PICKGLOW TRADING (PRIVATE) LIMITED

versus

COUNTRY PETROLIUM (PRIVATE) LIMITED

t/a GLOW PETROLIUM

and

BELINDA MUSARIRI

and

BARBRA MUSARIRI

and

SASHA MUSARIRI

HIGH COURT OF ZIMBABWE

BHUNU J

HARARE, 23 April 2012 & 27 June 2012

 *A Makoni,* for the applicant

*R.* *Tsvaki*, for the respondent

**Urgent Chamber Application**

BHUNU J: The applicant leased Highway Service Station in Macheke to the first respondent on 1 February 2012. The lease has a life span of 12 months. The applicant paid the agreed rentals for the full 12 months period in the sum of US$7 200.00.

Apart from occupying the Service station for the purpose of conducting the business of selling fuel and lubricants as stipulated in the written lease agreement, the applicant also took occupation of the shops situate at the same premises comprising, a takeaway shop, tuck-shop and a bottle store.

A dispute has now arisen as to whether or not the applicants are entitled to occupy the shops. It is clear that the written lease agreement is limited to the service station it does not extent to the shops. The applicant however alleges that there was a subsequent verbal agreement on or about the 10th of February 2012 in terms of which the respondents agreed to lease the shops in question on condition the applicants paid outstanding electricity bills in the sum of US$5000.00. The applicant alleges that it has since made substantial payments in this respect including reconnection fees.

The applicant’s complaint is that on 6 April the second, third and fourth applicants initially attempted to evict them without success as police declined to assist them correctly pointing out that this was a civil dispute that had nothing to do with the police. Thereafter and on the same date, the respondents took the law into their own hands and unlawfully evicted the applicants from the shops without any court order.

In opposing the application the respondents correctly point out that the written lease is limited to the service station it does not extent to the shops. They deny having entered into the verbal agreement as alleged by the applicant. They went onto allege that the relief sought by the applicant is no longer available as the premises are now occupied by one Pauline Bere in term of a lawful lease agreement concluded on 6 April 2012.

In this case there is no clear evidence that prior to the alleged spoliation the applicant was in lawful, peaceful and undisturbed occupation of the premises in question. Counsel for the applicant however sought to rely on the case of *Bok Estates (Pvt) Ltd* v *Masara and Ors* 2009 (2) ZLR 466 at 469 where BERE J remarked that:

“It has been held that spoliation is a remedy available even to a thief... By parity of reasoning, a former farm owner who opts to illegally continue squatting on acquired land is entitled to this remedy. It would be sanctioning illegality if the court was to make an order that would ratify the unlawful conduct of the first and second respondents (who have used force to evict the applicant).”

With respect the above judgment ignores the fact that by allowing the unlawful land occupier to remain in unlawful occupation of the land the court was perpetuating an illegality at the expense of the lawful land occupier. It is therefore not surprising that this judgment has since been overturned by the Supreme Court in the leading case of *Commercial Farmers union and 9 Ors* v *The Minister Of Lands and Rural Resettlement and 6 Ors* SC 31 / 10.

What concerns the Court more than anything else is that Pauline Bere who is said to have taken occupation of the disputed premises since 6 April 2012 has not been cited. On 16 April 2012 I directed that Pauline Bere be joined to these proceedings. None of the feuding parties have been able to join her to these proceedings.

Pauline Bere as the new occupier whether rightly or wrongly is entitled to be heard before any order affecting her rights can be made against her. This is not possible without her being a party to the proceedings. That being the case the application cannot succeed.

It is accordingly ordered that the application be and is hereby dismissed with costs.

*Mbidzo Muchadehama and Makoni, a*pplicant’s legal practitioners

*Chinyama & Partners,* the respondents’ legal practitioners