TRUSTEES OF THE S.O.S. CHILDREN'S VILLAGE ASSOCIATION OF ZIMBABWE
versus
BINDURA UNIVERSITY
and
MINISTER OF STATE, MASHONALAND CENTRAL
and
MINISTER OF LANDS AND RURAL DEVELOPMENT
and
THE ATTORNEY – GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 20 June 2014 and 10 July 2014

Urgent chamber application - spoliation

I. Mureriwa, for the applicant
I. Ndudzo, for the first respondent
H. Magadure, for the third & fourth respondents
Second respondent in person

MAFUSIRE J: On 13 June 2014 the applicant filed an urgent chamber application for an order of spoliation. The order was sought in respect of a farm called Glen Avilin Estate (hereafter referred to as "***the farm***"). What triggered the application were the events that had occurred on the farm on 12 June 2014. Applicant's version of events was set out in its founding papers. Except for the fourth respondent, all the others filed opposing affidavits. I heard the application on 20 June 2014. I dismissed it with costs for lack of merit. The applicant has now sought written reasons for my decision.

The facts presented by the applicant in its founding papers were these. It is a private voluntary organisation. It looks after thousands of orphans and other vulnerable children. For its operations, it used to rely mainly on donor support. However, that support had dwindled. It now relied increasingly on farming and other income generating activities being carried out on the farm. Applicant had been on the farm since 1983. However, on 12 June 2014, officials of respondents 1, 2 and 3 called applicant's director, one Gary Birditt (hereafter referred to as "***Mr Birditt***") to come to the farm. He came in the company of applicant's counsel, Mr *Mureriwa*.

According to Mr Birditt it was apparent the respondents were planning a major event. There were too many government officials. Armed personnel were also present. A shed had been erected. Chairs and tables had been arranged. On enquiry, Mr Birditt had been advised that the farm had been allocated by government to the first respondent in terms of an offer letter. The planned event was to officially hand over the farm to the first respondent.

Mr Birditt and Mr *Mureriwa* had protested. They said the intended takeover would be illegal. However, the respondents had remained resolute. The ceremony would proceed. Mr Birditt and the lawyer had left. On the following day the application had been filed. The order of spoliation was being sought on the basis that at all relevant times the applicant had been in peaceful and undisturbed possession of the farm but that on 12 June 2014 the respondents had forcibly taken it over, leaving the applicant's employees and students on vocational training hopelessly wandering about. It was also alleged that the applicant's operations had ceased owing to the takeover.

In their opposing affidavits the respondents strenuously denied that they had despoiled the applicant. They maintained that the events of 12 June 2014 had merely been a once-off ceremony for the purpose of handing over the ownership of the farm to the first respondent symbolically. Mr Birditt had been invited to the ceremony. He had come with his lawyer. However, both had left before the proceedings had even started.

The respondents said it had been a peaceful ceremony. No force had been used or shown. Everybody had left after the proceedings had been concluded. The temporary shelter had been dismantled.

The respondents said the farm had been compulsorily acquired by government way back in May 2002 in terms of the land reform programme. Over the years it had become derelict due to neglect. Applicant's donors had dwindled. The farm had become prone to illegal land invaders from the surrounding villages. On 10 February 2014 government had officially allocated the farm to the first respondent. However, neither government nor the first respondent had yet taken occupation. It was said an application to evict the applicant from the farm was pending. But guards had been posted to the farm for security. They had been deployed in February 2014. The applicant had raised no issue over the presence of the guards. They interfered with no one.

At the hearing more facts came to light. The applicant conceded the presence of the respondents' security guards on the farm since February 2014. It said at any given time there would be two guards around. Applicant also conceded that other than the security guards

none of the respondents' officials had remained on the farm. During submissions Mr *Mureriwa* said the application for spoliation was in fact predicated on the presence of those guards.

Before argument on the merits the respondents raised some points *in limine*. The first was that the matter was not urgent because a similar application had been made in 2011 and that it had been dismissed. The second point was that the matter had become *res judicata* by virtue of that previous application. However, I dismissed both points. It was conceded that the application in 2011 had been in respect of a different farm altogether even though their circumstances seemed the same. With particular regard to the question of urgency I dismissed it because the first respondent had expressly conceded that a spoliation application is generally urgent by its very nature. Furthermore, the application was predicated on the events of 12 June 2014. If the conduct of the respondents complained of amounted to spoliation then there would be no question that the matter was urgent.

The third point *in limine* was that Mr *Mureriwa* should be disqualified from representing the applicant. He had been present at the scene. He had witnessed the events. According to the respondents' submissions, it was Mr *Mureriwa* himself who had in fact engineered the dispute. On top of that he had filed a supporting affidavit to the proceedings. He had become so intimately involved in the affairs of his client that his impartiality and sense of judgment had become compromised. Reference was made to the case of *Core Mining and Minerals Resources (Pvt) Ltd* v *Zimbabwe Mining Development Corporation and Ors* 2011 (1) ZLR 22 (H). Therein the court had disbarred counsel for some of the respondents from representing them at the hearing. He had had extensive and intimate dealings on behalf of those respondents and had aligned himself so closely with their affairs. On top of that those respondents' affidavit had been commissioned by his firm.

I dismissed the respondents' third point *in limine*. It was common cause that Mr *Mureriwa* had questioned and challenged the respondents' presence on the applicant's farm on the day in question. He had filed an affidavit supporting Mr Birditt's version of events. Mr Birditt's affidavit had touched on the nature and extent of Mr *Mureriwa's* involvement.

However, I took the view that Mr *Mureriwa's* nature and extent of involvement in the applicant's affairs on 12 June 2014 was in no way comparable to that of counsel in *Core Mining and Mineral Resources*. In my view, there is no rule of thumb that says a lawyer is automatically disbarred from representing his client in court proceedings where he was a witness to the events that subsequently form the subject matter of those proceedings, or

where he has filed an affidavit confirming his involvement and supporting his client's version of events. Every case must depend on its own set of circumstances. Nonetheless, and in my view, a lawyer who finds himself in Mr *Mureriwa's* situation must consider seriously the wisdom of wearing the two hats; that of being counsel for the client and that of being a witness for the client. In my view, it would be more prudent to let someone else conduct the court proceedings where the lawyer has been seriously involved in the affairs of the client giving rise to the litigation. This is so to avoid a conflict situation. The lawyer should at all times avoid clouding his sense of judgment.

In this matter, it is my earnest view that the precipitous manner in which Mr *Mureriwa* brought these proceedings betrayed the invidious position of his situation. On the merits it seemed true that his sense of judgment had somewhat been impaired. He had challenged the presence of the respondents' representatives on the farm on the day in question. The farm is somewhere in Shamva, some 10 km away from Bindura. On being fobbed off by the respondents' representatives Mr *Mureriwa* had rushed back to his offices in Harare, more than 80 km away. By the following day the urgent chamber application was all ready and complete. It was filed on 13 June 2014.

In my view the application was completely devoid of merit. No wonder during the proceedings the applicant shifted ground and sought to rely on facts that had not formed part of the application. It sought to rely on the presence of the security guards on the farm to found an act of spoliation.

The remedy of spoliation or *mandament van spolie* is designed to restore at once possession that has been deprived unlawfully: see SILBERBERG AND SCHOEMAN'S *The Law of Property*, 5th ed, para 13.2.1.2 at p 288. See also *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-operative & Ors* 1999 (2) ZLR 19 (SC). The applicant must show that he was in peaceful and undisturbed possession of the thing and that he was unlawfully deprived of such possession: *Kama Construction (Pvt) Ltd*, *supra*, and *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S), at p 79D – F.

Spoliation is a quick remedy. Its rationale is to prevent anarchy in society: see *Muller* v *Muller* 1915 TPD 29, at p 31. People must not resort to self-help each time they want to recover things they feel belong to them and which may be in the possession of another. In

Shoprite Checkers Ltd v *Pangbourne Properties Ltd* 1994 (1) SA 616 (W)], the rationale was expressed this way[1]:

> "All of this of course is based upon the fundamental principle that no man is allowed to take the law into his own hands and that no one is permitted to dispossess another forcibly or wrongfully and against his consent 'of the possession of property, whether movable or immovable' and that if he does so 'the Court will summarily restore the *status quo ante* and will do that as a preliminary to any enquiry or investigation into the merits of the dispute.'"

Spoliation is aimed only at the recovery of lost possession. It does not lie where there has been a mere disturbance of possession or a threat that possession will be disturbed; SILBERBERG AND SCHOEMAN, *supra*, para 13.2.2 at p 308. It implies a deprivation and not a mere disturbance of possession; para 13.2.1.3 (b) at p 295. See also *Van Rooyen en 'n Ander* v *Burger* 1960 (4) SA 356 (O), at p 363B – F.

I am alive to the fact that an illicit dispossession of a right, whether corporeal or incorporeal, can be protected by an order *mandament van spolie*: *Kama Construction (Pvt) Ltd*, *supra*, at p 22. What is protected is the quasi-possession of a movable or immovable incorporeal. Thus in *Sebastian & Ors* v *Malelane Irrigation Board* 1950 (2) SA 690 (T) a spoliation order was granted for the unlawful interruption of water supplies. In *Naidoo* v *Moodley* 1982 (4) SA (T) a spoliation order was granted for the interruption of the flow of electricity. In *Beukes* v *Crous* 1975 (4) SA 215 (NC) and *Bon Quelle (Edms) Bpk* v *Munisipaliteit van Otavi* 1989 (1) SA 508 (A) orders were granted to restore the right of passage, i.e. a servitude. In *Tigon Ltd* v *Bestyet Investments (Pty) Ltd* 2001 (4) SA 634 (N) an order was granted restoring the name of a shareholder of a company back in the share register where such name had been removed unilaterally. Finally, in the case of *Xsimet (Pty) Ltd* v *Telkom SA Ltd* 2002 (3) SA 629 (C) an order was granted to restore the applicant's telephone connectivity and bandwidth system that the respondent, the service provider, had unlawfully terminated.

In casu the applicant was neither despoiled of the physical possession of the farm nor deprived of its right of possession of it. The once-off and brief presence of the respondents on the farm on 12 June 2014 was to handover to the first respondent symbolically the ownership, not possession, of the farm. Applicant's physical or mental possession of the farm was not taken away. Applicant was still on the farm. On a balance of probabilities I chose to believe the respondents' version of events. Once the symbolical handover was over the respondents

[1] At p 619H, per ZULMAN J

had left. At worst, the ceremony was a **disturbance** of possession rather than a **deprivation** of it. Spoliation is not available in such circumstances.

Whether the applicant could interdict the respondents from coming onto the farm before they had done so is besides the point. The event was over and done with by the time the applicant brought its application. There was no longer anything to interdict. But as it prepared its papers for the order of spoliation, it seems the applicant was somewhat confused on the choice of remedy. After laying out the foundation for a spoliation order it also went on to lay out some foundation for an interdict. Among other things, the applicant alleged a *prima facie* right. It alleged an actual harm suffered; the absence of no other effective remedy; the balance of convenience being in its favour and the fear of an irreparable harm. All these are factors for an interlocutory interdict. In the result the applicant sought a provisional order the draft of which was clearly a hybrid. The final order sought an interdict. The provisional order sought an order of spoliation.

In my view, the applicant's approach was defective. An order of spoliation is a final order. It does not have an interlocutory nature: see *Mankowitz* v *Loewenthal* 1982 (3) SA 758, at p 767F - H. The two elements of spoliation, namely peaceful and undisturbed possession and the act of spoliation, have to be proved on a balance of probabilities. On this point the learned authors SILBERBERG AND SCHOEMAN, *supra*, para 13.2.1.3 at p292 say:

> "These two facts have to be proved on a balance of probabilities: a *prima facie* case will not suffice, the *mandament van spolie* being a final order."

In a footnote, and after citing several case authorities on the point, the learned authors say:

> "Kleyn[2] emphasises this aspect very clearly in his discussion of the *Aussenkehr* case. The *mandament* is a unique remedy that falls within a category of its own and should not be confused with an interdict. The most important difference between the *mandament* and an interdict is that the merits are not considered where the *mandament* is claimed, whereas the merits are extremely important when an interdict is sought in that a clear right has to be established."

It is for the above reasons that I dismissed the application.

[2] KLEYN *1989 DE Jure* 154

Scanlen & Holderness, applicant's legal practitioners
Mutamangira & Associates, first respondent's legal practitioners
Civil Division of the Attorney-General's Office, legal practitioners for the third and fourth respondents