PETER PEDZISAI
and
PATRSON CHIPUNZA
and
COLLIN SIGAUKE
and
TERESA TSURO
and
LOICE MUPAMBA
and
PERGY NYAGORO
and
PERCY GOVHA
and
PETER MUTANDWA
and
TAFADZWA NYANZUNDA
and
ACQUILINE MAGAYA
and
ADIJA KAZEMBE
and
DORREN MUTSAMBA
and
CHARLES CHIKUDZA
and
KENNED MURINDASHIRI
and
DAVID RAMBAEPASI
and
NORAH SIYAMACIRA
and
ANNAH MAMBWERE
and
KEITH TAPFUMA
and
NORMAN MUSEKIWA
and
TINASHE MHOSVA
and
MARGARET MWAZHA
and
EDNA MAKUSHA
and
BEAULAH MAKUSHA

and
CASPER KADIMU
and
TRACY MULAMBO
versus
HOPE WEREKENAI KATUKA
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 25 October, 2021 and 17 February, 2022

URGENT CHAMBER APPLICATION

R Kuchidza, for the Applicants
N Mugiya, for the 1st Respondent

MANGOTA J: I heard this matter on 25 October 2021. I delivered *an ex tempore* judgment in which I granted the applicant's prayer as captured in its draft.

On 26th November, 2021 the registrar of this court wrote requesting me to give reasons for my decision. He advised that the first respondent appealed my decision. He advised further that the first respondent requests reasons for the decision which I made for purposes of appeal. These are they:

The first and second applicants have been embroiled in a dispute with the first respondent from as far back as 2019. At the center of their dispute is a piece of land which is known as Subdivision 2 of Erling Farm, Seke, Beatrice {'the farm'}. On 1 October 2021, the dispute in which only the first respondent, on the one hand, and the first and the second applicants, on the other, were involved escalated itself to the third to twenty-fifth applicants whom the first respondent moved to evict from the farm together with the first and second applicants. He premised his motion on HC 7440/19 which the court issued to him on 20 September 2019.

The first to twenty-fifth applicants claim to have occupied the farm from as far back as prior to Government's Land Reform Program of 2000. They allege that all of them have been in peaceful and undisturbed occupation of the farm until 1 October 2021 when the second respondent

who is the sheriff for Zimbabwe, acting on the instruction of the first respondent, despoiled them of the same. They assert that HC 7440/19 which the respondents employed as a basis of their eviction from the farm does not confer authority on the respondents to evict them. They allege that their eviction from the farm is unlawful and is, therefore, in substance, a spoliation. They insist that the eviction of the third to twenty-fifth applicants who are not parties to HC 7440/19 is not only high-handed but is also illegal and is without any justification. They move that they be returned to the *status quo ante* their eviction from the farm.

The first respondent opposes the application. The second respondent who is cited in his official capacity did not file any notice of opposition. My assumption is that he intends to abide by my decision.

The first respondent raised a number of preliminary matters before he proceeded to address me on the merits. I will deal with his case in due course. What is pertinent for me at this stage is to identify the area of law under which the application falls.

The current is an application which the applicants filed through the urgent chamber book. It is for the remedy of what is normally referred to as *mandament van spolie*. The remedy discourages self-help. It encourages people to assert their rights through lawful means. Due process is the hallmark of the remedy of spoliation. It does not subscribe to the rule of the jungle, so to speak.

An applicant, in a spoliation application, must allege and prove that:

a) he was in peaceful and undisturbed possession or occupation of a thing or property

b) the respondent despoiled him of his peaceful and undisturbed possession or occupation –and

c) he wants to be returned to the *status quo ante* the spoliation: see *Botha and Anor v Barret*, 1996 (2) ZLR 73 (S) at 79-80; *Chisveto v Minister of Local Government and Town Planning*, 1984 (1) ZLR 248 at 249 H and 250 C , *Magadzire v Magadzire,* SC 196/1998.

The applicants meet the above-mentioned three requirements for spoliation in a clear and unambiguous manner. They, for instance, state in their affidavit of urgency, that:

i) they have been in peaceful and undisturbed occupation of the farm from as far back as the period which precedes Government's Land Reform Programme- and

ii) the respondents evicted them from the farm unlawfully- and

iii) they want the *status quo ante* the eviction to prevail.

The first respondent confirms paragraph (i) above. He, states in paragraph 28 of his Heads, that:

> "……it is not disputed that the applicants were in peaceful and undisturbed possession of the piece of land in question".

His point of departure with them, however, is the propriety or otherwise of the order which the court issued to him under HC 7440/19. He employs the same as a foundation for his conduct against the applicants.

The order upon which this application is premised appears as Annexure C. It is at page 15 of the applicants' founding papers. It is evident, from a reading of the same, that, apart from the first and second applicants who are parties to the order, none of the remaining applicants are parties to it. The third to twenty-fifth applicants are strangers to HC 7440/19. They were dragged into the matter which is none of their business by the respondents.

None of the respondents was able to explain why the mentioned applicants were bundled into a case to which they are not a party. The fist respondent, for instance, did not ever suggest to the court or to anyone else for that matter that the third to the twenty-fifth applicants were in occupation of the farm through the first or the second applicants or both. This is a clear case of an unlawful execution of a court order against innocent third parties.

The third to twenty-fifth applicants are well within their right when they describe the conduct of the respondents against them as contemptuous and their eviction from the farm as unlawful. Their eviction which is premised on a case to which they are not a party remains unjustified and, therefore, unlawful.

The sheriff acted in a cavalier manner. He refused to read the order to ascertain if the mentioned group of applicants was, or was not, a party to the court order. He does no explain why he chose to act outside the order which was clear and unambiguous.

The first respondent on whose instruction the second respondent acted was/is equally to blame. He should have realized that the order which he was enforcing should not have been executed against the third to twenty-fifth applicants. His insistence on their eviction portrays nothing but *mala fides* of the highest degree on his part. The eviction of the mentioned applicants was/is, no doubt, unlawful and is without any justification. It was/is nothing but a clear resort to self-help by the respondents. Both respondents took the law into their own hands in an

unforgivable manner. They made the third to twenty-fifth applicants to suffer for having committed no offence at all. They could not and cannot justify their unwholesome conduct.

Counsel for the respondent missed the point of the application when he strayed into the area of the Gazetted Land (Consequential) Provisions Act during his submissions. Those relate to the remedy of vindication and not that of spoliation. The requirements for spoliation have already been stated in the foregoing part of this judgement. They are separate and different from those of vindication which thrives on the concept of ownership.

Spoliation thrives on the principle of possession or occupation. It does not deal with ownership at all. The requirements for spoliation do not inquire into how the victim got possession or occupation of a thing or a property. In the extreme case scenario, it has often been stated that spoliation is so robust that it allows even a thief who has been despoiled by the owner of the thing which he stole to approach and move the court to restore the thing to him (the thief) pending the owner asserting his right to the same through lawful means: *Beckus v Crous and Another*, 1975 (4) SA 215 (NC).

The respondent obtained the order which is under HC 7440/19 two years ago. It was issued to him on 20 September 2019. He does not explain as to what prompted him not to enforce it against the first and second applicants for two consecutive years. He does not state what the two did which violated the order justifying him to move for their eviction from the farm. The order specifically mentions one Trymore Muzondo and a Mr Kalembo whom it respectively cites as the first and second respondents. These would appear to have despoiled the first respondent in *casu* of the farm. They were ordered to place him in control, possession and occupation of the farm. They do not appear to have violated clause 1 of the order. It is for the observed reason, if for no other, that they were not evicted from the farm together with the applicants whom the respondent evicted from the farm on 1 October, 2021.

The first respondent appears to have remembered HC7440/19 which had been entered in his favour. He remained alive to the fact that the first and the second applicants are a party to the court order. He joined the third to the twenty-fifth applicants to HC 7440/19 and instructed the second respondent to execute the court order without showing whether or not the first and second applicants interfered with his stay, business and/or welfare at the farm as HC 7440/19 directed them not to do.

The first respondent's manner of reasoning is faulty. It is nothing but a complete abuse of court process. If he was able to live with the first and second applicants on the farm for two consecutive years, as has already been observed in the foregoing paragraphs of this judgment, his motive to have them evicted from the farm two years later is, in all probability, without justification. This is a *fortiori* the case where he is not able to show the manner, if any, in which the two applicants interfered with his stay, business and/or welfare at the farm. This is also a *fortiori* when, as *in casu*, he evicted them without giving them any notice.

HC 7440/19 was an application which the first respondent filed through the urgent chamber book. He had been despoiled, it appears, by Trymore Muzondo, Kalembo and others. He moved the court to restore him to the status *quo ante* the spoliation. It is for the mentioned reason, in my view, that the order under HC 7440/19 is couched in the form and manner that it appears. It insists on the first respondent being returned to the *status quo ante* the spoliation and that, if he is once again despoiled, the second respondent should assist him to regain possession of his business and welfare without him having to return to court with another application for a spoliatory relief.

Counsel for the applicants submits, correctly, that HC 7440/19 does not confer authority on the respondents to evict the first and second applicants let alone the third to the twenty-fifth applicants from the farm. An order for eviction, he submits, does not lend itself to ambiguity or misconstruction. It is, he insists, more often than not, couched in a clear and unambiguous language. It is not, he further submits, left to interpretation as the first respondent is moving the court to believe.

I fully associate myself with the submissions of counsel for the applicants. An order of court, being what is, cannot be couched in vague and unclear terms. It is specific. It speaks to what the defaulting party is directed to do or to refrain from doing. It cannot speak to the defaulting party in a round-about manner. It is clear, concise, direct and to the point. It is as such because it should be obeyed by the defaulting party under the pain of a sanction where he fails to live up to it.

If it was the intention of the court to order eviction of the first and second applicants from the farm in a situation where they violate the order of court, the order would not have gone about that matter in a round-about way. It would have directed them to obey it to the letter and spirit failing which it would have empowered the first respondent to evict the first and second applicants

from the farm. It would, in addition, have spelt out the conduct which the two applicants were interdicted from performing under pain of the sanction of eviction if they disobeyed the order which the court issued under HC 7440/19.

The second respondent, it is evident, executed HC 7440/19 outside the law. He did so at the instance of the first respondent. An order which is executed outside the four corners the law is unlawfully executed. It is a violation of the law by the officer of court who has been charged with the responsibility of executing court orders. Both respondents broke the law when they executed HC 7440/19 outside what the court granted to the first respondent. The execution was, as the applicants insist, unlawful and a spoliation of their peaceful and undisturbed occupation of the farm.

The applicants' statement is that they were despoiled. They assert that they have been despoiled by the criminal conduct of the respondents. They aver that they had to sleep in the open for the night that preceded their filing of this application. They claim that they may have many more nights in the open if their application does not succeed.

The respondents acted in a very high-handed manner, in my view. They abused the process of the court in an unacceptable way. They displayed a very high degree of *mala fides*. The sheriff, for instance, is first and foremost an officer of the court. His conduct must reflect the conduct of the court. He must be a man of an impeccable character. He should not, therefore, allow himself to be abused by a litigant in the name of enforcing a court order as he did *in casu*. He is not an agent of the party in whose favour an order of court has been made. He should, therefore, always be circumspective.

A mere reading of HC 7440/19 would have shown the second respondent that:

i) the third to twenty-fifth applicants were or are not parties to the case- and

ii) the order which he was enforcing under HC 7440/19 does not have a clause which authorizes eviction of any of the applicants from the farm. He would, as a reasonable officer of this court, have refused to evict any of the applicants from the farm. He would have refused to perform that unlawful act from a mere reading of HC 7440/19 which did not direct him to evict anyone from the farm let alone the applicants. The vindictiveness which he displayed *in casu* is difficult to countenance let alone accept. He cannot, as a consequence, escape the censure which first

respondent shall suffer. He will be censured so that he performs the function of his office more conscientiously than what he did in this case in his future performance of duty.

Both respondents should have realized that an unlawful enforcement of a valid court order would have a devastating effect on the welfare of the applicants, their children in particular. These had to sleep in the open from 1 October 2019 todate. They missed their education from the mentioned date todate. The conduct of the respondents was callous in the extreme sense of the world. It cannot be condoned let alone accepted. They abused HC 7440/19 in a shameless manner.

It was, in my view, disquieting for counsel for the first respondent to leap onto his feet and raise a number of in *limine* matters in addition to the opposition which he filed on behalf of his client in circumstances where he should have known that the first respondent was abusing HC 7440/19 which had been entered for him but outside the applicants. The preliminary issues which he raised were that:

i) the applicants were approaching the court with dirty hands and should not, therefore, be heard;
ii) the relief which the applicants were seeking was impossible;
iii) the order which the applicants were seeking was/is defective;
iv) spoliation cannot be granted on an interim basis;
v) the application is not urgent;
vi) the application suffers from material non-disclosure – and
vii) there is disjoinder of the final, as read with the interim, order.

The first respondent made submissions in respect of each of the above mentioned preliminary matters. The applicants counter-argued on each of the same. After all had been said and done, I found that that the in *limine* matters which had been raised were all without merit. I, accordingly, dismissed all of them. I indicated that my reasons for the view which I hold of the matter would be availed to the parties in this judgment. These are they:

a) Dirty-Hands

I agree with the respondent that a litigant who approaches the court with dirty hands cannot be granted audience by the court: *Nqobile Khumalo and Anor v Maoni Trading (Pvt) Lt and 4 Others*, HB 279/17, *Deputy Sheriff Harare v Mahleza and Anor*, 1997 (2) ZLR 426 (H) at 426 B. He cannot because he is in contempt of the very court from whom he is seeking assistance. The Supreme Court and this court have, therefore, pronounced themselves clearly on this principle.

They have not allowed litigants who come to court with dirty hands to show their faces in the halls of justice.

The above-stated matter constitutes the first respondent's first line of defence. He alleges that the applicants were evicted from the farm by the sheriff on 1 October, 2019 and they returned to the farm without a court order after which they filed this application on 3rd October, 2019 as a way of sanitizing their unlawful conduct.

The applicants, it is observed, did not file an answering affidavit to rebut the allegations which the respondent levelled against them. Counsel for them persuaded me not to penalize them for their failure to file one such affidavit. He insisted on the trite position of the law which is to the effect that urgent matters are, by their nature, argued by the respondent without him having filed any notice of opposition. He moved me to go by the view that, in as much as the respondent in an urgent application can argue his case without having filed any opposing papers, the applicant, in the same application, should be allowed to argue his case without having filed any answering affidavit. He insisted that the dynamics of the application allows parties to cut corners which are a *sine qua non* aspect of any ordinary application without being penalized for the same.

Mr *Mugiya's* submission on the point in issue was to the contrary. He insisted that Mr *Kuchidza,* for the applicants, should have rebutted the allegation which the respondent made. He should, according to counsel for the respondent, have rebutted the allegations in the course of Mr *Kuchidza's* submissions.

The insistence is misplaced. It is akin to requesting counsel for the applicants to go on a collision course with the respondent. It is also not dis-similar from requesting counsel for the applicants to give evidence from the bar which, as is known, is inadmissible.

It is not the function of a legal representative of a party to give evidence for, and on behalf of, his client. The law of practice and procedure does not sanction such. The duty of the legal practitioner is to apply the law to the facts or depositions which the person whom he represents makes or has made and to persuade the court to see the case from the perspective of the person for whom he appears and not more than that.

Nothing turns on the observation that the applicants did not file an answering affidavit in rebuttal of the respondent's allegations which are to the effect that the applicants approached the court with dirty hands. The statement of the applicants which is contained in para 6.2 of their

founding affidavit shows that the applicants do not have the intellectual capacity to act as the respondent alleges. This is a *fortiori* the case when regard is had to Annexures E,F,G,H,I,J,K,and L which respectively appear at pp 18,19,20,21,22,23,24 and 25 of their founding papers. The annexures, it is evident, are not in consonant with the first respondent's claims. They are, in effect, *in sync* with the case of persons who have been removed from their place of habitation and dumped in the middle of nowhere. They state, in their papers, that the second respondent, with the assistance of about 70 members of the police force, evicted them from the farm and left their goods and them along the road which leads to Masvingo.

The allegation which is to the effect that the applicants acted in the manner which is claimed appears to be a creation of the respondent's fertile mind. He, in all probability, hatched it with a view to either confuse issues which are in themselves clear or to persuade me to refuse to give audience to the applicants whose unfortunate circumstances, as portrayed in the annexures, cannot be wished away. It is for the mentioned reason, if for no other, that Mr *Mugiya* found it difficult to identify the paragraph in the founding papers which supported, in so many words, the allegation which his client made.

Further, even if it were to be accepted for argument's sake that the applicants returned to the property following their eviction from the same, the applicants cannot be said to be approaching the court with dirty hands. The third to twenty-fifth applicants, it has already been observed, were/are not parties to HC 7440/19. They are, therefore, not bound by the order which the court issued under the mentioned case. They would not, under the stated set of circumstances, be contemptuous of an order of court which is not binding upon them. They, therefore, have no soiled hands when they refuse to comply with an order which does not relate to them.

The first and second applicants were not in contempt of court if they returned to the farm against the order which the court issued under HC 7440/19. If they were, the respondent would have moved to have them punished for contempt of court. Because HC 7440/19 did not authorize the respondents to evict the two applicants from the farm, their eviction was unlawful and that fact placed them outside the dirty hands principle which the respondent raised.

As has already been observed, none of the applicants, in all probability, ever returned to the farm from where they were evicted. They are, in my considered view, at the spot where the

respondents left them on 1 October, 2021. The *in limine* matter which the respondent predicated on the dirty hands principle is, therefore, without merit.

b) Draft order

Four of the preliminary matters which the respondent raised relate to the propriety or otherwise of the draft order which the applicants, as self-actors, filed with the application. They should, to their credit, be commended for the effort which they made in their desire to comply with the rules of court. These enjoin an applicant to file a draft order in an application which he files with the court. An application which has no draft order, it is trite, is so defective that it has to be struck off the roll of the court. Where a draft order which has been filed is defective, the court, more often than not, makes the effort to glean the intention of the applicant from the latter's papers and have the draft order amended so that it reflects not only the intention of the application but also its substance.

It follows, from the stated matter, that where the substance of the application is not without merit, the draft order will, at the instance of the applicant, be amended before the application is granted. The order is, after all, not that of the applicant. It is the order of the court. The draft only assists the court to read, from it, what the applicant is moving it to grant to him.

Because the applicants were self-acting when they drafted the order which is the subject of this part of the judgment, they would not have known that the relief of spoliation is final in nature. Their drafting of the order cannot, therefore, be ruled against them. This is a *fortiori* the case given that even legally trained minds more often than not fail to realize that spoliation, as a remedy, does not have a provisional order. They, therefore, invariably apply to amend their draft order during submissions so that they remain with the final order only.

The applicants did not mince their words. They were clear in both form and substance. They stated that their application was one for spoliation. Both the respondent and counsel for him were unmistaken as to what the applicants were/are moving me to grant to them. Both of them were aware that the draft order of the applicants which the latter drafted in their self-acting capacity would require to be amended so that it retains only the relief which was final in nature. They remained alive to the fact that, as self-actors, the applicants were not endowed with the precision of a legally-trained mind and that their draft order may suffer some defects.

The respondent's knowledge of the above matter notwithstanding, the respondent and counsel for him made every effort to create a mountain out of an ant-hill. They moved to derail the application on the strength of the defective draft order all in an effort to ensure that the application would not see the light of day. The unfathomed *mala fides* of the respondent and his legal representative remains disquieting. It should be discouraged in a firm but respectful manner.

The question which begs the answer is: should the applicants be made to suffer for the sins of their legal practitioner who, out of no fault of his own, did not correct the draft order which the applicants filed when he was not yet seized with their case. The answer, in my view is, in the negative. This is a *fortiori* the case when counsel states in para 20 of the applicant's heads, that the applicants will move to amend the relief which they are seeking from being a provisional, to being a final, order which reads:

> "The applicants be and are hereby allowed to return to their homesteads in Subdivision 2 of Erling Far, Beatricce."

Counsel, true to his intention, moved for the amendment and his motion was duly granted as often occurs in an application for spoliation. There is, therefore, nothing which is untoward in the manner that the draft order was amended so that it remains *in sync* with the substance of the application which the parties placed before me.

Paragraphs (ii), (iii), (iv) and (vii) of the respondent's preliminary matters are without merit. It is, for instance, without merit for the respondent to suggest that the applicants did not treat their case with the urgency which it deserves when he state, in para (a) of his opposing affidavit, that:

a) the applicants were evicted from the property on 1 October, 2019 – and

b) they filed the application through the urgent chamber book on 3 October, 2019.

An application which is filed two days after the event cannot be said not to have been treated urgently by the applicants. Nor can it be suggested that such an application wherein the applicants were unlawfully removed from the farm and dumped along a road does not meet the requirements of urgency.

The respondents should not be allowed to confuse the attempts at eviction which occurred on 4 November 2020 and 30 September 2021 with the eviction of the applicants which occurred

on 1 October, 2021. The first set of eviction is separate and different from the second set. At any rate, the first set of evictions were only attempts at evicting and the last eviction was the effective one. It is this recent eviction upon which the applicants acted with more haste than otherwise. They treated their case with urgency which the matter deserved.

The allegation that the applicants did not disclose that they applied under HC 6553/20 seeking the relief which they are now moving me to grant to them and that their application did not succeed does not constitute what the respondent refers to as material non-disclosure. HC 6553/20, it is evident, was an application which the first and second applicants filed through the urgent chamber book. They sought to interdict the second respondent from visiting the farm. They withdrew the same on 16 November, 2020.

The respondent, it is observed, does not tell the effect which the alleged non-disclosure by the first and second applicants does have on the present application. He appears to have raised the issue of the alleged non-disclosure just for the sake of it. The matter of non-disclosure as it relates to the third to twenty-fifth applicants who are not a party to HC 6553/20 makes little, if any, sense. They have no duty at all to refer to a matter to which they are strangers. They cannot be penalized for not having made any reference to the case. The *in limine* matter which relates to the issue of material non-disclosure is, once again, without merit.

All-in-all, therefore, the preliminary points which the respondent raised lack merit. They do not, in short, dispose of the case which the applicants placed before me. It is in view of the observed matter, in for no other, that one is left to wonder why the respondent went to town about matters which are of an inconsequential nature. In stating as I am doing, I am not in any way suggesting that the respondent should not have raised them. His right to raise preliminary points remains without any qualification. What he is not allowed to do, however, is to abuse the same. Abuse occurs when he raises preliminary matters which he knows do not assist in the disposal of the case which is before the court.

Because the respondents' were both to blame for executing a lawful order of court in an unlawful manner with an apparent *mala fide* intention on their part, the respondents shall pay, jointly and severally, the one paying the other to be absolved, costs of suit at the scale of legal practitioner and attorney.

The applicants' statement was/ is uncontroverted. They proved their case on a balance of probabilities. The application is, accordingly, granted as prayed in the applicants' amended draft.

Moyo and Jera, applicant's legal practitioners.

Mugiya and Muvhami Law chambers, respondent's legal practitioners.