RUVIMBO PATRICIA ZHEWE
versus
ROCY LODGE (PVT) LTD
and
TAFIRENYIKA CHIPATO

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 11 October 2023

Urgent Chamber Application

Mr *C Maraura,* for the applicant
2nd respondent appearing in person &
also appearing for the 1st respondent

DEME J: On 11 October 2023, I delivered an order to the effect that:

"1. The 1st and 2nd Respondents be and are hereby ordered to restore occupation to the Applicant to one bedroom cottage, which she occupied prior to 21 September 2023 at number 12 Penn Place, Strathaven, Harare.
2. The Respondents be and are hereby ordered not to unlawfully evict the Applicant from the property specified in Paragraph 1.
3. The Respondents be and are hereby directed to bear the costs of this application on an ordinary scale."

The respondents subsequently requested for the reasons of the order. Thus, I now supply the reasons for the order of 11 October 2023.

The applicant approached this court on an urgent basis for a spoliation relief, the applicant prayed for the following in its draft order—

"1. Respondent be and is hereby interdicted from interfering in any manner with the Applicant's occupation at number 12 Penn Place, Strathaven, Harare, including barring her from accessing the cottage.
2. The Respondent be and is hereby ordered not to unlawfully evict Applicant from 12 Penn Place, Strathaven, Harare.
3. The Respondent to pay costs of suit on an attorney client scale."

The applicant in this matter is a female business consultant while the first respondent is a company incorporated in terms of the laws of Zimbabwe and its Loss Control Manager is the second respondent.

In February 2023 the applicant entered into a one-year lease agreement with the first respondent. Due to the economic situation in Zimbabwe, the applicant alleged that she was

failing to settle the rentals, agreed in terms of the lease, timeously. She, however, according to her affirmation, managed to settle rental arrears. The first respondent and the applicant also agreed to reduce the tenure of the lease agreement. Pursuant to this agreement, the parties, on 3 August 2023, entered into a 2 month lease agreement which was to expire on the end of September 2023. The applicant acknowledged her arrears for rentals by signing an acknowledgment of debt.

According to the applicant's averment, the second respondent later on threw the applicant's possessions outside the rented accommodation on the basis that the applicant had failed to settle her arears for rentals. This forced the applicant to report this development to the police and was referred to the Rent Board which then issued a letter to the effect that the eviction was illegal. The applicant submitted the letter to the police who later on escorted her back to her premises and her occupation was restored. On 13 September 2023 the first respondent wrote to the applicant advising her that they were cancelling the lease agreement and consequently they were going to move her to a single room.

The second respondent then approached the Rent Board and obtained confirmation that the board did not have jurisdiction over this matter but rather the magistrates court. On 17 September 2023 the applicant received a threatening letter from the second respondent for her to move to a single room or face eviction from the cottage. The second respondent went on to report the applicant to the police for the illegal use of property, and a docket was opened. On 22 September they went to court and upon vetting the prosecution declined to prosecute the matter. The first respondent through the second respondent locked the applicant out of the premises again on 21 September according to the applicant. She further affirmed that she had to seek shelter at Avondale police station and the respondents continued to deny her access to the premises.

The present application was opposed by the respondents. According to the respondents parties entered into a lease agreement on 3 February 2023. The respondents asserted that the applicant defaulted in paying rent which led to the new agreement on 3 August 2023 which would expire at the end of September 2023. The respondents claimed that on 3 August the applicant acknowledged her debt. It is the respondents' case that the applicant then failed to honour the new agreement and the acknowledgment of debt which forced the respondents to ask her to move into a single room. On 21 September 2023, the respondent moved the applicant's property into the one room in terms of Clause 5 of 3 August lease agreement.

The respondents in opposing this application raised three points *in limine.* Firstly, the respondents argued that the matter is not urgent. The respondents maintained that on 3 August 2023, the parties concluded a new lease agreement. In terms of the revised lease agreement, the applicant agreed to move to a single room in the event of her failure to defray her rental arrears by 17 August 2023. According to the respondents, the need to act arose on 17 August 2023 the date on which she was to face her consequences in terms of a new lease agreement upon failing to discharge her rentals. The respondents argued that the certificate of urgency was prepared prior to the founding affidavit and hence the author of such certificate did not apply the mind.

In response to this point *in limine*, the applicant argued that the matter remained urgent as she was dispossessed by the respondents. The irregularities arising from the dates of the certificate of urgency and the founding affidavit were a result of typing errors. According to the applicant, the two were signed on the same day. She further affirmed that the seven day delay in filing the present application was as a result of the newly introduced online system.

Secondly, the respondents also raised a further point *in limine* to the effect that the parties consented to the jurisdiction of the magistrates court in the event of a dispute arising. According to the respondents, the two lease agreements and the acknowledgement of debt attached to the founding affidavit by the applicant confirm this position. The respondents contended that therefore the High court has no jurisdiction to determine this matter. In response, the applicant argued that she approached this court based on a common law remedy of spoliation order and not based on a lease agreement.

The respondents also raised an additional point *in limine* that the relief sought was not the one applied for. The applicant applied for a spoliation order but her order was that of an interdict, according to the respondents. The respondents affirmed that the conduct which the applicant seeks to stop had already occurred and hence the relief sought by the applicant is incompetent.

Responding to this point *in limine,* the applicant insisted that the relief she sought is competent because she wants to stop the respondent from barring her from possessing or occupying the property. She also declared that the respondents admitted that they barred her from accessing the property without a lawful reason. According to the applicant, the relief sought is for the restoration of the status *quo ante.* She was unlawfully deprived of her possession by the respondent and also the applicant did not agree to the unlawful action by the respondent. Hence, for this reason, the applicant claimed that the relief is competent.

The applicant in response averred that according to the attached resolution the second respondent was allowed to represent the first respondent up until 5 May 2023 so technically the first respondent did not oppose this application.

I will now proceed to deal with the points *in limine* raised by all parties. The counsel for the applicant did not make oral submissions to buttress the applicant's point *in limine.* This led me to make an assumption that the applicant had abandoned her point *in limine* to the effect that the deponent to the opposing affidavit was not properly authorised by the first respondent.

Now turning to the points *in limine* raised by the respondents, it is apparent that our jurisdiction has developed jurisprudential discourse that has gone a long way in defining urgency. In the case of *Kuvarega* v *Registrar General & Anor*[1] urgency was extensively circumscribed in the following way:

> "What constitutes urgency is not only the imminent arrival of the day of reckoning. A matter is urgent if at the time the need to act arise, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules. It necessarily follows that the certificate of urgency or the supporting affidavit must always contain an explanation of the non-timeous action if there has been any delay."

It is common cause that the applicant was removed from her rented accommodation without her consent on 21 September 2023. The present application was filed on 28 September 2023, seven days after the dispossession. In my view, the applicant acted with such a reasonable speed to arrest the situation. A delay of seven days cannot be categorised as an inordinate delay. The present circumstances deserve that the applicant must be allowed to jump the long queue of ordinary roll. Failure of this court to act under such a situation will result in incurable prejudice to the applicant as she will be forced to continue being homeless. In the case of *Seventh Day Adventist Association of Southern Africa* v *Tshuma*[2], the court held that:

> "It is only in exceptional circumstances that a party should be allowed to jump the queue on the roll and have its matter heard on an urgent basis……. An urgent application amounts to an extraordinary remedy where a party seeks to gain an advantage on other litigants by jumping the queue, and have its matter given preference over other pending matters……"

In addition, the nature of relief and cause of action is very key in determining whether or not the matter is urgent as enunciated in the case of *Document Support Centre (Pvt) Ltd* v

[1] 1998 (1) ZLR 188 (H).
[2] HB213-20.

Mapuvire[3]. MAKARAU J (as she then was), in making her determination in the case of Document Support Centre (Pvt) Ltd (*supra*) held that:

> "Without attempting to classify the causes of action that are incapable of redress by way of urgent application, it appears to me that nature of the cause of action and the relief sought are important considerations in granting or denying urgent applications."

The applicant is praying for spoliation order. Ordinarily, in the absence of other effective remedies, the relief of spoliation order, where there are no compelling and special reasons, should always be given preferential treatment where the applicant has promptly approached the court. I am of the view that the question of irregular dates appearing on the certificate of urgency and founding affidavit is purely as a result of typing errors. Consequently, the point *in limine* to the effect that the present application is not urgent lacks merit and is therefore dismissed.

Now turning to the question of jurisdiction, it is apparent that this court in terms of s 13 of the High Court Act [*Chapter 7:06*] does have jurisdiction to hear this matter. The section provides as follows:

> "Subject to this Act and any other law, the High Court shall have full original civil jurisdiction over all persons and over all matters within Zimbabwe."

The lease agreements between the applicant and the first respondent does not have effect of varying or amending the statutory provision. For this reason, the point *in limine* that this court does not have jurisdiction is hereby dismissed.

I do not agree with the respondents that the relief is not competent. The purposes of all paragraphs of the draft order have the effect of protecting the applicant's possession or occupation right. One of the chief purposes of spoliation order is to ensure that the right of possession is protected. I do agree with the submissions of the applicant's counsel that the relief for spoliation order amounts to an order of restitutory interdict. In the circumstances, the final point *in limine* raised by the respondents to the effect that the relief sought by the applicant is incompetent is not merited. I consequently dismiss it.

The question that arises for determination is whether the applicant managed to satisfy the requirements of the present application. The requirements for a spoliation relief are well established as postulated in *Botha & Anor* v *Barret*[4] where the learned Chief Justice GUBBAY had occasion to remark that:

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[3] 2006 (2) ZLR 240
[4] 1996 (2) ZLR 77(S) at p79

> "It is clear law that in order to obtain a spoliation order, two allegations must be made and proved. These are:
> (a) That the appellant was in peaceful and undisturbed possession of the property and
> (b) That respondent deprived him of the possession forcibly or wrongfully against his consent."

It is not disputed by the respondents that the applicant enjoyed peaceful possession of the property before being dispossessed. Further, it is agreed that the respondents forced the applicant out of the rented accommodation. In responding to para 10 of the founding affidavit, the respondents admitted the contents thereof. The relevant portion of para 10 of the founding affidavit is as follows:

> "2nd Respondent threw my possessions outside stating that I no longer have any right because I felt to settle arrear rentals."

In para 18 of the opposing affidavit, the respondents responded to para(s) 7-11 of the founding affidavit. Their response is as follows:

> "This is admitted."

Further, in para 16 of the founding affidavit, the applicant alleged that the second respondent locked her out of the premises. More particularly, she averred as follows:

> "After lodging the malicious and unfounded complaint with ZRP, the 1st Respondent through 2nd Respondent again locked me out of the property on 21 September 2023 depriving me of possession and control of the property."

The respondents responded to this allegation in para 22 of the opposing affidavit where they averred as follows:

> "The Applicant is not being truthful to this Honourable Court. The action taken by the 1st Respondent was in keeping with the letter and spirit of what had been agreed upon by the parties. The Applicant was not locked out but she was relocated to the one room which she had accepted in the event of her defaulting on the undertakings which she made on the 3rd of August 2023. The Applicant cannot have her cake and eat it at the same time. She wants comfort yet she cannot pay for it."

It is apparent from para 22 of the opposing affidavit that the relocation was not voluntary. According to the respondents, the applicant was relocated. This confirms the forceful and wrongful removal of the applicant by the respondents from the property which she occupied prior to 21 September 2023. The respondents failed to prove that on the day in question, the applicant consented to the relocation referred in para 22 of the opposing affidavit. The new lease agreement of 3 August 2023 cannot be accepted as the justification of the

conduct by the respondents of forcing the applicant into one room against her will. Such conduct constitutes an act of spoliation, in my view.

Thus, the applicant's circumstances makes her to be a proper candidate requiring protection by way of spoliation order. One of the principal purposes of spoliation order is to prevent the thriving of the law of the jungle in the society where the fittest members of society will persecute the weaker members of the society. This remedy ensures the prevalence of law and order in the society. Conversely, it prevents lawlessness. Spoliatory relief prevents self-help by domineering members of the society.

I also made an order of costs on an ordinary scale against the respondents in accordance with the established and usual practice that costs follow the outcome. There were no compelling reasons advanced by the respondents to persuade me to have a departure from this tradition. In my view, such costs are reasonably sufficient. Thus, for these reasons, I saw it prudent to grant the relief as prayed with necessary consequential amendments. Paragraph 1 of the draft order was necessarily amended to reflect the exact description of the rented accommodation which the applicant occupied prior to 21 September 2023.

Madzima Chidyausiku Museta, applicant's legal practitioners