BRICKSTONE BUILDERS AND CONTRACTORS (PRIVATE) LIMITED
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 13 & 28 June, 2023

Urgent Chamber Application

Ms *C Ushe-Bwititi*, for the applicant
Mr *C Kwaramba,* for the respondent

MANGOTA J: The dispute of the parties of Local Government and Public Works ("the Ministry") allocated the property to it in April, 2023. The allocation, it alleges, occurred following its application of the same to the Ministry. The property, it avers, comprises stands 18991-19041 residential stands. It alleges that it applied to the respondent to develop the property as a result of which the latter advised it, in response, that the same has a pending application for change of reservation from public open space to cluster housing and that the respondent applied to the Ministry which would, in due course, decide on the matter subject to clearance by the Environment Management Authority. It alleges that it took all necessary steps to service the property. It claims that it pegged the stands, labelled them, opened access roads as well as gravel dumping and compacting. It avers that it paid to the respondent design approval fees for sewer reticulation and roads as well as storm water draining. It states that it constructed on the property cottages and cabins for its employees and storage of equipment which structures the respondent destroyed on the morning of 7 June, 2023. It, therefore, applies for the remedy of *mandament van spolie* against the respondent's alleged unlawful conduct. It moves me to direct the respondent to restore to it peaceful, quiet and undisturbed occupation of the property.

The respondent opposes the application which it insists does not meet the requirements of urgency. It claims that the applicant did not act when the need to act arose. It states that the occupiers of the property were notified of the need to remove their illegal structures or face demolition of them as far back as October, 2022. The applicant should have acted when the notices were served upon the occupiers of the illegal structures, according to it. The application, it insists, is self-inflicted urgency. It states that the illegal structures have already been removed and restoration of the same to the *status quo ante* the removal is no longer possible. It alleges, on the merits, that there is no evidence to support the claim that the applicant owned or occupied the removed structures. It insists that there is nothing which shows that the applicant has been despoiled. It states that the applicant did not attach to its founding papers its application to the Ministry for allocation to it of the property. It disputes the allegation that permission was granted to the applicant to develop the property. The property, according to it, is reserved for public open space and it is not suitable for residential use. It insists that the applicant, and not it, took the law into its hands by deliberately acting without its knowledge and consent. It alleges that the payments which the applicant made are not a licence for the latter to do anything which it did not authorise. It insists that it did not lease nor sell the property to the applicant. The property, it alleges, was invaded by illegal settlers who have proceeded to put up illegal structures. It states that it moved in to remove the structures with a view to arresting the situation and restore sanity on the property. The structures which it removed were not completed houses but were under construction and not occupied, according to it. It insists that the removed structures do not qualify as homes for purposes of s 74 of the constitution of Zimbabwe. It avers that the application does not meet the requirements of spoliation. The *status quo ante,* it insists, can no longer be restored. The applicant, it claims, cannot be allowed to benefit from its own wrongs. It moves me to dismiss the application with costs.

The application cannot fail to succeed.

The remedy of *mandament van spolie* discourages the respondent from taking the law into his own hands. It encourages him to resort to due process of the law for him to assert his rights in a thing. It, in short, discourages self-help and/or use of the law of the jungle where, as *in casu*, one

can obtain his relief through lawful means which are available to him when he approaches the court.

An applicant for a spoliatory relief requires only to prove two thigs. These are that:

a) He was in peaceful and undisturbed possession of, or occupation in, a thing-and
b) He was unlawfully deprived of such possession or occupation: *Kama Construction (Private) Limited* v *Cold Comfort Farm Co-operative & Ors*, 1999 (2) ZLR 19 (SC).

*Mandament van spolie d*oes not concern itself with the respondent's ownership in a thing. Ownership, as is known, lies in the realms of the Law of Property. It concerns itself with the applicant's possession of, or occupation in, a thing. It is for the mentioned reason, if for no other, that the remedy which is under consideration has, in some extreme cases, been allowed to be applied even in some very bizarre situations. It has, for instance, been stated that even a thief who has been despoiled by the respondent who owns a thing may approach and move the court to restore the same to him pending the latter's motion in court to have the thing which the applicant stole from him restored to him. Unlawful deprivation which is the hallmark of a spoliatory relief was qualified to mean that the respondent deprived the applicant of possession forcibly and wrongfully against the latter's consent: Botha & Anor v *Barre*t, 1996 (2) ZLR 73 (S). An applicant in spoliation proceedings need not even allege that he has a *jus possident spoliatus ante aomnia restituendus est…*All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession: Silberberg and Schoeman, The Law of Property, pp 135-136.

That the applicant was in possession of the property requires little, if any, debate. The letter, Annexure 1, which it attached to its answering affidavit as read with other annexures which it attached to its founding papers confirms the view which I hold of the matter. The letter which is dated 22 April, 2021 appears to be a response to the correspondence which the respondent wrote to the Ministry on the matter. The respondent received the letter of the Ministry on 2 May, 2021. The letter states, in categorical terms, that the property has been allocated to the applicant. It reads in para (s) 2 and 3 of the same as follows:

> "I am pleased to inform you that the above piece of land (ie Proposed 18991 – 19041 Residential Stands) has been allocated to Brickstone Builders and Contractors (Pvt) Ltd.

> Brickstone Builders and Contractors (Pvt Ltd shall be involved in the infrastructure development of the land, facilitating surveys, designs, engineer, procure, finance, construction of requisite infrastructure, that is, roads and storm water drainage, water supply and sewage reticulation and electricity reticulation to standards approved by the local authority".

It is on the strength of the letter part of whose contents are quoted in the foregoing paragraph that the applicant, in conjunction with the respondent, paid to the latter the sums of ZWL$1 360 100 and ZWL$1 454 600 for sewer reticulation and water reticulation for stands18991- 19041 respectively. Reference is made in the mentioned regard to Annexures C1 and C3 as read with Annexures C2 and C4 which appear at pp 15 and 17 as read with pp 16 and 18 of the application. The sums which the applicant paid emanated from no person other than the respondent. The applicant made the payments pursuant to its agreement with the Ministry which agreement the respondent sanctioned. The respondent cannot, in the face of this cogent piece of evidence, be allowed to turn round and renege on the agreement which the applicant, the Ministry and it agreed upon in respect of the property. This is a *fortiori* the case when regard is had to the letter, Annexure B p 14 of the record, which it wrote to the applicant on the matter on 13 February, 2023.

The respondent made serious insinuations on the fact that the Ministry allocated the property to the applicant. It challenged the applicant to produce evidence of the allocation of the property to it. Paragraphs 22 and 23 of its opposing papers contain the challenge. They each read in turn, as follows:

> "22…..The alleged application to the Ministry of Local Government and Public Works for allocation of Stand No 19156 Belvedere residential stands on the disputed piece of land. The purported application is not attached and is therefore denied and the applicant is put to strict proof of its existence.
>
> 23. It is disputed that any permission was granted to the applicant to develop the disputed piece of land. The Ministry of Local Government and Public Works does not grant verbal permissions in matters involving land allocations. If such permission existed I am certain the applicant would have attached it."

It is this challenge of a fact which the respondent knew about which prompted the applicant to attach the letter which the Ministry wrote to the respondent to its answering affidavit. That the respondent knew of the existence of this letter is evident from the contents of the letter itself. The letter reads, in its last paragraph, that:

> "Three copies of the allocation letter are endorsed herein for your use, records and onward transmission to the relevant stakeholders. We have forwarded one copy to Brickstone Builders and Contractors (Pvt) Ltd and retained one copy for our records."

The respondent was being economic with the truth when it challenged the applicant to produce the letter. The letter was, in fact, addressed to its Director of Works. One therefore wonders what the respondent meant to prove when it challenged the existence of the letter as it did. The applicant was, in the circumstances of this case, within its rights to produce the letter following the challenge which had been made to it about the letter.

The court takes a very serious view of a litigant who comes to court with a prepared mind to tell a lie about a fact which, as *in casu*, is not only known to him but is also common cause as between the other party and him. It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given any evidence at all: *Leather Trade Zimbabwe (Pvt) Ltd* v *Smith*, HH 131/ 03. It is fundamental to court procedures in this country and in all civilized countries that standards of faithfulness and honesty be observed by parties who seek relief. If this court were not to enforce that standard, it would be washing its hands of its responsibility: *Underbay* v *Underbay*, 1977 (4) SA 23 (W) at 24 E-F. People are not allowed to come to court seeking the court's assistance if they are guilty of a lack of probity or honesty in respect of the circumstances which cause them to seek relief from the court: *Deputy Sheriff, Harare* v *Mahleza & Anor*, 1997 (2) ZLR 425.

The above-cited case authorities show the disdain to which the court is prepared to go when it discovers that it is dealing with a dishonest litigant. It quite rightly draws adverse inferences against such. It does so because it cannot tell the moment that such a litigant is telling the truth and not a lie. The respondent told a lie about a matter which is known to it. It challenges the applicant to prove that the property which is the subject of this application was allocated to the latter. The challenge is meaningless when it worked with the applicant and accepted sums of money from it in relation to the applicant's duty to develop the property. Annexures A1, A2, A3 and A4 which it attached to its notice of opposition are of no moment. They are a complete fabrication by it to bolster its assumed position that the application was not urgent. The addressees of the notices which it issued in September or October, 2022 are unknown. The possibility that it used the notices it issued to persons who are other than the applicant is more probable than it is otherwise. More

probable in the sense that, if it really intended the notice to reach the applicant, it would simply have served the same on the latter who was or is known to it. Nothing prevented it from serving the notice on the applicant to whom it wrote on 13 February, 2023. Annexure B which appears at p 14 of the record confirms the stated matter. It addressed its notices to some unknown occupier whoever that was. It cannot use the illegible notices to defeat the application which is as clear as night follows day. Its dishonest tendency in the observed regard cannot be condoned let alone accepted.

The respondent does not dispute that it destroyed structures which were at the property. It states, in para 8, of its notice of opposition, that the applicant was aggrieved by the removal of illegal structures from Stand 19156, Belvedere, Township, Harare. It states, in para 13, that the structures have already been removed. It disputes, in para 19, that the applicant was in peaceful and undisturbed possession of the property. It, however, does not show what disturbed the applicant's peaceful and undisturbed possession/occupation of the same. It states, in paragraph 30, that the payments which the applicant made to it do not amount to a licence to the applicant to do anything which it has not authorized. It states, in para 32, that it did not lease nor sell the property to the applicant. It also states, in para 33, that the property has been invaded by illegal settlers who have gone on to act with brazen IMPUNITY by putting up illegal structures.

It is clear from the statements of the respondent that the structures which it destroyed on 7 June, 2023 were nowhere else but on the property which the applicant is in occupation of. Its flip-flopping on the issue which is under consideration portrays its unwholesome conduct which is difficult, if not impossible, to comprehend let alone condone. It despoiled the applicant in a most reprehensible manner. Reprehensible in the sense that it allowed the applicant to be on the property as well as to construct structures on the same and, without any warning to the latter, it proceeded to render the applicant's employees who had constructed dwelling structures on the same homeless. The disquieting thing about its unlawful conduct is that it destroyed the structures without a court order and it contravened s 74 of the constitution of Zimbabwe in the mentioned regard.

The manner in which the respondent conducted itself shows its complete disdain of the law. Its callous conduct and the harm that it placed in the way of the applicant cannot attract anything other than it being mulcted with costs which are at attorney and client scale. The sanction

is relevant as a way of punishing it for its unwholesome conduct which caused the applicant's workers to suffer the vagaries of the cold weather without any mistake on the applicant's part. The harm which it caused to the applicant's employees is of unimaginable proportions. The same is exacerbated by the fact that it acted outside the law to the utter inconvenience of the applicant which has to re-construct the destroyed structures.

The application which sought the remedy of an interdict in para 2 of the draft order was, to the stated extent, misplaced. The applicant conceded the observed matter when the same was drawn to its attention during the hearing of the application. It moved, correctly in my view, that para 2 of the draft order which is not related to the remedy of *mandament van spolie* be struck off the record. I agree. The net result is that only paragraph 1 of the draft order remains in the equation.

The applicant proved its case on a preponderance of probabilities. It treated its situation with the urgency which the same deserved. It filed this application within a day of the destruction of its structures by the respondent. The application is, in the result, granted as prayed in paragraph 1 of the draft order.

Zvavanoda Law Chambers, applicant's legal practitioners
Mbidzo Muchadehama Makoni, respondent's legal practitioners