CROWHILL FARM (PRIVATE) LIMITED
versus
FLORENCE PAMBUKANI (nee BEHANE)
and
FELIX PAMBUKANI

HIGH COURT OF ZIMBABWE
CHINAMORA J
HARARE 26 March 2021 and 15 November 2021

Opposed application for an interim interdict

Mr T Tanyanyiwa, for the applicant
Mr J Koto, for the respondents

CHINAMORA J:

Background facts:

The applicant is a company incorporated according to the laws of Zimbabwe and owns pieces of land known as Chirika Extension of Borrowdale Estate, measuring 121,4029 hectares and Lot J of Borrowdale Estate measuring 724,0475 hectares, which are under Crowhill Estate and held under Deed of Transfer No. 1214 of 1986. The respondents are husband and wife occupying a piece of immovable property on Crowhill Estate, namely, an undivided 0,0298%, being share number 702 in Lot J of Borrowdale Estate, measuring 724,0475 hectares.

On 10 March 2021, the applicant filed this urgent chamber application complaining that on 19 February 2021, the respondents in the company of some unknown persons unlawfully occupied the applicant's land in Crowhill Estate. The applicant further alleges its guards, builders and caretakers were chased away, and that the respondents soon began digging shafts and grading roads, as well as fencing the area. According to the applicant, the respondents also took occupation of the applicant's site office, and made demands for development fees from respondents. Additionally, the applicant submitted that, prior to the actions of the respondent, it enjoyed

peaceful and undisturbed possession of the said land. Finally, the applicant argued that the respondents had no right to disturb the applicant's occupation.

Owing to the said actions of the respondents and their employees or agents, the applicant made a report at Borrowdale Police Station. The applicant asserted that until 19 February 2021, it was in peaceful and undisturbed possession of the property which the respondents forcibly took from it without its consent. To prove that it has a right to occupy the property in question, the applicant attached to its application Deed of Transfer No. 1214/86. Furthermore, in order to demonstrate its occupation of the property until the actions of the respondents, the applicant attached to its application orders previously issued by this court. Firstly, there is an order issued under HC 7674/14 by Justice Chigumba on 29 October 2014, which confirms that possession of all stands under Crowhill Estates was to be restored to the applicant. Secondly, there is an order granted by Justice Bhunu under HC 7674/14 confirming that the applicant is the sole and lawful owner of the property known as Chirika Estate measuring 121,4029 hectares and Lot J of Borrowdale measuring 724,0475 hectares held under Deed of Transfer No. 1214/86. I will return to this issue when I comment on the order issued by Justice Chitapi in the judgment, HH 406-20. Thirdly, in HC 8487/17, Justice Muremba dealt with a dispute between the applicant and Mrs Pambukani, where the learned judge granted a spoliation order against Mrs Pambukani. Finally, in HC 10100/18, the application by Mrs Pambukani seeking a stay of the writ of eviction issued under HC 8487/17 was stuck off the roll by Justice Manzunzu. The applicant was aggrieved by the actions complained of and approached this court on an urgent basis.

Relief sought by the applicant

The applicant sought an interim order in the following terms:

> "**INTERIM ORDER GRANTED:**
> Pending the return day, it is hereby ordered that:
>
> 1. The respondents or any of their agents and/or employees, or anyone acting on their behalf are ordered to restore possession of the land and stands they are currently occupying in Crowhill Estate, which is not an undivided 0,00298%, being share number 702 in a certain piece of land in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, to the applicant or any of its agents and/or employees, or anyone acting on its behalf, immediately upon service of this provisional order, failing which the Sheriff of Zimbabwe be and is hereby directed forthwith to eject the respondents or any of their agents and/or employees, or anyone acting on their behalf, from occupation thereon and restore occupation to the applicant or any of its agents and/or employees or anyone acting on its behalf.

2. The respondents or any of their agents and/or employees, or anyone acting on their behalf are ordered to cease operations and remove all of their equipment, materials and/or weapons on the land and/or stands they are currently occupying in Crowhill Estate, which are not an undivided 0,00298%, being share number 702 in a certain piece of land in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, immediately upon service of this provisional order, failing which the Sheriff of Zimbabwe be and is hereby directed forthwith to remove the said equipment, materials and or weapons.
3. The respondents are restricted to occupy only an undivided 0,00298%, being share number 702 in a certain piece of land in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares.
4. The respondents may only enjoy the rights of usufruct enjoyed the general public in Crowhill Estate".

The application was opposed by the respondents, who filed an affidavit raising some points *in limine* in addition to addressing the merits. They submitted that the application was defective for failure to use Form 29 (appropriately modified) as required by the High Court Rules. They added that, in particular, the form used did not advise interested parties of the rights or specify when the respondents were expected to respond. Besides, the respondents averred that the application was afflicted by a material non-disclosure of facts. It was alleged that the applicant did not disclose to the court that the respondents had been in lawful and peaceful occupation of the property in question since August 2020. They said that this occupation was pursuant to an order granted under HC 3469/20 for leave to execute pending appeal. In addition, the respondents submitted that the applicant had not disclosed that an order granted under HC 2456/18 restrained it from interfering with the respondents' occupation of an undivided 0,00298%, being share number 702 in a certain piece of land in the District of Salisbury called Lot J of Borrowdale Estate. The respondents also argued that they were lawfully in occupation and, consequently, the relief of a spoliation order was untenable. Lastly on preliminary points, the respondents averred that the certificate of urgency was defective in that its author did not apply his mind to the facts he certified as forming the basis of urgency.

In relation to the circumstances of the spoliation, the respondents denied the allegations. They said that on 15 February 2021, the applicant reported a case of trespassing at Borrowdale Police Station under CR 227/02/21 and, on 19 February 2021, their employees denied the charge. Instead, their employees responded that they were in lawful possession. The responded continued that 6 of their employees were taken to court on 20 February 2021, and were granted bail under

CRB 2214-19/21. The respondents attached the bail receipts for those employees. In addition, the respondents assert that they own 0.0298%, being share number 702 in a piece of land known as Lot J of Borrowdale, measuring 724,0475 hectares. They confirm this in paragraphs 13 and 14 of their opposing affidavit.

Regarding the act of spoliation alleged by the applicants, the respondents averred that the applicant's employees fled when the police from Borrowdale Police Station tried to arrest them for contempt of court for flouting the order granted under HC 2546/18. The respondents also alleged that they lawfully sought the eviction of the applicant's guards on 9 March 2021 in the Magistrates Court under MC 123/21. Accordingly, the respondents submitted that that they did not despoil the applicant of possession, but resorted to lawful processes.

In its answering affidavit, the applicant denied that the urgent chamber application was fatally defective, but indicated that it was applying for condonation of the departure from the Rules, in terms of Rules 4C of the old Rules, if the court decided that a wrong form had been used. Additionally, the applicant argues that the respondents are entitled to occupy share 702, but have encroached to occupy share 7292 of Crowhill Estates and other adjoining properties of the applicant. As they had occupied an area beyond share 702, the applicant contended that the respondents were not in peaceful and undisturbed possession since August 2020. The applicants attached an affidavit from one Elias Matenha and Isaac Muriwo to corroborate this assertion. The affidavit of Mr Matenha states that the respondents had moved onto share 7293, which they had never occupied since August 2020. Mr Matenha explains that on 19 February 2021, some men one of whom was armed with an axe entered the applicant's site office and ordered him and Mr Muriwo to leave the office and not to return. He said that their belongings were thrown from the cabins where they kept them. The evidence of Mr Matenha, on affidavit, is that the land they were working from belongs to the applicant, and that it was only on 19 February 2021 that possession was taken in the manner he deposed to. Mr Muriwo, in his affidavit, associates himself with Mr Matenha's averments.

Further, the applicant stated that it does not dispute the order of Justice Chitapi, but explained that the respondents were abusing the order to claim owner of land which is not part of share 702, and extends beyond its size. In the interest of justice, I allowed the respondents to file a supplementary affidavit to answer any new allegations raised in the answering affidavit. The

respondents denied that they had invaded share 7293, and averred that this share is on a different title deed number 3530/98 which in not near Lot J of Borrowdale Esate. For reasons appearing in their opposing and supplementary affidavits, the respondents maintained that they had not despoiled the applicant.

Let me start by examining the judgement of Justice Chitapi, before addressing the points *in limine* raised by the respondents.

The judgment of Justice Chitapi under HC 2427/18 (HH 406-20)

The respondents have heavily relied on Justice Chitapi's judgment, HH 406-20, as giving them authority to occupy or possess the disputed piece of property. The judgment followed an application filed by the respondents against the applicant herein and a Mrs Mawarire, Mr Cephas Msipha, Themba Hlongwane and the Registrar of Deeds. Before the learned judge, the issue was whether the cancellation of Deed of Transfer No. 2410/10 in the name of the respondents (herein) should be declared null and void. The second issue was whether the aforesaid title deed should be reinstated. In his judgement, Justice Chitapi concluded that the cancellation was a nullity and reinstated Deed of Transfer No. 2410/10. The issue that confronts me is one of spoliation. I am not required to resolve the issue of ownership, because this is an application for a spoliation order. The nature of the issue that I am seized with is concerned with the restoration of the status quo ante and not who is the rightful owner of the property in dispute. Thus, the question of ownership rights inhering in the respondents as a result of the judgment, HH 406-20, do not concern me and will not come into the matrix of my considerations. I have related to this judgment to afford a context to the application in *casu*, so that I do not stray into the issues already dealt with by this court. Nor does the issue at hand require me to peak into the correctness or otherwise of HH 406-20. I move on to look at the points *in limine* raised by the respondents.

Preliminary points

Whether application is fatally defective

The respondents contend that this application is fatally defective for want of form. This issue is not a novel one at it has been previously considered by this court, and it is instructive to look at how it was resolved. In *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance Co. of*

Zimbabwe & Anor HH 667-15, a point *in limine* was raised that nothing was before the court to determine because the applicant's application was neither in Form No. 29 nor Form 29B as required by Rule 241 (1) of the High Court Rules ("the old Rules"). The said Rule provides:

> "(1) A chamber application shall be made by means of an entry in the chamber book and shall be accompanied by Form 29B duly completed and, except as is provided in subrule (2), shall be supported by one or more affidavits setting out the facts upon which the applicant relies:
>
> Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

However, an infraction of the Rules which renders an application fatally defective is not the mere failure to use a modified Form 29. In fact, it is the filing of an application on a form which does not exist in the Rules at all, i.e. a form which is not Form 29 or Form 29B which infringes the Rules. I say so, because MAFUSIRE J in *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance Co supra* comments:

> "But all that is required of litigants is simply to copy and paste either Form 29B or Form 29, the latter with appropriate modifications if the application is a chamber application that needs to be served on interested parties. Form 29 is for use in ordinary court applications, or those chamber applications that require to be served. One of its most important features is that it sets out a plethora of procedural rights. It alerts the respondent to those rights. For example, in notifying the respondent of the court application, the form also notifies the respondent of his right to oppose the application and warns him of the consequences of failure to file opposing papers timeously. On the other hand, Form 29B, for simple chamber applications, requires that the substantive grounds for the application be stated, in summary fashion, on the face of that form. Nothing can be more elementary". **[My own emphasis].**

Nothing can be clearer. In *casu*, I observe that the urgent chamber application is on Form 29B, which is for ordinary chamber applications, but with the grounds for application summarised on its face. This places it outside the scope of applications singled out for criticism by the learned judge. In the circumstances, the application cannot be said to be fatally defective.

At any rate, in *Marick Trading (Pvt) Ltd v Old Mutual Life Assurance Co supra*, the learned judge alluded to the discretionary power of this court to allow a departure from the Rules in the interests of justice. It has to be mentioned that when this particular point in *limine* was raised in the opposing affidavit, the applicant quickly applied for condonation. I would have granted the application on the ground that good cause has been shown to condone the non-compliance. (See *National Social Security Authority v Chipunza* SC 116-04). Because of my conclusion above, I hold the preliminary point to be without merit and dismissed it.

Whether or not this matter is urgent

Whether or not this matter is urgent is a matter of fact. I looked at the circumstances of this case, particularly, the issue of when the need to act arose, and am satisfied that the matter is urgent and justifies consideration as such. Perhaps it bears mentioning that spoliation applications are by thir very nature urgent, given that peaceful and undisturbed possession would have been disturbed without due process. The position of the law was aptly put by KUDYA J (as he then was) in *Gifford v Muzire & Ors* 2007 (2) ZLR 131 (H) in the following words:

> "It seems to me that the preservation of law and order and the prevention of self-help in the resolution of disputes place an application for spoliation in this unique position. To wait for the ordinary time limits and procedures to apply would undermine these salutary aims and encourage the usurpation of the due process by the strong and well connected at the expense of the weak and disadvantaged. In determining whether a matter involving spoliation is urgent, the court will in the exercise of its discretion obviously be guided by the specific averments of fact that are made in the particular case before it." **[My own emphasis].**

The logic of the learned judge is self-commending. I would add that, on the authority of *Dodhill (Pvt) Ltd and Anor v Minister of Lands & Rural Resettlement & Anor* HH 40-09, any perceived delay in instituting *mandament van spolie* is not necessarily fatal to the application. One needs to carefully consider the basis of spoliatory relief sought in this matter. The applicant's complaint is that the respondents resorted to self-help when vindicating their claim to the property they aver is theirs. In other words, the quarrel of the applicant is that the respondents did not follow due process and acted with neither a court order nor the applicant's consent. I therefore consider this matter to be urgent and dismiss the point *in limine* for lack of merit.

Material dispute of fact

The respondents have also contended that there is a material dispute of fact which renders this application incapable of resolution without calling oral evidence. In my view, the facts set out by the respondents are insufficient to found a material dispute of fact. In this context, I share the wisdom of MATHONSI J in *The Railways Enterprises t/a Paroun Trucking* v *Dowood and David Bruno Luwo* HB 53-16, where the learned judge said:

> "a party does not create a real dispute of facts by merely denying the allegations made by the applicant in its founding affidavit. That party must present a story in its defence which would lead the court to the conclusion that indeed a dispute of facts exists that cannot be resolved on the papers"

In this jurisdiction, in *Supa Plant Investments (Pvt) Ltd v Chidavaenzi* 2009 (2) ZLR 132 (H), MAKARAU J (as she then was) provides an interesting guidance on how to identify whether or not a material dispute of facts exists. She appositely said:

> *"*A material dispute of fact arises when material facts alleged by the applicant are disputed and traversed by the respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence."

At the risk of sounding too simplistic, the logic expressed by Justice Makarau is inspired by common sense. Even if it is accepted that the facts alluded to by the respondents create an apparent conflict, in my view, no oral evidence is required to settle the areas of disagreement. In *Douglas Muzanenhamo* v *Officer in Charge CID Law & Order and Ors* CCZ 3/13, the Constitutional Court urged courts to take a robust and common sense approach with the endeavour to achieve justice. Therefore, if the approach urged in both *Supa Plant Investments supra* and *Douglas Muzanenhamo supra* is deployed, it is apparent that this application raises no material dispute of fact which can only be resolved upon calling of viva voce evidence. Accordingly, I dismiss this point *in limine* for lack of merit.

Material non-disclosure

The respondents allege a material non-disclosure by the applicant. They contend that the applicant did not disclose that there is an extant order of this court which effectively gives the respondents ownership of 0.0298%, being share number 702 in a piece of land known as Lot J of Borrowdale Estate. I find this criticism unfair if one looks at the relief sought by the applicant. The draft order makes it apparent that the applicant recognizes that the respondents could not be precluded from occupying the property they got from Justice Chitapi's order. That is why the draft order seeks restoration of the applicant to land on Crowhill Estate except the land they gained by virtue of the judgment, HH 406-20. The averments about alleged inaction by the police were explained in the applicant's answering affidavit, and I will not dwell on them. In any event, they do not constitute material non-disclosures, in my view. I therefore dismiss this preliminary point. I will proceed to consider the merits of the application.

Did an act of spoliation take place?

It important to stress (as I have done earlier) that the dispute before me is not about ownership of the piece of land that the applicant alleges he was despoiled of. Rather, the issue concerns the act of spoliation alleged by the applicant. If the act of spoliation which has given rise to this application is established, whether or not the respondents owns the disputed land need not detain me. The remedy of spoliation aims at preventing a resort to self-help restoring the *status quo ante*. (See *Chimeri v Nguluve* HH 06-17). If the evidence establishes that the respondents despoiled the applicant as alleged, the applicant is entitled to spoliatory relief. In this respect, the law makes it clear that once an applicant demonstrates that he was in peaceful or undisturbed possession, and that the respondent disposed him forcibly and wrongfully without his agreement, then spoliation is established. It is because of this trite position of the law that in *Chisveto v Minister of Local Government* 1984 (1) ZLR 248 (H) this court appositely stated:

> "The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent court of law assesses the relative merits of the claims of each party … lawfulness or otherwise of the applicant's possession of the property does not fall for consideration".

My role is not to determine the right of ownership. The narrow remit I have in *casu* is to examine whether or not the applicant was disposed of its occupation wrongfully through an act of self-help. I cannot decide on ownership, in any event, as that issue is not before me. The averments by the applicant that on 19 February 2021, the respondents acting through its employees or agents committed an act of spoliation were not controverted in any material way. On the contrary, the affidavits of Mr Matenha and Mr Muriwo confirmed that the applicant was in peaceful and undisturbed possession to the respondents' actions on 19 February 2021. While the respondents submitted that the applicant's guards fled from the police who were trying to effect an arrest emanating from a charge of contempt of court, no evidence in the form of a CR (criminal report) reference has been tendered to the court. This remains an unsubstantiated allegation. It has also not escaped my notice that the supplementary affidavit of the respondents does not comment on the contents of the affidavits of Messrs Matenha and Muriwo. The settled position of our law is that what is not disputed is taken as admitted. (See *Fawcett Security Operations v Director of*

Customs & Excise 1993 (2) ZLR 121 (SC). Those affidavits confirm two things, namely, peaceful and undisturbed possession by the applicant, and the act of despoliation by the respondents through their employees or agents.

Similarly, the submission that the respondents deferred to due process by instituting legal proceedings for eviction in the Magistrates Court under MC 123/21 raises more questions than answers. Firstly, it is a blatant admission that when the urgent application for spoliation was filed on 10 March 2021, there was no order which sanctioned the eviction or removal of the applicant's guards or employees. Otherwise, such removal or eviction would have been done by the Messenger of Court on the authority of a writ of ejectment and not by the police or respondents themselves. Secondly, if an order for eviction existed under MC 123/21, I find no conceivable reason why the respondents would invoke contempt charges instead of simply enforcing the writ. Thirdly, if as appears from the response of the respondents they found it necessary to institute eviction process via the courts, then it is another admission that the applicant and/or its employees were in occupation of the property, hence the need to evict them. It is therefore evident from the respondents' own papers that the applicant was in peaceful and undisturbed possession of the property and was despoiled by the respondents through their employees or agents. In respect, it is noteworthy that the respondents did not dispute that it is their employees who were arrested and subsequently granted bail by the court following a report made by the applicant. In my view, this admission by the respondents fortifies my conclusion that they despoiled the applicant.

Conclusion

Having found that the applicant has established a case for a spoliation order, the relief ought to be afforded. Nevertheless, I must observe that a spoliation order can only be granted as a final order and not on an interim basis. (See *Blue Range Estates P/L v Muduvisi* 2009 (1) ZLR 368 at 377D). The same point was made by GARWE JA (as he then was) in *JC Conolly & Sons (Pvt) Ltd v Ndlukula & Anor* SC 22-18, that an order of spoliation is final in nature and that it determines the immediate right of possession of a particular *res.* The rules of this court permit the granting of an order as prayed for or as varied. (See *Chiswa v Maxess Markerting (Pvt) Ltd & Ors* HH 116-20). As I am satisfied that the applicant has proven its case for *mandament van spolie*, I shall grant a final order for spoliation. The applicant has asked for costs on an attorney and client costs in the final order on the return day. However, as there is no return day in respect to a spoliation order.

The final point I make is that, since the draft order recognizes the right of the respondents to occupy the property known as 0.0298%, being share number 702 in a piece of land known as Lot J of Borrowdale Estate, my order will take cognizance of that. I now turn to consider the issue of costs.

Costs of suit in this matter

Generally, costs follow the result. The applicant has asked for punitive costs. However, in order for a litigant to successfully claim costs as between attorney and client scale, he/she or it must show that the other party deserves to be penalized for its conduct of the litigation. It must always be realized that costs are in the discretion of the court. In the exercise of that discretion, I have decided that costs on the ordinary scale will suffice in this case.

Disposition

Accordingly, I make the following order:

1. The respondents or any of their agents and/or employees, or anyone acting on their behalf are ordered to restore possession of the land and stands they are currently occupying in Crowhill Estate, which is not an undivided 0,00298%, being share number 702 in a certain piece of land in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, to the applicant or any of its agents and/or employees, or anyone acting on its behalf, immediately upon service of this order, failing which the Sheriff of Zimbabwe be and is hereby directed forthwith to eject the respondents or any of their agents and/or employees, or anyone acting on their behalf, from occupation thereon and restore occupation to the applicant or any of its agents and/or employees or anyone acting on its behalf.

2. The respondents or any of their agents and/or employees, or anyone acting on their behalf are ordered to cease operations and remove all of their equipment and/or materials on the land and/or stands they are currently occupying in Crowhill Estate, which are not an undivided 0,00298%, being share number 702 in a certain piece of land in the District of Salisbury called Lot J of Borrowdale Estate measuring 724,0475 hectares, immediately upon service of this order, failing which the Sheriff of Zimbabwe be and is hereby directed forthwith to remove the said equipment and/or materials.

3. The respondents shall pay costs of suit on the ordinary scale, jointly and severally, the one paying the other to be absolved.

Tanyanyiwa & Associates, applicant's legal practitioners
Jarvis, Palframan, respondents' legal practitioners