HERBERT MUTASA
versus
STANLEY MTETWA
and
NATSAI BVIRAKURE

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 24 January 2018 & 28 March 2018

Urgent Chamber Application

R. Moyo, for the applicant
W. Chinhamora, for the respondents

NDEWERE J: On 19 January, 2018, the applicant filed what he termed an "Urgent Chamber Application for a Spoliation Order and Interdict" against the first and second respondents.

The background facts were that the applicant bought a property which was previously occupied by the first and second respondents by agreement with the previous owner, Tufnell (Pvt) Ltd. The applicant obtained title to the premises on 17 March, 2017.

In his founding affidavit, the applicant said he visited the property for purposes of inspection and he met one Stewart Bumhira at the premises and he later engaged the said Bumhira as his gardener. He said Bumhira used to be the respondents' gardener.

He said he showed Bumhira proof that he was the new owner of the property, also known as No. 6 Ryehill Close, Greystone Park, Harare and advised him that he would commence work at the premises and that he would take action to recover the two rooms which the first and second respondents had left filled with their property.

Thereafter, the applicant filed a *rei vindicatio* against the respondents in HC 3622/17. The applicant said he then asked Bumhira to stay on at the property and look after it. Thereafter, he delivered building materials to the premises, namely aluminium windows, door frames and cement.

Then on 4 January, 2018, the respondents helped themselves to applicant's cement and used it to do some flooring without the applicant's authority. He reported the incident to

Borrowdale Police Station and the respondents replaced the cement they had taken that very day.

The applicant then alleged that on 15 January, 2018, the respondents forcibly removed his gardener, Mr Bumhira from the premises and by so doing, they committed an act of spoliation and he was seeking the restoration of his possession and all those claiming through him on an urgent basis.

The first and second respondents opposed the application. They said the application was not urgent and that it was a repeat of the application filed by Stewart Bumhira himself on 5 January, 2018 where urgency was declined. The respondents attached the 5 January, 2018 application as an annexure. They also raised additional points *in limine* about the certificate of urgency and the point that no proper application for spoliation was before the court.

On the issue of urgency, it was clear from the facts that the applicant was relying on the treatment of Stewart Bumhira, the gardener, by the respondents. That created challenges for him. Firstly, according to Stewart Bumhira himself in his founding affidavit in HC 99/18, he was in peaceful possession of a spare bedroom in the main house and a wooden cottage until 4 January, 2018. The respondents then demanded that he vacates the premises on 4 January, 2018 and they escorted him out of the premises and out of fear, he left.

On 19 January, 2018, the same Stewart Bumhira deposed to a supporting affidavit wherein he stated that "until the 15th of January, 2018," he was resident at No. 6 Ryehill Close, Greystone, Park. How could he have been a resident of that place up to 15 January, 2018, when in earlier proceedings he stated that on 4 January, 2018, he was forced to vacate the premises? He corrected himself in the paragraphs which followed and confirmed that he left the premises by force on 4 January, 2018, but returned on 15 January, 2018, because his goods were still at the premises. On 15 January, 2018 he said he was assaulted, his goods were thrown outside and the gates were locked to prevent his entry. So he failed to enter the premises on 15 January, 2018. This means he was in occupation of the premises till 4 January, 2018. He failed to enter the premises thereafter.

It is trite law that utmost good faith is required of an applicant in an urgent application. The moment there are contradicting facts, the privilege of being heard on an urgent basis is denied. There is a contradiction between the applicant's founding affidavit and the supporting affidavit of Stewart Bumhira. The applicant said Stewart was despoiled on 15 January, 2018, while Stewart himself said he was despoiled on 4 January, 2018. The date was critical in determining when the need to act arose in order to determine the issue of urgency.

During oral submissions, the applicant's counsel denied Stewart's position and maintained that his instructions were that Stewart remained on the premises till 15 January, 2018, when Stewart's own affidavit stated otherwise. If the applicant's facts are contradictory, how can he obtain urgent relief?

Secondly, still on the issue of urgency the respondents took issue with the Certificate of Urgency. It was observed that the Certificate of Urgency in the present application was a duplication of the one in HC 99/18, save for citing a different legal practitioner. When this is considered jointly with the contradiction between the applicant and Stewart about when Stewart was despoiled, the inescapable conclusion is that the legal practitioner did not apply her mind to the case before issuing the certificate. In my view, the criticism of the Certificate of Urgency by the respondents has merit.

The 2nd point *in limine* raised by the respondents was that there was no proper application for spoliation before the court.

Indeed there was nothing in the applicant's founding affidavit which indicated that he was despoiled. It is common cause that he bought the property and obtained title for it. But nowhere in his affidavit did he state when he took occupation of the property. In para 8 he said:

"At the time I took transfer, I visited the property for purposes of inspecting same."

In para 9 he said he showed the gardener proof that he was the new owner and "was about to commence work at the premises 'and that I would be taking action to recover the two rooms that the previous occupier had left filled with his property."

In para 10 he said that he filed a *rei vindicatio* in HC 3622/17.

In para 12 he advised that he delivered building materials to the premises.

Nowhere in all the above paragraphs does he tell the court that he took occupation of the premises.

Then in para 21 he suddenly advised that he had been in 'undisturbed possession of his property,' except for the two rooms occupied by the respondents' goods." How could his possession, if it ever was there, be 'undisturbed' when the respondents not only kept their goods at his premises but also occasionally visited the premises, as borne out by para 12 and 14 of his affidavit and did as they pleased? Even Stewart Bumhira's two affidavits show that the respondents were in occupation of the property. Their goods were locked in the two rooms and they were on the property on several occasions.

(a) They were there when they took applicant's cement and used it.

(b) They were there on 4 January, 2018, and they led him out of the property.

(c) They were also there on 15 January, 2018 and they denied Stewart Bumhira entry

So the applicant cannot claim to ever have had 'peaceful and undisturbed possession.'

The respondents denied ever having committed an act of despoliation towards the applicant. They admitted being involved with Stewart Bumhira, their former gardener whom they said worked for them till they fired him on 4 January, 2018. They disputed that the applicant employed Stewart Bumhira. So the basis which the applicant sought to use for spoliation, that Bumhira was his gardener and that he was despoiled is a disputed factor which he cannot rely on until he satisfactorily proves through *viva voce* evidence, that the said Bumhira was indeed his gardener before 4 January, 2018.

The applicant could have joined Stewart Bumhira as his co-applicant in Stewart's application in HC 99/18 but he chose not to do so. In the absence of proof of Stewart's employment by the applicant and in the absence of a joinder the applicant has no legal basis to rely on acts perpetrated upon Stewart as a basis for his interdict application. Stewart Bumhira is an adult and no Power of Attorney or other authority was revealed to the court to grant the applicant the necessary *locus standi* to proceed against the respondents on Stewart Bumhira'a behalf. The respondents' point *in limine* that the application is not properly before the court is therefore found to have merit.

The third point *in limine* raised by the respondents was that the applicant has already instituted a *rei vindicatio* in HC 3622/17 and instead of waiting for the court action to be finalised the applicant is trying to sneak in the same issue as an urgent chamber application when it is not. The respondents said the applicant, by filing the urgent chamber application, was actually contradicting his case in the *rei vindicatio*. In the rei vindication, the cause of action was that the respondents were in possession of the property and they were depriving him of possession while he was the owner, therefore he wanted them ejected. How then does he come to the same court and argue that he was in possession and the respondents despoiled him and he wants restoration of the status *quo ante*? The respondents accused the applicant of not being candid with the court, thus breaching the rule of utmost good faith. In the case of *Leadertrack (Pvt) Ltd* v *Smith* HC 131/2003, it was held that a litigant should not base his claim on false or incomplete information. In the present case, the applicant did not fully advise the court of the circumstances surrounding the application. The respondent had to attach the first

application, HC 99/18, in order to clarify the circumstances to the court. Hence the principle of utmost good faith was violated.

In view of the factors outlined above, I am of the view that all the three points in *limine* raised by the respondents are valid. It is therefore ordered as follows:

1. The application not being urgent, is struck off the roll of urgent applications.
2. The applicant shall pay the costs of suit on an attorney and legal practitioner scale.

Gill Godlonton & Gerrans, applicant's legal practitioners
Thompson Stevenson & Associates, respondent's legal practitioners