PASI CHITSIKO
and
SHADRECK ZIMBA
and
ALOIS ZIMBA
versus
BERGUS INVESTMENTS (PVT) LIMITED

HIGH COURT OF ZIMBABWE
CHINAMORA & MAXWELL JJ
HARARE, 15 February 2023 & 7 March 2024

CIVIL APPEAL

R A Sitotombe, for the appellants
S M Bwanya, for the respondent

MAXWELL J

BACKGROUND

The Applicant (respondent in this appeal) filed an application in the Magistrates Court seeking *inter alia* restoration of the *status quo ante* before the spoliation and that the respondents (Appellants in this matter) and anyone acting through them be ordered to vacate the property known as Lot 1 of Lot 2 of Derbyshire, Harare. The applicant also wanted the Respondents interdicted and restrained from asking, encouraging or instructing any of their employees or agents from visiting or invading the mentioned property, and that they be interdicted and restrained from visiting the property of the Applicant. In opposing the application, Respondents challenged the authority of the deponent to the founding affidavit to depose thereto and submitted that there are disputes of fact which are not capable of resolution on the papers. They denied all the averments made by the Applicant. Both points *in limine* were dismissed. On the merits, the presiding Magistrate was of the view that Respondents had not been truthful and sincere. Further that issues pertaining to ownership should be addressed at the appropriate forum rather than Respondents taking the law into their own hands. The Magistrate was satisfied that on a balance of probabilities Applicant had established the requirements of spoliation. He found that it was improper for the Applicant to

seek eviction in spoliation proceedings. He granted spoliation and interdict with costs on an ordinary scale.

Appellants were aggrieved and noted an appeal on the following grounds.

1. The court *a quo* erred in law and misdirected itself in dismissing the Appellants' preliminary point that the deponent to the Respondent's founding affidavit had no authority, without making a finding as to whether or not he had such authority.
2. In the alternative to 2 above, the court *a quo's* finding that the deponent Respondent's founding affidavit had authority to represent the Respondent was grossly irrational in that no reasonable court applying its mind to the disputed facts before it, could ever have reached such a conclusion.
3. The court *a quo* erred in law and misdirected itself in proceeding to determine the matter on the papers when there were material disputes of fact incapable of resolution on the papers and in circumstances where the court a quo acknowledged that virtually all facts were in dispute and where such decision did injustice to the Appellants.
4. The court *a quo* erred in law and misdirected itself in finding that the Appellants were not truthful and sincere on the basis of the court's own conjecture about facts that were beyond the Appellants' control and without affording them an opportunity to be heard and explain.
5. The court *a quo's* finding that the Respondent had proved on a balance of probabilities that it was in possession of the property in question apart from the Appellants and was despoiled by the Appellants was grossly irrational in that no reasonable court applying its mind to the disputed facts before it, could ever reached such a conclusion.
6. The court *a quo* erred in law and misdirected itself in granting a final interdict against the Appellants without giving any consideration to the requirements of an interdict, and where the Respondent had pleaded only a prima facie right, and without determining the issues placed before it for determination regarding whether the requirements for an interdict had been proven.
7. The court *a quo* erred and misdirected itself in granting a final interdict against the Appellants restraining them from "visiting or coming to the property" in circumstances where they and their families have not been lawfully evicted form their

homes, or terminated as employees, and where the court had made a finding that the Appellants could not be lawfully evicted through the proceedings before it.

8. The court *a quo* erred and misdirected itself in failing to take into account the best interest of the Appellants' minor children which ought to have been paramount as this matter concerns children.

SUBMISSIONS BY THE PARTIES

Mr Sitotombe submitted that the court *a quo* erred in the manner in which it dealt with preliminary points raised. Firstly, though evidence of lack of authority on the part of the deponent to the Respondent's founding affidavit was placed before it, the court *a quo* did not pronounce itself on the issue raised. Secondly, despite acknowledging that there were material disputes of fact, the court *a quo* proceeded to deal with the matter without giving reasons for dismissing the preliminary point. Mr Sitotombe also submitted that the court *a quo* erred in granting an order of spoliation in circumstances where no evidence was led. He further submitted that the court *a quo* also issued an interdict where the requirements for an interdict were not traversed.

In heads of argument, Appellants also fault the lower court for finding that they were not truthful and sincere on the basis of conjecture on facts that were beyond their control. They complained that they were not afforded an opportunity to be heard and the lower court did not take into account the best interest of their minor children.

In response, Mr Bwanya pointed out that Appellants did not deal with the facts relating to spoliation and they did not deny locking the gate. He further pointed out that the affidavits attached in support of their case in the lower court pertained to ownership. On the question of the deponent to the Respondent's founding affidavit's authority, he referred to Form No. CR 6 which shows that the deponent is a director in the Respondent. On the issue of the interdict, he conceded that paragraphs 3 and 4 of the lower court's ruling should be struck out. In heads of argument, Respondent submitted that the court *a quo* did not err in granting spoliatory relief as the requirements thereof were satisfied. Further that the lower court pronounced itself on the preliminary issue, that the point *in limine* raised was not capable of disposing the matter. Respondents prayed for the dismissal of the appeal with an order for punitive costs.

ANALYSIS

The Respondent's prayer that the appeal be dismissed with an order for punitive costs cannot be proper in circumstances where its counsel made a concession that part of the ruling

of the lower court cannot be supported. The concession disposes of grounds of appeal number six and seven.

Appellants fault the lower court for not making a finding in respect of whether or not the deponent to the Respondent's founding affidavit had authority to depose thereto. On page 6 of the record the court a quo dealt with the issue. It indicated that an extract of the minutes of the board authorizing deponent to represent the Applicant was attached. It then proceeded to comment that the issue raised is not capable of disposing of the matter. Indeed, on record, the Form No. CR 6 is attached. That the lower court did not specifically say the deponent had authority is a question of style, in my view. The attached documents confirmed the authority of the deponent and the lower court's reference to them was its way of dealing with the issue.

Appellants argued in the alternative that the finding that the deponent had authority was grossly irrational. In my view, the mere fact that Appellants argued in the alternative is an indication that the question of authority was addressed. Appellants argued that no reasons were provided for such a finding yet the lower court referred to Form No. CR 6. Appellants made allegations of fraud and of the doctoring of the documents. The allegations were not substantiated. Moreover, the relief of *mandament van spoile* is not concerned with ownership in which the authenticity of the documents produced would be relevant. I find no merit in the first and second grounds of appeal.

Third Ground of Appeal

Appellants fault the lower court for proceeding to determine the matter on the papers when there were material disputes of fact incapable of resolution on the papers. In the Respondent's founding affidavit, the deponent stated in para 12 (p34 of the record) that

> "12. On the 22nd July 2022, we were in free and undisturbed possession of our property when the Respondents arrived at the property described as Lot 1 of Lot 2 Derbyshire, Harare and chased away my workers before taking over control of the property and locking it. I attach hereto marked as Annexure "D" a picture of the gate which they have locked denying me access to the property"

Proof of peaceful and undisturbed possession is key to an application for the relief of *mandament van spoile*. Appellants disputed that Respondent was in peaceful and undisturbed possession. In paragraph 13.3 of the opposing affidavit the deponent stated

> "13.3 Furthermore, it is denied and disputed that the Respondents despoiled the Applicant. It is in fact the Respondents who have been in peaceful and undisturbed possession of the property in question for many years continuing up to the present date. I, the 1st Respondent Mr Pasi Chitsiko, have lived at the property since 2016. I still stays (sick) there with my wife and minor children. The 2nd Respondent, Mr Shadreck Zimba, has lived at the property since 2009. He still lives there with his wife and minor children. The 3rd Respondent has lived at the

> property his entire life and still stays at the property with his family including his wife and minor children. See attached hereto photographs of the Respondents and their families living at the property in question as Annexure "PC2".
> 13.4 It is actually the deponent purporting to represent the Applicant who tried to despoil the Respondents……."

The averments were repeated in para 23 which was specifically responding to para 12 of the Respondent's founding affidavit.

The court a quo's view was that the Applicant attached all documentary evidence that it is relying on though that is being challenged by the Respondents who submitted that the documents are fraudulent. It went further to say

> "I do not believe that there is any meaning (sic) dispute that is not capable of be (sic) resolved on paper in the present matter"

Clearly the lower court shied away from determining the crucial question of who was in peaceful and undisturbed possession. Both sides produced photographs which did not take their respective cases further. Both were claiming to have been in peaceful and undisturbed possession. Such a dispute could not have been resolved on paper. It was a serious misdirection for the lower court to proceed to deal with the matter on the papers in the face of a dispute which went to the heart of the matter.

The third ground of appeal has merit and therefore succeeds.

Fourth Ground of Appeal

Appellants fault the lower court for making conjecture about facts that were beyond their control and without affording them an opportunity to be heard and explain. The lower court was of the considered view that the Appellants had not been truthful and sincere in making allegations of fraud. It wondered why the issue would not be treated with urgency. It was of the view that if the matter had been reported in February 2022 it was doubtful that investigations would still be in progress.

Appellants argued that they are not decision makers at the company and therefore any perceived delay in taking remedial action cannot be attributed to them. Whether or not investigations would still be in progress in a matter reported in February 2022 is a matter for police to explain. I find it irrational that the lower court concluded that the Appellants were not truthful and sincere in the absence of evidence to the contrary.

The fourth ground of appeal has merit and therefore succeeds.

Appellants fault the lower court for finding that Respondent had proved on a balance of probabilities that it was in possession of the property in question and was despoiled by them.

They argued that the finding was grossly irrational considering the disputed facts before it. I agree. As stated above, it was not established who was in peaceful and undisturbed possession.

The fifth ground of appeal therefore succeeds.

Eighth Ground of Appeal

Appellants argued that the lower court completely ignored and failed to take into account the best interests and rights of their minor children. They referred to s 81 (1) (f) of the Constitution of Zimbabwe which provides that every child has a right to shelter. They also referred to the case of *Zimbabwe Homeless People's Federation and 7 Others* v *Minister of Local Government and National Housing and 3 Others* SC 94/20 in which the Supreme Court confirmed that s 81 (1) (f) of the Constitution of Zimbabwe creates an enforceable and justiciable right to shelter for all children.

Appellants' reference to the above case does not help their case. The Supreme court stated on p 34 that

> "However, the best interest of the child does not necessarily override or trump other rights and interests. The concept of "best interest" is an indeterminable and flexible one that must take its shape and content from the particular circumstances of each given case. To this extent, it is correct to take the view that the paramountcy principle embodied in s 81 (2) as well as the right to shelter guaranteed by s 81 (1) (f) are not unfettered or absolute but are subject to reasonable qualification and limitation where this is necessary and justified"

The presence of children in *mandament van spoile*. proceedings is not a defence that can defeat the cause. If it were, no family with minor children would be evicted and no litigant would win in such proceedings against a family with minor children. I find no merit in this ground of appeal.

DISPOSITION

1. The appeal partially succeeds.
2. The judgment of the court *a quo* is set aside and in its place the following is substituted

   "The application be and is hereby dismissed"

3. Each party bears its own costs.

CHINAMORA J……...Agrees

Mtetwa & Nyambirai, apellant's legal practitioners
Jiti Law Chambers, respondent's legal practitioners