PATRICK MUREGWI
versus
NORTHSIDE COMMUNITY CHURCH
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE, 5 February 2020 & 20 February 2020

Urgent chamber application

K. P. Kaseke, for the applicant
N.C. Magoge, for the 1st respondents

DUBE-BANDA J: This is an urgent chamber application for a spoliation order. It is alleged that on the 31st January 2020 applicant was unlawfully evicted from stand number No. 985 Hatcliffe, Harare. The eviction is alleged to have been carried out by the second respondent at the instance of the first respondent. It is said in evicting the applicant, second respondent relied on a court order obtained by first respondent against an entity called Premier College (Pvt) Ltd and all those claiming occupation through it. It is contended that the order that culminated in the writ of eviction was issued by the Harare Magistrates Court. Applicant argues that it was an act of spoliation to cause his eviction based on a writ that had nothing to do with him.

The matter was argued before me on the 5th February 2020. After hearing the parties I dismissed the application with costs of suit. I did at that stage give brief reasons for my ruling. After the hearing applicant's legal practitioners addressed a letter to the Registrar of this Court asking for detailed reasons for the ruling. These are the reasons.

Applicant sought an order drafted in the following terms:

Terms of the final order sought

That you show cause to this Honourable Court why a final order should not be made in the following terms pending the determination of Case No. HC 6343/19.

1. The Respondents are and are hereby ordered not to interfere with the Applicant's occupation at Stand 985 Hatcliff.
2. The Respondent's eviction of the Applicant from Stand number 985 Hatcliff be and is hereby declared unlawful.
3. The 1st Respondent's legal practitioners shall bear all the costs and expenses arising from the Applicant's unlawful eviction from Stand number 985 Hatcliff.
4. The 1st Respondent's legal practitioners shall pay the costs of this application *de bonis propriis* on a legal practitioner and client scale.

Interim relief granted

Pending the determination of this matter the Applicant is granted the following relief:

1. The Respondents be and are hereby ordered to reinstate the Applicant to his possession and occupation of Stand 985 Hatcliff.
2. The Respondents be and hereby ordered to refrain from unlawfully interfering with the Applicant's occupation of Stand 985 Hatcliff.
3. That 1st Respondent's legal practitioners are to pay the costs of this application *de bonis propriis* on a legal practitioner client scale.

Service of the provisional order

That leave be and is hereby granted to the applicant's legal practitioners or to the Sheriff to attend to the service of this Order forthwith upon the respondents in accordance with the Rules of the High Court.

This application is opposed by the first respondent. Second respondent did not participate in these proceedings.

This is an application for a spoliation order. Spoliation is a possessory remedy. The objects of spoliation are as follows: to restore the possession of the things possessed; to put a stop to unlawful taking the law into one's hands; to protect the person who apparently has a possessory right and to prevent disturbance of public peace. In such an application applicant must prove that he was in possession of the property. In *Bota & Anor* v *Barrett* 1996 (2) ZLR 73 (S) it was stated that it is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are: that the applicant was in peaceful and undisturbed possession of the property; and, that the respondent deprived him of the possession forcibly or wrongfully against his consent. See *Magadzire* v *Magadzire & Ors* SC 196/98.

In *Yeko* v *Oana* 1973 (4) SA 735 (AD) it was stated that the fundamental principle of the remedy of spoliation is that no one is allowed to take the law into his own hands. Therefore,

what applicant has to prove for him to succeed in this application is that he was in peaceful and undisturbed possession of the stand number 985 Hatcliff, and that the respondents deprived him of the possession forcibly or wrongfully without his consent. Further, applicant must establish conclusive proof or a real right, not merely *prima facie* proof. See *Blue Rangers Estates (Pvt) Limited* v *Muduviri & Another* 2009 (1) ZLR 386.

Applicant says he was evicted from the property on the 31st January 2020. First respondent disputes that applicant was evicted from the property on the 31st January 2020 or at all. It contends that applicant had long vacated from the property and a college called Premier College had taken occupation of the property. The writ of ejectment issued at the magistrates court was directed against this entity called Premier College.

In opposing the application, first respondent filed two affidavits, one from one *Shephard Chizwina* and the other from *Nariti Luboza. Shephard Chizwina* stated that on the 31st January applicant was not in peaceful and undisturbed occupation of the property, he and his family had long moved out to a destination unknown. *Nariti Luboza* says he is employed by first respondent as the head of security. He knows applicant very well, and he moved out from the property many years ago, and he was subletting the property to a third party.

I accorded applicant an opportunity to file further evidence to show that on the 31st January he was in occupation of the property. He filed three affidavits, one from *Patricia Muregwi,* the second from *Praise Muregwi,* and the third from his legal practitioner *Davison Kanokanga.* The affidavit of *Patricia Muregwi* had photographs attached to it. As applicant contends that he and his family are living in the open, one would have expected the photographs to show household goods in the open. However, the first photograph shows many plastic chairs and a vehicle. On the same page there is a photograph showing wooden desks piled on each other. On the second page there are two photographs, the first shows a vehicle, chairs and some items covered with a plastic. The second shows plastic chairs again and a motor vehicle. On the third page there two photographs showing motor vehicles, two persons and a wooden bench and some things covered by what looks like a plastic cover. On the next page the photographs show plastic chairs and a vehicle. There is nothing meaningful in the photographs confirms applicant's version that he and his family are staying in the open. The presence of plastic chairs and desks corroborate first respondent's contention that applicant was renting out the property to a college.

In any event, the *onus* is on the applicant to show that on the 31st January he was in peaceful and undisturbed possession of the property. My view is that applicant has failed to

discharge such *onus*. Therefore, I find that on the 31 January 2020 applicant was not in peaceful and undisturbed occupation of stand number 985 Hatcliff. Without possession of the property the inquiry into the remedy of spoliation does not even arise. The inquiry should ordinarily end at this point, however out of caution, I proceed to deal with other issues arising in this application.

An applicant for a spoliation order must show that the deprivation of possession must have been unlawful. That the spoliator took the law into his own hands. Even if one were to accept for a moment that applicant was evicted by the messenger of court, (which is not borne out by the evidence), such an eviction cannot ground an application for spoliation. The messenger of court cannot be said to have taken the law into his own hands. The messenger of court acts on the basis of a court order, applicant says the order used did not relate to him, even if it were so, I do not agree that such an eviction can ground a cause of action in an application for a spoliation order. Even if the messenger might have been mistaken, it cannot be said he took the law into his own hands. Then the *mandament van spolie* is not available in such a case. Again on this ground, this application should fail.

Further this application was filed on the 31st January 2020. On the same day, applicant filed a similar application at the Magistrate court, seeking substantially the same relief sought in this court. Although the application in the Magistrate court was for an interdict, the relief sought was in essence to ensure that applicant remains in occupation of the property, which is what he is asking for in this court. This is a case in which the matter between the same parties is pending before the magistrate court and in respect of the same subject matter. In fact I heard this application on the 5 February and the case before the magistrate's court was set down for the following day, the 6th February. In fact it amounts to an abuse of the process of this court to file two identical applications in two different courts. Again on this ground this application must fail.

The draft order shows a lack of understanding of the purpose of an interim relief. An interim relief is a remedy by way of an interdict which is intended to prohibit all *prima facie* unlawful activities. It is temporary and provisional, safeguarding the *status quo* pending the determination of the rights of the litigants. The *status quo* is safeguarded until the return day. See *Development Bank of Southern Africa (Ltd)* v *Van Resburg NO and Ors* [2002] 3 SA 669 (SCA). It is incompetent to seek a final order under the guise of an interim relief. In *casu,* applicant seeks substantively a final order disguised as an interim relief. He wants to be reinstated to what he calls his possession and occupation of stand 985 Hatcliff, merely on *prima*

facie proof. If he is reinstated there would be nothing to determine on the return day. The case would be closed. He even prays, on an interim basis, against respondent's legal practitioners, costs *de bonis propriis* on a legal practitioner client scale. A court cannot grant an order of costs in an interim relief. These are issues to be determined on the return day.

A spoliation order cannot be granted on the evidence of a *prima facie* right. See *Blue Rangers Estates (Pvt) Limited* v *Muduviri & Another* 2009 (1) ZLR 386. The onus lies on the applicant to establish on a balance of probabilities that an act of spoliation was committed against him. My view is that applicant failed to discharge the *onus* on him to entitle him to a spoliation order.

It is for these reasons that I dismissed this application with costs of suit.

Kanokanga & Partners applicant's legal practitioners
Magoge law, 1st respondent's legal practitioners