

TAPIWA MUPONDA

Versus

TRYMORE MUZIRI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 8 OCTOBER & 6 DECEMBER 2012

H.T. Garikayi for applicant
N. Bvekwa for respondent

Judgment

NDOU J: The applicant seeks a provisional order in the following terms:

“Terms of final order sought

1. That the respondent, his agents, proxies, servants, nominees be and are hereby permanently interdicted from entering and disturbing the operations of the applicant at shop number 6 Tanaka House, 3rd Street, Gweru.
2. That the respondent shall pay costs of suit on an attorney and client scale.

Interim relief granted

1. The respondent be and is hereby ordered to restore applicant’s peaceful possession and control of shop number 6 Tanaka House, 3rd Street, Gweru together with applicant’s stocks therein forthwith failure of which the Deputy Sheriff be and is hereby empowered to do so.
2. That the respondent, his agents, proxies, servants, nominees be and are hereby interdicted from entering and disturbing the operations of the applicant at shop number 6, Tanaka House, 3rd Street, Gweru.”

The salient facts are the following. The applicant opened the said shop in June 2012. He sought assistance of the respondent to obtain the trading licence from Gweru City Council. The applicant operated the business until September 2012. On 16 September 2012 he closed the shop and proceeded to Harare. On 21 September 2012 he received information from his security guard that the respondent had come and opened the shop with a locksmith. This act was without his (applicant’s) consent and approval. When applicant called the respondent to understand his actions, the latter did not budge resulting in this application.

From the grandiloquent opposing affidavit filed on behalf of the respondent, it is extremely difficult to understand what his defence is to the applicant's claim for the spoliation order. What I can glean therefrom is that he is claiming the right of ownership of the shop in dispute. In paragraph 6.8 he averred:

"When I opened the shop on 18 September 2012 the intension [sic] was to keep business. It was unreasonable to close the shop. I suspect and I think I am being vindicated that he was working in cahoots with the said Li, and that is why he closed the shop when I had been arrested on supirious charges brought against me by Li."

The respondent also concedes in paragraph 6.7 that the applicant was in possession of the keys to the shop after they were given to him by one Woowoo. He states – "We then agreed with Woowoo that he (applicant) can have the keys. He was therefore not in control of the shop as I had given him the keys to enable the operation of business."

All this shows that the applicant was in peaceful and undisturbed possession of the property in issue. The respondent deprived him of the possession forcible by using a locksmith to open the shop in the applicant's absence and without his consent. In his opposing affidavit the respondent does not dispute using a locksmith to open the premises in the absence of the applicant. He did not aver that he had the consent of the applicant instead, he said he did not need such consent. It is trite that the purpose of a spoliation order is not to restore ownership but to prevent self help. A spoliation order has nothing to do with the rights of ownership. The applicant has proved that he was in peaceful and undisturbed possession of the disputed shop and that the respondent deprived him of the possession forcibly or wrongfully against his consent. He has thus fulfilled the requirements of a spoliation order – *Davis v Davis* 1990 (2) ZLR 136 (H) at 141C; *Kramer v Trustees Christian Coloured Vigilance Council Grass Park* 1948 (1) SA 748 (C) at 753; *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) and *Botha and Anor v Barrett* 1996 (2) ZLR 73 (S).

In the circumstances the applicant has made a case for the relief that he seeks.

Accordingly the order is granted in terms of the amended draft.

Garikayi & Co, c/o Calderwood, Bryce, Hendrie & Partners, applicant's legal practitioners
Bvekwa Legal Practice c/o Lazarus & Sarif, respondent's legal practitioners