JEREMIAH GWAKU
and
JERRY ENGINEERING (PRIVATE) LIMITED
versus
ADMIRE MAJARI
and
ADIVA MINES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 21 & 25 April and 11 May 2016

**Urgent Chamber Application**

*N. Munhungowarwa* for the applicant
*T. Mudambanuki* for the respondents

ZHOU J: This is an urgent chamber application for a *mandament van spolie*. The precise terms of the relief sought are set out in the draft provisional order as follows:

> "TERMS OF FINAL ORDER SOUGHT
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms: -
>
> 1. That the property removed from the Cold Storage Commission Complex at Kadoma by the 1st respondent on the 31st March 2016 be returned into the possession and control of the 1st applicant.
> 2. That the costs of this application shall be borne by the 1st respondent at an attorney-client scale.
>
> INTERIM RELIEF GRANTED
>
> That pending the finalisation of this matter the applicant is granted the following relief: -
>
> 1. That the 1st respondent be and is hereby ordered to return the property into the possession and control of the 1st applicant at Kadoma Cold Storage Commission Complex upon service of this order.
>
> SERVICE OF ORDER

> That the applicants' legal practitioners be and are hereby given leave to serve a copy of the order on the respondents and/or the respondents' legal practitioners."

The application is opposed by both respondents.

The first applicant is a director of the second applicant. He states in the founding affidavit that the second applicant has been leasing a workshop in Kadoma from the Cold Storage Company since 2008. Sometime in 2012 he invited the first and second respondents to share the workshop with the second applicant. He and the first respondent formed another company by the name Adjerry (Private) Limited in which they were the directors. That company was subsequently dissolved when the two had some problems. After the dissolution of Adjerry (Private) Limited there was a dispute regarding the occupation of the workshop. The Cold Storage Company resolved to award the occupation of the workshop to the first applicant. The first applicant states that he was also awarded the machinery and other equipment which he had purchased from the landlord. The first applicant states that on 30 March 2016 while he was in Zambia he was telephoned that the respondent was in the process of removing some machinery and equipment from the premises. The respondent stopped removing the equipment and machinery that night following the intervention of the police who had been informed by the first applicant of the developments at the workshop. The respondent returned the following day and removed the equipment from the workshop. There was no one to prevent the respondent from removing the equipment and machinery then because the applicants' employees had been arrested by the police following a complaint of assault which had been lodged by the first respondent. The first applicant states that he returned from Zambia on 1 April 2016 but could not locate the property which was removed by the respondents. The list of the equipment and machinery removed was not given by the applicants. Although there is reference to an annexure "B" to the applicants' affidavit, such an annexure was not attached to the affidavit.

The respondents in their opposing affidavit deny that they took possession of property belonging to or from the possession of the applicant. Their case is that they "took and removed second respondent's property from a workshop second respondent had rented from Cold Storage Company at Kadoma". They allege that the applicants had access to and used the same workshop. The applicants and respondents shared the workshop in which the machinery was housed but, according to the respondents, the property removed was in the possession of the respondents. The respondents attached receipts issued by the Cold Storage

Company in respect of rentals as well as electricity and water charges for the workshop in question. The receipts are issued in the name of the second respondent. The respondents also attached receipts to prove their purchase from the Cold Storage Company of certain equipment and machinery, as well as a lease agreement between the second respondent and the Cold Storage Company. According to the respondents the machinery and equipment was always in their possession and not in the possession of the applicants.

In order to obtain the *mandament van spolie* the applicants must prove the following:

1. That they were in peaceful and undisturbed possession of the property; and
2. That they have been unlawfully deprived of such possession.

See *Free Methodist Church of Zimbabwe* v *Dube & Ors* 2012 (1) ZLR 103(H) at 112F-H; *Church of the Province of Central Africa & Ors* v *Jakazi & Ors* 2011 (2) ZLR 231(H) at 239C-D; *Van den Berg & Anor* v *Lang* 2010 (1) ZLR 469(H) at 472G-473D; *Botha & Anor* v *Barrett* 1996 (2) ZLR 73(S) at 79E-F; *Kama Construction (Pvt) Ltd* v *Cold Comfort Farm Co-operative & Others* 1999 (2) ZLR 19(S) at p. 21 F-H.

The applicants have not attached any document to show the property which was in their possession. The applicants stated that most of the property removed by the respondents belonged to them while a few other items belong to the Cold Storage Company. As shown above, no proof has been tendered to substantiate those claims. There is not even an affidavit from representatives of the Cold Storage Company to support the applicants' assertions. The applicants did not in the affidavit lead evidence to suggest that the respondents were not in possession of the property which has been shown by documents to belong to the second respondent. In argument Mr *Munhungowarwa* for the applicants made the submission that this is a case of joint possession of the removed property. That submission is not supported by the averments in the affidavit or by any other evidence for that matter, and is certainly not the basis of the relief which is set out in the founding affidavit.

In view of the above observations, it is clear to me that the applicants failed to prove that they had possession, let alone peaceful and undisturbed possession, of the things which were removed from the workshop by the respondents. The fact that the applicants were not in peaceful and undisturbed possession of the property removed by the respondents is a valid defence to a request for a *mandament van spolie*. See *Kama Construction (Pvt) Ltd* v *Cold Comfort Co-operative & Ors* (*supra*) at p. 21G-H; *Diocese of Harare* v *Church of the Province of Central Africa & Anor* 2008 (1) ZLR 112(H) at 120G-123A. The failure by the

applicants to establish possession of the property removed means that the relief which they are seeking cannot be granted, as the *mandament van spolie* is designed to protect possession.

The respondents invited me to award costs on the legal practitioner and client scale against the applicants. I do not believe that there are special reasons in this matter to warrant the imposition of a punitive order of costs.

In the result, IT IS ORDERED THAT:

1. The application is dismissed.
2. The applicants shall pay the costs jointly and severally the one paying the other to be absolved.

*Mwonzora & Associates*, applicants' legal practitioners
*Jarvis Palframan*, respondents' legal practitioners