JET VENTURES (PRIVATE) LIMITED
versus
RAINBOW TOURISM GROUP LIMITED
t/a RAINBOW TOWERS HOTEL & CONFERENCE CENTRE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 9 October 2018

Urgent Application

R. Zimudzi, for the applicant
K. Kachambwa, for the respondent

MATHONSI J: The applicant has approached this court on an urgent basis seeking what is in essence spoliatory relief, restoration to a portion of the respondent's hotel known as Rainbow Towers Hotel and Conference Centre situated at the second mezzanine floor of the prestigious hotel. The applicant also seeks an order allowing it to continue operations at that portion of the hotel without interference and to be allowed free access to its tools, material and machinery which it placed at that location and related relief.

The policy considerations behind spoliation proceedings, the *mandament van spolie,* is to preserve law and order and to discourage persons from taking the law into their own hands. To achieve those lofty goals, it is necessary for the *status quo ante* to be restored until such time that a competent court of law assesses the relative merits of each party's claims. See *Chesveto* v *Minister of Local Government and Town Planning* 1984 (1) ZLR 240 (H) at 250 A-D. The requirements for an order for spoliation to be granted are essentially two fold and have to be proved by an applicant for a spoliation order to be granted. They are:

(a) that the applicant was in peaceful and undisturbed possession of the property; and

(b) that the respondent deprived him or her of the possession forcibly or wrongfully against his or her consent.

See *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 77E. *Kramer* v *Trustees,*

Christian Coloured Vigilance Council, Grassy Park 1948 (1) SA 748 (C) at 753; *van den Berg & Anor* v *Lang* 2010 (1) ZLR 469 (H) at 472G, 473A.

On the other hand, in order to defeat an application for a spoliation order the respondent can raise two defences. They are stated by the learned authors, Silberberg and Schoeman in their book, *The Law of Property,* 2 ed at p 138 as:

> "A respondent may, as a general rule, raise only the following defences in spoliation proceedings:
>
> (a) applicant was not in the peaceful and undisturbed possession of the thing in question at the time of deprivation.
>
> (b) respondent has not committed spoliation
>
> With regard to the first defence the respondent may, in an appropriate case, prove that the applicant did not exercise the measure of physical control which was necessary to acquire or retain possession or that the intention to derive a benefit from holding the thing was absent. Regarding the second defence, the respondent may, for instance prove that his act of dispossessing the applicant was in fact not unlawful in that it amounted to counter spoliation, was justified in terms of some or other statutory enactment or took place with the consent of the applicant."

In this jurisdiction the Supreme court has sought to simplify and expand on those requirements in *Kama Construction (Pvt) Ltd* v *Cold Comfort Farm Co-op & Ors* 1999 (2) ZLR 19 (S) at 21E-G which was cited by Mr *Kachambwa* for the respondent. MC NALLY JA remarked:

> "The relief applied for was in essence a spoliation order. It is trite that in order to obtain a '*mandament van spolie*' or spoliation order, the applicant must show that:
>
> (a) he was in peaceful and undisturbed possession of the thing; and
> (b) he was unlawfully deprived of such possession.
>
> See Joubert *Law of South Africa* Vol 27 para 78; *Botha & Anor* v *Barret* 1996 (2) ZLR 73 (S) at 79 E-F.
>
> 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 respondent acted within the limits of counter-spoliation in regaining possession of the article."

The facts of that matter are almost on fours with the present. The appellant company had entered into an arrangement with the trustees of the respondent co-operative in terms whereof it became involved in the management of the farm run by the co-operative and various of the farm's activities. When the co-operative terminated the arrangement following a dispute,

the appellant sought spoliation relief in the High Court restoring it into peaceful possession of the farm which was eventually refused. The Supreme Court reasoned that a spoliation order was not the proper remedy for the perceived wrong alleged by the appellant which should have sued for specific performance of the alleged contract together with interlocutory relief in the form of an interdict if such was available.

The significance of that decision is that it makes it clear that rights such as the right to performance of a contractual obligation are not covered by the protection given by the *mandament van spolie*. The right of access to a property does not extend to the right of possession. The court remarked at 22G in dismissing the appeal:

> "The applicant never 'possessed' Cold Comfort Farm. It had access to the farm. It still has that access as a member of the Cold Comfort Farm Society. What it has lost is its alleged contractual right to give orders to the workers on the farm in pursuance of an alleged management agreement. Such an agreement does not found a 'contractual right of use."

The facts of this matter are that on 27 July 2017 the parties entered into a written agreement in terms of which the applicant was to renovate a portion of the respondent's hotel at the second mezzanine floor of Rainbow Towers Conference Centre for the establishment of a night club which was, upon completion, to be run for the mutual benefit of both of them. The parties also agreed that prior to the commencement of their partnership to run what they called "an exclusive international night club", the applicant would make certain agreed improvements to the premises which included fixtures, fittings, furnishing and installations in line with plans approved by the respondent. In terms of clause 5.4 of their agreement the applicant would complete construction of all the improvements prior to 1 October 2017 which was fixed as the date of commencement of operations.

The applicant failed to meet that time line for one reason or another as a result of which the parties signed an addendum to the original agreement in terms of which the time during which the applicant was to complete construction work was extended from 11 June to 11 September 2018. With the amendments to the initial agreement, the partnership was to then commence on 1 October 2018 and was to subsist for 5 years up to 30 September 2023. It is common cause that when 11 September 2018 came the applicant had not completed construction work. In fact up to now construction has not been completed meaning that the partnership to run the night club could not commence as well.

Citing the applicant's failure to complete construction work as agreed, the respondent terminated the agreement between the parties by letter dated 11 September 2018. It complained that from the time the parties jointly inspected the construction site on 7 August 2018 right up

to the expiry of the extension period for construction on 11 September 2018, no work whatsoever had been done at the premises meaning that the applicant had no capacity to fulfill its obligations in terms of the agreement. Following the termination, the applicant was advised to remove all its tools and machinery from the premises. The applicant did not do so. Instead it filed an application in this court, HC 8411/18, on 14 September 2018 seeking a declaratory order that the termination of the agreement was null and void and for it to be set aside. It also sought an extension of time to complete construction work by another 6 months from the date of the court order. The application in question is opposed by the respondent and is yet to be finalized.

After filing the application in HC 8411/18 the applicant waited more than 3 weeks before filing the present urgent application on 3 October 2018 for spoliatory relief as I have stated above. There is merit in the point *in limine* on lack of urgency but I do not intend to decide the matter on such legal technicalities. The basis of the present application is that it was in peaceful and undisturbed possession of the premises under construction and as such it had a clear or *prima facie* right to remain in such possession. The cancellation of the agreement was wrongful and has the potential of causing irreparable harm to the applicant as it is now on the verge of losing occupation of the premises together with its tools and machinery. This is because after the cancellation the respondent barred the applicant from accessing the premises.

The application is opposed by the respondent which insists that it was entitled to cancel the agreement owing to a material breach, the applicant's failure to meet the construction deadline, not once but twice. As the location of the construction site is within the hotel which is private property, it is entitled to bar the applicant from its private property. It has requested the applicant to remove its tools and machinery but there has been no compliance. The essentials of a spoliation application have not been met and as such the application should be dismissed.

I have already set out the law governing the grant of a spoliation order. The matter turns on the peculiar nature of the agreement between the parties. As I have said the area of concern is situated within the hotel premises and the applicant was only allowed access to carry out construction work in order to facilitate the commencement of a partnership business. The applicant has not suggested that it even had exclusive access or possession of the area in question, which must have been accessible at all times to the respondent who maintained possession. It has not suggested that it resided at that place or carried out business other than construction work which has been stopped and for which access was given. I am therefore not

satisfied that even the first requirement, namely that of peaceful and undisturbed possession has been met. The applicant has only proved access which, by the authority of *Kama Construction* (*supra*) does not give rise to possession for purposes of spoliation.

The alleged act of spoliation is in the form of the applicant being stopped from constructing the bar. It would like to be allowed access so that it carries out construction work which is now the subject of litigation in another case yet to be determined. It occurs to me that the application is meant to side-step the other application and allow the applicant to defeat the cancellation of the agreement via spoliation proceedings. It is not a proper case of spoliation.

Even if I am wrong in arriving at that finding I take the view that the respondent is able to repel the application on the basis of the defences that have been raised namely that the applicant did not exercise the measure of physical control which is necessary to acquire or retain possession. This is because the possession was never exclusive or undisturbed and was only for purposes of providing service to the respondent. It could not possibly be, right in the middle of a busy hotel. For that reason the application cannot succeed because it is trite that a contractor cannot impose himself or herself on the other party who is no longer interested in the contract.

Faced with those difficulties Mr *Zimudzi* for the applicant sought to amend the draft order to provide that the premises should not be leased to anyone else until the resolution of the application for a declaratur in HC 8411/18. Unfortunately the application before me is that of spoliatory relief and not one for an interdict. The requirements for the grant of an interdict have not been pleaded. Neither have they been established. I am therefore unable to grant a relief that has not been established.

Mr *Kachambwa* for the applicant has asked for costs on an adverse scale by reason that the applicant was advised quite early that the intended application for spoliatory relief was inappropriate. It did not take heed but went ahead and filed the ill-advised application. In addition, there has been a lack of good faith on the aspect of when the need to act arose and the issue of tools and material. The applicant admitted in its letter of 25 September 2018 that the respondent's security personnel asked it to remove its items of property from the premises. Not only has the applicant sought to amend its claim in court to provide for the release of its tools and machinery, Mr *Zimudzi* has suggested in his address that the applicant was denied its tools and machinery. In short it is clear that the application was unnecessary, could have been avoided and that the applicant has taken a wrong turn. The consequence of such misadventure is an award of costs on the adverse scale.

In the result the application is hereby dismissed with costs on a legal practitioner and client scale.

Zimudzi & Associates Legal Practitioners, applicant's legal practitioners
Mawere Sibanda Commercial Lawyers, respondent's legal practitioners