BARBARA KASEKERA NYABAWA
versus
ONIAS GOTORA
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 August 2018

Urgent chamber application

W Bherebende, for the applicant
M F Chapeta, for the 1st respondent

MUREMBA J: On 24 August 2018 I heard an application for spoliation and granted the following order in favour of the applicant after delivering an *ex tempore* judgment.

> "It be and is hereby ordered that÷
>
> 1. Applicant is restored unhindered possession of stand 8282 Kirkman Gardens, Harare and second respondent shall forthwith remove 1st respondent and his cabin from stand 8282 Kirkman Gardens, Harare.
> 2. 1st respondent is ordered to maintain peace and applicant's undisturbed access to stand 8282 Kirkman Gardens Harare."

The Sheriff of Zimbabwe is the second respondent in the matter.

The applicant averred the following in her founding affidavit. On 28 November 2005 she bought an undeveloped and unserviced stand, being stand 8180 Tynwald North Township measuring 1040 square metres from Braddah Engineering (Private) Limited. She paid the purchase price and was given vacant possession of the stand. She attached the agreement of sale thereof. In March 2006 the developer, Braddah Engineering (Private) Limited advised her and other beneficiaries that they were going to be allocated stands on a new site as per directive from the Ministry of Local Government and the City of Harare. Resultantly, she was allocated stand number 8282 Kirkman Gardens, Tynwald. She was asked to make some top up payments which she did. She attached receipts bearing the description of the new stand as proof. She took occupation and set up a temporary structure. She arranged for her relative, one Loveness Gotora to stay there and Loveness Gotora has been staying there since 2016.

On 17 June 2018 Loveness Gotora advised the applicant that the first respondent had visited the stand claiming ownership thereof. The applicant called him and advised him that she owned the stand. He went away. On 12 July 2018, he delivered a truck load of bricks to the stand and went away. Resultantly, the applicant instituted legal proceedings under case number HC 5852/18 to protect her rights in the property. She sued the first respondent and the developer who sold the stand to her. She served the first respondent with the summons. On 16 August 2018, the first respondent without the consent of the applicant and without a court order and through the use of threats of violence forcibly occupied the stand and set up a cabin. He and his wife started staying there and ordered Loveness Gotora to vacate the stand by the end of the month. He instructed builders to start digging the foundation. This prompted the applicant to file the present application on 21 August 2018 for a *mandament van spolie*.

Loveness Gotora deposed to a supporting affidavit confirming that she had been in physical occupation of the stand since 2016 at the instance of the applicant. Her account of what transpired from the first day the first respondent came to the stand was similar in all material respects to what the applicant averred. She further averred that on the day the first respondent brought the bricks she tried to stop him from off-loading them but he threatened to assault her. On the day he then brought the cabin he came with 3 men. She attempted to prevent them from setting it up and he threatened to assault her again. He took occupation and ordered her to vacate the stand by 30 August 2018. On 19 August he instructed the builders to start digging the foundation of a 5 roomed cottage.

In response, the first respondent raised 3 points *in limine* which I will deal with *seriatim.*

Matter not urgent

The first respondent's argument was that the need to act arose on 24 June 2018 when he delivered the bricks to the stand. He argued that for 2 months, the applicant sat on her laurels and took no action and as such the court was not supposed to treat the matter with urgency. The applicant averred that she had treated the matter with urgency as soon as the need to act arose.

I dismissed the point *in limine* and treated the matter as urgent because applications for spoliation are by their nature urgent. Besides, the circumstances of the matter did not show that the applicant had delayed in bringing the application. On 24 June 2018 (the date the first respondent alleges to have delivered the bricks) other than off-loading the bricks at the stand, the first respondent did not take physical occupation of the stand. He just off loaded the bricks and left. The applicant issued summons against him on the next day and served him. She thus

sprang into action. She said that she had hoped that he would be stopped in his tracks until the matter was determined by the courts. She was mistaken. He was not deterred by the summons. After some days he went to the stand and erected a cabin and took occupation with his family. He also ordered the applicant's caretaker to vacate at the end of the month. It was at this juncture that the applicant filed the present application for a spoliation order.

I did not find fault with the way the applicant handled the matter right from the onset. She had not applied for a spoliation order when the bricks were off-loaded because at that time she had not been despoiled of the stand as it were. Some bricks had just been left at the stand and she had sued in a bid to protect her interests in the property. A reasonable man would have been deterred by the summons and would have respected the law. When he then moved in to the stand despite having been served with the summons, the first respondent showed disrespect for the law and the applicant was right in approaching the court on an urgent basis because the matter was now urgent.

It was my considered view that the applicant had made no delays in bringing the matter. Besides, delay *per se* does not preclude the grant of a *mandament van spolie*. The court has a discretion to decline the remedy where, on account of the delay in seeking it, no relief of any practical value can be granted at the time of the hearing[1]. In *casu* even if there had been a delay in making the application, a relief of a practical value could still be granted under the circumstances. What is also considered in an application for spoliation is whether the claimant's failure to apply for relief immediately can be taken to constitute acquiescence to the spoliation that was done by the spoliator to the extent that the claimant is deprived of the right to seek restoration of the *status quo ante*[2]. In the circumstances of the present matter it cannot be said that the applicant had acquiesced to the spoliation. Initially she had issued summons to protect her rights when the first respondent delivered the bricks. When he took occupation she immediately filed the present application for spoliation. There was no doubt that the applicant needed urgent restoration of the *status quo ante*.

Non-joinder of the seller

The first respondent contended that the developer, Braddah Engineering (Pvt) Ltd should have been cited as an interested party since it was the seller of the property to both

[1] *Free Methodist Church of Zimbabwe v Dube & Others* HH 315-11
[2] Ibid.

parties. The applicant averred that it was not necessary to join the developer because it had not been involved in despoiling her. I dismissed this point *in limine* too because the person who had despoiled the applicant was the first respondent alone. Braddah Engineering (Pvt) Ltd had not been involved in despoiling the applicant. The issue for determination had nothing to do with the issue of ownership. As to who between the claimant and the spoliator is the rightful owner or purchaser of the property is not the issue for determination in an application for spoliation. The court does not look into the judicial nature of the possession claimed. All that the claimant is required to prove is that he or she was in peaceful and undisturbed possession of the property and that the spoliator unlawfully or wrongfully deprived him of such possession[3]. The fact that the claimant was in occupation unlawfully is not the issue in an application of this nature[4]. A person claiming a right to the property is not entitled to evict the occupier without following legal process. The grant of spoliation does not depend on the lawfulness of the possession. The purpose of spoliation is to preserve the law and discourage people from taking the law into their own hands. The idea is to restore the *status quo ante* until a court of law makes a determination on the merits of the claims of each party[5]. Since the legality of the applicant's possession was not of concern, it was therefore unnecessary for the applicant to join the developer as a party to the proceedings. The developer had not participated in despoiling the applicant and the relief that was being sought was being sought against the first respondent only. The seller was therefore irrelevant to the spoliation proceedings.

Defective relief

The first respondent averred that the applicant was seeking a defective relief in that the way the interim order was couched was not different from the way the final order was couched. In terms of the law, a spoliation order is final in effect. It cannot be granted unless a clear right and not a *prima facie* right for restoration of possession of the property is established in claimant's favour[6]. Once the order is made it has the effect of a final determination on the issues between the parties and once it is fully executed, it is discharged[7]. Consequently, there will not be anything to confirm on the return date. It therefore follows that once the court is satisfied that there is merit in the application for spoliation and that its requirements have been

[3] *Shiriyekutanga Bus Services (Pvt) Ltd v Total Zimbabwe (Pvt) Ltd* 2008 (2) 37 (H).
[4] *Asher v Minister of State for Lands & Anor* 2009 (1) ZLR 153 (H).
[5] *Dodhill (Pvt) Ltd & Anor v Min Of Lands & Anor* 2009 (1) 182 (H).
[6] *Blue Ranges Estates (Pvt) Ltd v Muduvuri & Anor* 2009 (1) 368 (S).
[7] Ibid.

met or satisfied it should grant a final order. In *casu* this is what I did. I was satisfied that the application met all the requirements of a *mandament van spolie* and granted a final order. In view of the foregoing, I found no merit in the present point *in limine* hence I dismissed it.

The merits

I granted the application because I was satisfied that the applicant was despoiled of the stand by the first respondent without her consent. She had been in peaceful and undisturbed possession of the stand from the time she took occupation thereof. Her caretaker had been in physical occupation since 2016. That was not disputed by the first respondent who said that he only bought the stand on 30 May 2018. The first respondent did not dispute that he left his bricks and erected a cabin without the consent of the applicant. The fact that the applicant even issued summons was further proof that she was not in agreement with the first respondent's actions. Irrespective of who is the rightful purchaser between the two, the fact remained that the applicant had been in peaceful and undisturbed possession of the stand when the first respondent came along. He forcibly took occupation of the stand without following due process of law. He had no court order to evict the applicant or any other person who was claiming occupation through her. The first respondent had thus taken the law into his own hands. It is for these reasons that I gave an order for the restoration of the *status quo ante.* The idea was to stop the perpetuation of an unlawful act. The fact that the first respondent has an agreement of sale did not make his actions right. For him to occupy the property, he must get vacant possession which he can only get by following due process of law.

I made an oversight on the issue of costs and none of the parties dealt with the issue. I thus did not make an award of costs.

Bherebende Law Chambers, applicant's legal practitioners
Antonio & Dzvetero, 1st respondent's legal practitioners