KHALIL GAIBEI

AND

SHABEIRA GAIBEI

VERSUS

THE ILLEGAL OCCUPANTS OF OFFICE
1, 3, 4, 7 AND 9 ELONS COURT
BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 9 FEBRUARY 2012 AND 16 FEBRUARY 2012

Mr. N. Dube for the Applicants
Mr S. Sibanda for the Respondents

Urgent Chamber Application

MAKONESE J: The applicants filed under a certificate of urgency claims seeking the following relief:

> "Pending the finalisation of the matter, the Applicants be granted the following relief.
> 1. The Respondents and all those claiming through them be and are hereby ordered to vacate ELONS COURT, 3rd Avenue/Main street, Bulawayo within 48 hours of this order.
> 2. failure to adhere to paragraph(1), the Deputy Sheriff be and is hereby empowered to evict the Respondents from ELONS COURT, 3rd Avenue/Main Street, Bulawayo and return vacant possession to the ApplicantS or their duly authorised agents.
> 3. The Respondents be and are hereby interdicted from disturbing the Applicants' vacant and peaceful possession of ELONS COURT, Bulawayo.
> 4. The Respondents and all those claiming through them be and are hereby interdicted from denying the Applicants or their authorised agents access to the premises"

The Respondents opposed the application and one JAPHET PHUTI claiming to be one of the Respondents deposed to an affidavit confirming that they are in occupation of the

premises. In paragraph 6 of the opposing affidavit Respondents concede that they took occupation of the premises without any lease agreement. In other words they have no legal basis for entering upon the said premises. They claim that at the time they took occupation the place was vacant. The Respondents go on to say that at the time they took occupation the building was dilapidated and unsightly. They say as people with an interest in the building and realizing the lack of interest on the part of the Applicants, the Respondents took it upon themselves (emphasis mine) by way of use of their own resources, to attend to the defects and also give the building a face lift by painting it thus establishing a right to the property through their investment. Further the Respondents aver that it is wrong to refer to them as trespassers as they invested in a dilapidated building but the Applicants want to be unjustly enriched at their expense. They contend that should Applicants want to have them evicted from the building they should compensate them for the value of their improvements. They further state that if they vacate without compensation they stand to suffer irreparable financial harm.

I am not sure that the Respondents' so-called investment in the improvement of a building belonging to someone else without their consent was a wise investment.

The Respondents by their own admission moved into the premises without permission and without a lease agreement. I asked *Mr Sibanda* appearing for the Respondents whether there was any legal authority upon which the Respondents moved in to occupy the building and he said as far as he was aware there was no such authority. In my view the Respondents are well aware that their actions are clearly illegal and wrongful. They have no right whatsoever to remain in the premises. Their occupation is unlawful and this court cannot condone an act of illegality.

It is beyond dispute therefore that the Applicants have satisfied the requirements of spoliation order:

1. They were in undisturbed and peaceful occupation of the property.
   There is no need for actual physical control of the building in terms of our law.
2. They were dispossessed of the property illegally.

3. They have a clear right to the property in the form of Title Deeds to the property.

I must comment here, that the Respondents are well aware that there are two judgments of this court against the Respondents which they have deliberately chosen to ignore. On the 4th August 2011 under case number 2187/11, KAMOCHA J issued an order against Constance Mkhwananzi and others directing them to vacate the premises. Those Respondents it would appear are acting in cahoots with the other Respondents in this matter. The conduct by the legal practitioners acting for the Respondents in these matters is not only deplorable but borders on being unethical to the extent that they are opposing the Applicants' claims with full knowledge that the facts are based on the same cause of action. In other words, the legal practitioners for Respondents are playing a cat-and mouse game with the court. The courts should show their displeasure at such behaviour especially in relation to the legal practitioners taking instructions that essentially are designed to defeat the ends of justice. On the 29th September 2011 under case number 2187/11 and in a written judgment NDOU J dismissed an application for a stay of execution by one of the same parties in the present case on the grounds that the parties had come to court with "dirty" hands.

I note that *in casu* the Respondents are arguing that despite not having lease agreements in respect of the property they have effected improvements to the property. The Respondents are at liberty to sue for any such improvements in a separate claim should they feel they have a case against the Applicants.

I have no hesitation in dismissing their counter-claim for improvements. The claims cannot be brought in opposition to a spoliation order and besides the claim raises disputes of facts which are not capable of resolution by way of an Urgent Chamber Application. The claims for compensation clearly have no bearing on the Application for Spoliation that is before the court.

In the case of *Botha and Another v Barrett* 1996(2) ZLR 73 at page 80 the GUBBAY CJ as he then was stated the position as follows:

> "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."

See also *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-operative and Others* 1999(2) ZLR 19, on the requirements for a spoliation order. In this particular decision, Mc NALLY JA stated that:

"The only valid defences that may be raised are that:
(a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession.
(b) the dispossession was not unlawful and therefore did not constitute spoliation.
(c) restoration of possession is impossible.
(d) the respondents acted within the limits of the counter-spoliation in regaining possession of the article."

I am satisfied that the Applicants were disturbed of their possession and that they did not give their consent to the occupation of the premises. Even if the premises were vacant at the relevant time there was no need for continuous possession. See the case of *Bennett Pringle (Pty) Ltd vs Adelaide Municipality* 1977(1) SA 230 E at 233, where ADDLESON J observed that:

"...it is not necessary that the possession be continuous, either by the claimant or his servant, if the nature of the operations which he conducts on the premises do not require his continuous presence..."

I am therefore satisfied that the Applicants have established that they are entitled to spoliation. Accordingly I would grant the Application in terms of the Draft Order. The Respondents are ordered to pay the costs of suit on an attorney and client scale.

Cheda and partners, applicants' legal practitioners
Advocate SKM Sibanda and partners, respondents' legal practitioners