OVERFLOW ZONE ENTERPRISES (PVT) LTD
versus
OWDEN NHIMURA
and
DENNIAS NHETA
and
JOHN DUBE

HGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 8 & 14 September 2017 and 16 March 2022

Urgent Chamber Application

P Chigumba, for the applicant
J Majatame, for the respondents

CHITAPI J: I must acknowledge the inordinate delay in rendering this judgment. The delay was due to misfiling of records by the judge's legal clerk. Indeed by letter dated 27 September 2017, the applicant's legal practitioners wrote a letter to follow-up on the judgment. A response was made on 26 October 2017 in terms of which it was advised that parties should expect the judgment by 24 November 2017 failing which they were advised to make follow ups through the Registrar. No follow-up was made. The record was brought to my attention by my new clerk upon moving offices in November 2021 when he stumbled on the record upon taking stock of all records in the judge's chambers. The late judgment is regretted.

When the application was set down before me on 8 September 2017, the respondents took objection that they had been served with copies of the application which comprised unsigned and uncommissioned affidavits. I took a swipe at the applicant's legal practitioner's dilatory conduct in not checking on their papers before filing and serving them. It turned out that even the copy of the application filed of record suffered from the same defect. The applicant's counsel applied to replace the copy filed of record with his copy which he had. I refused to grant the request because of the extent of the dilatoriness in not only filing unsigned copies but serving the other parties with an equally defective application. I struck the matter off the roll as there was no proper application before me. I however gave leave to the applicant to put its house in order and to ensure that a properly signed application is filed of record and

copy served on the respondent's legal practitioners. I gave leave to the parties to appear before me on 4 September 2017 on properly signed documents so that I could hear the matter. The parties did appear before me on properly prepared paperwork.

The applicant in the provisional order prayed for the following relief:

"**TERMS OF FINAL ORDER SOUGHT**

1.1 The 1st, 2nd and 3rd respondent's occupation of **Stand 51a, 61b, 97a** and **97b of the REMAINDER OF LOT 12 OF TYNWALD, ASHDOWN PARK, HARARE**, on the 28th of August 2017, be and is hereby declared unlawful.

1.2 The respondent be and is hereby ordered to pay costs of suit on an attorney and client scale.

INTERIM RELIEF GRANTED

Pending the return day, it is hereby ordered that:

2.1 The 1st, 2nd and 3rd respondents and everyone claiming occupation through them be and are hereby ordered to stop any building, demolition or construction operations on **Stand 51a, 61b, 97a** and **97b of the REMAINDER OF LOT 12 OF TYNWALD, ASHDOWN PAR, HARARE** until finalisation of this matter.

2.2. The respondents, their agents, nominees or anyone acting through him be and are hereby ordered to restore applicant's vacant possession and to desist from interfering with applicant's possession and occupation of **Stands 51a, 61b, 97a** and **97b** of the **REWMAINDER OF LOT 12 OF TYNWALD, ASHDOWN PARK, HARARE.**

2.3. The respondent be and is hereby ordered to pay costs of suit on an attorney and client scale."

At the hearing, the parties' legal practitioners moved that the application should be determined on the papers filed as they had no further submissions to make.

The dispute at play in this application concerns the occupation of four properties, namely, Stands 51a, 61b, 97a and 97b of the Remainder of Lot 12 of Tynwald, Harare. The applicant attached pictures of the four stands to the founding affidavit. There is no dispute on the description of the stands. The applicant averred that the stands in question were acquired by it as payment for developing land and buildings on the whole of the remainder of Lot 12 of Tynwald on behalf of the owner, Martin Sibindi Trust. The applicant attached a copy of the agreement of acquisition of the stands. The applicant averred that it subcontracted another entity called Afritage Developers to help in the discharge of the applicant's obligations to the original owner. The subcontract was cancelled on 4 October 2017 (sic). The applicant attached a copy of the letter of cancellation. It is dated 4 October 2016. It is addressed to Mr Ngwaru, cc Mr a Patsikadova, Roofers Builders Depot (Pvt) Ltd, 11th Floor, Livingstone House, Harare. The letter does not mention Afritage Developers and the applicant did not explain the anomaly.

The applicant averred that it had been despoiled of the stands by the respondents. It is important to note that an order of spoliation is final in nature. It cannot be granted on the basis of a *prima facie* case being established but upon evidence on a balance of probabilities that proves that the respondents despoiled the applicant. The court must be satisfied that the allegations of spoliations have been established on a balance of probabilities. This means that the evidence led satisfies the court that the spoliation more likely occurred than not.

The approach of the court to spoliation was set out by the Supreme Court in the judgment of OMERJEE AJA in *Evans Tapfumaneyi Munyati* v *Godfrey Mugayi* SC 17/2013. It is stated therein as follows:

> "The rationale for an order of spoliation has been set out in various decisions of the court in this jurisdiction. In *Chisveto* v *Minister of Local and Town Planning* 1984(1) ZLR 248 at 250F, RAYNOLDS J quoted with approval the remarks of INNES CJ in *Nina Bonins* v *De Lange* 1906 TS 120 at p 122 that:
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> > It is a fundamental principle that no man is allowed to take the law into his own hands. No one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property whether movable or immovable. If he does so, the court will summarily restore the *status quo ante* and will do that as a preliminary to any inquiry or investigation into the merits of the dispute."

Put simply, it matters not who actually owns the property or what the dispute between the parties is as long as respondent had possession in fact, which is not disputed and was wrongly dispossessed.

In *Oglodzisk*i v *Oglodziski* 1976(4) SA 273 at p 247F, LEON J remarked:

> "In a spoliation application the court does not decide what – apart from possession – the rights of the parties to the spoliated property were before the act of spoliation but merely orders that the *status quo* be restored. (*Niember* v *Stuckey* 1946 AD 1049 at pp 1053, 1054). The onus lies upon the applicant to prove on a balance of probabilities that:
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> (i) he was in peaceful and undisturbed possession of the property in question at the time of the alleged deprivation.
> (ii) He was unlawfully deprived of such possession."

See *Augustine Banga & Anor* v *Solomon Zawe and 2 Ors* SC 54/14; *Ngonidzashe Gumbo* v *ZACC* SC 36/2018.

The first issue to decide is therefore whether or not the applicant was in peaceful and undisturbed possession of the stands. What constitutes peaceful and undisturbed possession is a question of fact. This is so because the court does not protect the right called possession. The court is concerned with protecting society against self-help. In the case of *Mbangi & Others* v *Sobsonville City Council* 1991 (2) SA 330(W) at 336, FLEMMING J stated quite correctly,

> "When a court becomes involved with the law, it is rarely otherwise than as a matter of enforcing a right or entitlement of a person. The termination of spoliation forms a contrast. A court interferes even to assist a party who should not have possession and, furthermore, in all cases (except where lawful authority is relied upon by the respondent) without taking any interest at all in what rights do or do not exist. That inverted approach finds its explanation and jurisdiction therein that the court is not protecting a right called 'possession' but that in the interests of protecting society against self-help; the self-service undertaken by a spoliation is stopped as being a justiciable wrong …. If private persons could right and avenge themselves, the country would not be fit to live in. the *mandament van spolie* finds its immediate and only object in the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the *status quo ante* is restored. The *mandament van spolie* finds its immediate and only object in the reversal of the consequences of interference with an existing state of affairs otherwise than under authority of the law, so that the *status quo ante* is restored."

The learned judge continued:

> "It is my view that the requirement of 'peaceful and undisturbed possession' was recognized to cater for the realities and to prevent the granting of the remedy from working injustice rather than operating in furtherance of a policy designed to discourage self-help. It is probably the obverse of that requirement which is reflected by the view that an own wading – off of spoliation is no longer possible only *nadat die situasie gestabiliseer* ….. The applicant for spoliation requires possession which has become ensconced, as was decided in the *Ness case*. See also *Sonnekus*. 1986 TSAR at 247. It would normally be evidenced (but not necessarily so) by a period of time during which the *defacto* possession has continued without interference."

Having set out the principles of spoliation as above. I analyse the facts of the matter. I carefully read through the applicant's founding affidavit. In this regard I was mindful that generally speaking, in application proceedings, the applicant's case stands or falls on the founding affidavit. In the case of *Yunus Ahmed* v *Docking Station Safaris Private Ltd t/a CC Sales* SC70/18, BHUNU JA, stated at p 3 of the cyclostyled judgment:

> "It is trite that an application stands or falls on its founding affidavit (see *Fuyana* v *Moyo* SC 54/06, *Muchini* v *Adams & Ors* SC47/13 and *Austerlands (Pvt) Ltd* v *Trade Investment Bank Ltd & Ors* SC 80/06. In cases where the headings on the cover of an application tell one thing and the contents of the founding affidavit tell another, the nature of the application that is before the court is determined by the contents of the founding affidavit and not the headings on the corner of the application. This was aptly captured by GOWORA JA in *Zimbabwe Posts (Pvt) Ltd* v *Communication and Allied Services Union* SC 20/16 as following:
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> 1. The issue that begs an answer is how the court *a quo* should have dealt with the matter given the apparent confusion that had been created by the appellant in settling its papers. An application must be disposed of on the basis of the founding affidavit."

In casu, the applicant filed a replying affidavit with leave which I granted. The replying affidavit is not intended to supplement the founding affidavit. This position was reiterated in the case of *Alfred Muchini* v *Elizabeth Mary Adams and 4 others* SC 47/13 wherein ZIYAMBI JA stated at p 4 of the cyclostyled judgment:

> "It is trite that an application stands or falls on the averments made in the founding affidavit. See Herbstein and VanWinsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed p 80 where the authors state:
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> The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged therein, and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the applications is the allegation of facts stated therein because these are the facts which the respondents is called upon to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out."

It must follow that it is in the founding affidavit that the applicant makes its case. As far as the replying affidavit is concerned, it is relevant to the extent that it relates to answering facts arising from the opposing affidavit and only where the act being answered arose in the founding affidavit.

I therefore consider whether or not the applicant proved that it was in peaceful and undisturbed possession of the four stands. The applicant who alleges being in peaceful and undisturbed possession of an immovable property should clearly plead and provide evidence which establish as the possession and its peacefulness. It would be necessary to plead *inter-alia* the date of taking possession of the property and the nature of the possession. The applicant's founding affidavit fell short of that. In para 1.9 of the founding affidavit the applicant pleaded the law on spoliation which manner of pleading is not permitted because a party should not plead the law but facts.

In the next paragraphs the applicant then averred that on 28 August 2017, the first respondent's builder named Nqobanizitha Ndlovu invaded the property namely stand 616. The applicant stated as follows in para 1

> "1.10 On the 28th of August, 2017, the first respondent's builder by the name of Nqobanizitha Ndlovu appeared on Stand 616 invaded the property, dug a well, detached the applicants cabins and dug a foundation with other illegal male occupants who to date have refused to identify themselves or produce any documentation to identify themselves. The applicant took a picture to aid its allegations hereto marked as Annexure "B".
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> 1.11 On the same date the second respondent by the help of other illegal male occupants who to date have refused to identify themselves dug a foundation for the placing of his durawall on stand 97a and 976 and the third respondent (sic) dug a well on stand 51(a) of the remainder of lot 12 of Tywald Harare. The applicant took pictures hereto attached as annexure "C" and "D"
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> 1.12 The applicant was forcefully ejected from the property by the first, second and third respondents and its dwellings where (sic) forcefully moved outside the boundaries of the property as shown on Annexure "B".
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> 1.13 Applicant's occupation and possession was peaceful and undisturbed until the unlawful invasion. Applicant's employee in the name of Machanic Chandasara has since been

violently chased away and cautioned to only attempt to remove the first, second and third respondents with a court order.

1.14 Respondents have vowed to continue with this illegal interference and have gone the extra mile to tell the applicant's employee that they are only people with the legal right of occupying and utilizing this place……."

The respondents in the opposing affidavit raised the issue of unsigned affidavits. This was corrected. They also raised the issue of urgency and averred that the application was not urgent because the applicant averred that it required the stands in order to sell them and raise money for their business. I do not agree. The urgency of the matter arose from the alleged conduct of the respondent in despoiling the applicant of possession of the stands. Whether or not the applicant would succeed to get the relief of spoliation is a different matter. The applicant also attacked the supporting affidavit of its employee, Macline Chandasarira who deposed to the violent event which allegedly took place on 28 August, 2017 at the stands in question. He stated that he with others whom he did not name were threatened with physical assault and that applicants cabins where there were tools and other items were taken off the stands and removed to a place outside the stands. It was abundantly clear that the applicant related to events involving destruction of property and threats to life and limb allegedly perpetrated on its property and employee. I was not persuaded by the respondent's arguments that the application is not urgent. When determining whether or not a matter is urgent, the court does not cherry pick one point as was done by the respondents. The court must read the complete application and ask itself whether the whole scenario revealed by the papers qualifies the matter to merit an urgent hearing. See *Svosve* v *Muchaka & Ors HH* 405/19*; Chidawu & 3 Ors* v *Sha +4 Ors SC* 12/13.

The respondent also cited the non-joinder of interested parties namely the Martin Sibindi Family Trust which is the registered owner of the stands and Afritage Land Developers (Pvt) Ltd. The respondent properly noted that the applicant had mentioned the two parties in the founding affidavit and should have explained why they were then not cited. The reason for joinder is that a court is loathe to issue an order which affects another person who is not before the court without affording that affected person the chance to be heard. Either of the parties can apply for a joinder of another party. The court can also make an order for joinder of any party which it considers that it may be affected by its order. Significantly though, the court will decide the matter as against the parties before it and grant an order where appropriate, which does not affect another party who is not before the court. *In casu*, the nature of the relief sought

by the applicant can be determined without the joinder of the two parties referred to by the respondents. This is so because the court only needs to determine who was in possession of the stands, whether the respondent despoiled the applicants, these issues being matters of fact. I therefore determined that the non-joinder of the parties referred to by the respondents was of no consequence to the determination of the application.

In relation to the important consideration of whether or not the applicant was in peaceful and undisturbed possession of the stands in issue, the respondents averred that it was not clear from the founding affidavit how the applicant was in peaceful and undisturbed possession of the property. They averred that the applicant was never in possession of the stands. The respondents attached a copy of a letter dated 9 December, 2016 wherein Martin Sibindi Trust through its legal practitioners cancelled the agreement between it and the applicants. The agreement is the one on which the applicant relied for taking occupation of the stands. Although the legality of possession of the stands by the party claiming spoliation is not a determinant of whether a spoliation order is granted, the disputed possession nevertheless has a bearing on whether the possession of the stands was peaceful in the light of the disputed rights of possession.

The applicant cursorily dealt with the key issue of the need to establish peaceful and undisturbed possession of the stands. It was necessary for the applicants not just to plead the basis of their entitlement to the stands but to plead how and when the applicant took possession. It was also necessary to plead the nature of the possession. To simply state as the applicant did in para1-13 of the founding affidavit that the applicant's possession was peaceful and undisturbed until the unlawful invasion was not sufficient to prove factual possession because its form was not pleaded. The applicants attached pictures of the stands. Very little if anything can be discerned from the pictures as evidence of spoliation. A photograph needs to be explained because without an explanation the court can only note what is sees. In the photographs there is a dug foundation and some bricks and what appears to be a durawall with broken or unfinished walling. This is what annexure B depicts and it is said to relate to stand 61B. It occurs to me that there is little which the photographs assisted with in establishing peaceful possession of the property by the applicant. Since possession is a fact to be established by the applicant on a balance of probabilities, I am not satisfied that the applicant established possession of the stands concerned. It becomes unnecessary to consider the nature of the possession, that is whether it was peaceful or not.

Having determined that the applicant failed to prove or establish that it was in possession of the stands in issue, the matter must end there. It becomes unnecessary to consider whether the respondents despoiled the applicant of possession since possession needs to be proved first before the issue of loss of that possession can be considered. Assuming that I am wrong in my determination that the applicant failed to discharge the onus to establish possession on the balance of probabilities and it becomes necessary to determine whether the respondents were despoiled, I would still found on the balance of probabilities that the applicant did not prove that the respondents despoiled it. A party that pleads forced dispossession by another party must set out the details of the spoliation. This is a matter of fact. The applicant cursorily glossed over the details of the alleged acts of spoliation. In the founding affidavit, the applicant in para(s) 1-15 and 1-17 simply alleged a spoliation by the respondent on 28 August, 2017 without going into details thereof. The act of spoliation should be described in detail as it occurred and the conduct or actions of each spoliator set out. One way of looking at the requirement to link the conduct of alleged spoliator to the spoliation is to ask the question, "what did the spoliator do in carrying the commission of the spoliation?" in the listed para(s) the applicant simply alleged that the first, second and third respondent unlawfully deprived the applicant of possession and that the law did not allow the taking of possession of the stands without the consent of the applicant. The supporting affidavit of Macline Chandakasarira lacks detail of how the alleged spoliation was committed and thus it is unhelpful to the applicant's cause.

The applicant also averred in para 1:19 that its employees were being denied access into the stands. The applicant averred that the respondents were digging wells, building durawalls and digging foundations without approved plans. It is not clear whether these actions were committed on the date of spoliation. The first and second respondents averred that they purchased the stands from Afritage Land Developers and took occupation of the stands. It appeared to me that there is a dispute concerning the stands between the applicant and Afritage Land Developers (Pvt) Ltd whom the applicant as averred by it subcontracted to carry out works contracted to the applicant by Martin Sibindi Trust, the registered owner of the land on which the stands in dispute sit. The applicant sought to introduce new evidence of details of the alleged spoliation in the answering affidavit which is not permitted since the case must be made out in the founding affidavit. The totality of established facts and circumstances of the history of the occupancy or possession of the stands by the applicant are not clear. It seems that

there is a wrangle between the applicant and Afritage Land Developers (Pvt) Ltd and the applicant seeks to gain advantage or a leverage over the other party by invoking the spoliation remedy in an ongoing dispute.

In respect of costs, the general rule is that the award of cost is in the discretion of the court. The approach of the court was set out by authors Herbstein and Van Hussein in their book *The Civil Practice of the High Court and the Supreme Court of Appeal of South African, 5th Ed.: Volume 2* p 954 as follows:-

> "The award of costs is a matter wholly within the discretion of the court, but this is a judicial discretion and must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at…. The law contemplated that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such orders as to costs as would be fair and just between the parties"… Even the general rule, viz that costs follow the event is subject to the overriding principle that the court has a discretion in awarding costs."

In casu, the applicant was its own worst enemy. It was coy with facts and did not go into specific detail in relation to how it claims to be in possession of the property and how the alleged spoliation unfolded. Under the circumstances were it a trial cause, the applicant's case would have qualified for absolution from the instance. *In casu,* there is insufficiency of evidence and a failure to establish the factors which are necessary to prove a spoliation cause on a balance of probabilities. I do not find any cogent reason to depart from the general rule that costs follow the event. The following order ensues.

IT IS ORDERED THAT:

1. The application be and it is hereby dismissed with costs

Lawman Chamunorwa Attorneys at Law, applicant's legal practitioners
Takawira Law Chambers, first and second respondent's legal practitioners