading up to the application for spoliation. More pertinently, she averred that she occupied the plot in August 2019 pursuant to the same having been allocated to her which in turn came in the wake of the withdrawal of the offer letter in favour of the respondent.

She further stated that respondent’s pleas for a reconsideration of the withdrawal of the offer letter were in vain as same were rejected by the Ministry of Lands who informed her (i.e respondent) that she had to conclude up all her operations on the plot. It was then that respondent

pleaded with her (i.e. appellant) to allow her to harvest the cabbages and water melons by October 2019 before she could hand over the plot to her. However instead of honouring the terms of the agreement, respondent proceeded to plant sugar cane.

Implicit in the appellant's averment is the fact that in February 2020, she had long since taken occupation of the plot in question with the express consent of the respondent hence the respondent was not entitled to spoliatory relief.

Regrettably, the court a quo did precious little to address this particular issue despite its centrality in the resolution of the dispute. This particular piece of evidence is important because in the absence of evidence of unlawful deprivation of the property the respondent would not be entitled to a spoliation order.

In the case of *Botha and Anor. v Barnett* 1996 (2) ZLR (S) at 79 E the Supreme Court qualified "unlawful dispossession: to mean that the respondent deprived the applicant of possession **"forcibly and wrongfully against his consent"** [emphasis added].

Further Silberberg and Schoeman *op cit*, at pages 140-145 list the following as defences against a claim for spoliation:

- a) denial of the *facta probanda*
- b) that restoration is impossible
- c) lapse of time
- d) counter-spoliation and;
- e) the exception *spolii*

Under the heading "denial of *facta probanda*" which finds relevance in this appeal, the following is stated:

"The respondent can prove that the applicant was not in possession at the time of the alleged spoliation. This means that the applicant did not exercise the necessary corpus or that he did not have the necessary animus ex re commodum aquirendi.

*The respondent can prove that he did not commit spoliation in the sense that it was not him but someone else or that the deprivation was not unlawful. **A deprivation of possession will be lawful if carried out with the consent of the applicant, or in terms of a statutory enactment or a court order or if it amounted to counter-spoliation"***
{emphasis mine}

The all-important question, therefore, which the court *a quo* was enjoined but neglected to interrogate was whether the appellant forcibly and wrongfully took over possession of the plot against the respondent's consent. I find that this question has to be answered in the negative.

That the appellant has been in possession of the land/plot since August 2019 is supported in part by the contents of the respondent's affidavit in GL 72/19 deposed to on 5 September, 2019 wherein she complained of the presence of the appellant at the farm. This runs contrary to paragraph 3 of her founding affidavit in the court below that spoliation took place on the 3rd of February, 2020.

It is pertinent to point out that GL 221/19 was before the court *a quo* by virtue of the preliminary point raised of *lis pendens* raised by the appellant then. More importantly during those proceedings the then counsel for the appellant *Ms Chakauya* applied for the incorporation of that record as part of the spoliation proceedings. Had the Magistrate taken time to peruse the contents of that record he would have realised that the respondent's averment in her founding affidavit in the spoliation application to the effect that the appellant took occupation of the plot on 3 February, 2020 was patently false. The respondent cannot in one breath allege that the appellant unlawfully seized the piece of land in September 2019 and in the next breath allege that he did so in February 2020.

The intractable picture that emerges, therefore, is that the appellant was resident on the plot alongside the respondent with the latter's consent for a period of almost half a year prior to the application for spoliation. The respondent could therefore not conceivably have been forcibly and wrongfully dispossessed of the piece of land against her consent. The decision of the court *a quo* therefore cannot be allowed to stand.

Costs:

The general rule is that the successful party is entitled to his or her costs and there is no justification in the present matter of depriving appellant of the same.

In view of the foregoing, therefore, the following order be and is hereby made;

ORDER:

1. The appeal be and is hereby upheld and the order of the court *a quo* be and is hereby set aside and substituted with the following:

“The application for spoliation order is hereby dismissed with costs.”

2. The respondent to meet the costs of this appeal.

ZISENGWE J.

WAMAMBO J. agrees

Muzenda and Chitsama Attorneys, appellant’s legal practitioners
Chuma, Gurajena and Partners, respondent’s legal practitioners