FEATURE PHIRI
and
KUDZANAI ROTI
and
FRASER PHIRI
versus
LOVEMILK GWATI
and
ARCHFORD GWATI
and
ALEXANDER GWATI

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE, 26 April 2019 & 8 May 2019

Urgent Chamber Application

N Mugiya, for the applicants
L Matapura,, for the respondents

CHIKOWERO J: This application for a spoliation order was hotly contested.

I heard full argument on the merits as well as on the preliminary points raised by the respondents. I reserved judgement.

Because of the view that I take of the matter, I will deal with the two preliminary points at the tail end of this judgement.

The third point *in limine* was not persisted with after I queried respondent's counsel on whether there was any factual foundation to sustain it.

Nothing much must be said about that argument *in limine*. Respondent's counsel was correct in conceding that the dirty hands principle was completely inapplicable to the circumstances of this matter.

Indeed, the mere filing of a police report by first respondent against the second applicant, without more, comes nowhere near anything resembling evidence that the latter's hands were dirty. It is not proof that second applicant transgressed the criminal law of the land in respect of the subject of this civil suit and yet is turning to the law, via this court, for redress.

Serious allegations lie at the heart of this application. They are set out in the notice attached to the application itself. These are they. The respondents allegedly evicted the applicants without a court order. The respondents are said to have demolished the applicants' homestead without a demolition order. The respondents have allegedly despoiled the applicants and have taken over the applicants' homestead where they have established their mining adventures.

The certificate of urgency supplies a bit of flesh to the foregoing.

To put the matter in proper perspective I think it is better that I quote the relevant paragraphs in full:

> "1. The respondents have demolished the applicants' bedroom and evicted the applicants without a court order, and purely on the basis that the respondents claim to have a mining claim at the applicants' homestead.
> 2. The respondents demolished the applicants' bedroom on 17 April 2019 and have since chased the applicants away from their place of residence contrary to the law.
> 3. The applicants are now living as squatters and have no access and control of their property after the respondents evicted them from their homestead.
> 4. The respondents have no right to act in the manner they have done and have taken the law into their own hands.
> 5. The applicants have no other alternative remedy and will definitely suffer irreparable harm should this court fails (sic) to act on urgent basis."

In the founding affidavit deposed to by the first applicant, whose contents were adopted by applicants two and three, the following material allegations were made. The applicants are siblings. The trio stays at 2nd applicant's homestead. The same is situate in Ward 17 Mwembezi village under Chief Nemakonde in Makonde. They have been staying there since 2000, having been resettled there by the District Administrator. In or about July 2018, the respondents, accompanied by the first respondent's sons, appeared at the homestead whereupon a demand was made to the applicants to vacate. The basis for the demand was that the applicants' homestead was situate within the first respondent's mining claim.

These further allegations are made. On July 25, 2018, applicants reported the matter to the District Administrator. That official did nothing about the report made to him.

On 27 September 2018, applicants allege that they visited the offices of the Mining Commissioner for Mashonaland West to obtain clarity on the first respondent's claim. It is alleged that there has been deafening silence from that office as well.

Meanwhile, so the allegations continue, on 16 July 2018 the first respondent had appeared at applicants' homestead and threatened them with death if they did not vacate. It is claimed that he openly pronounced himself as a sacred cow. He was untouchable.

At this juncture, the matter will be even clearer if I let the first applicant to take up his story from paragraphs 11 right up to the end of his Founding Affidavit. This is what he says:

> "11. On the 18th of January 2019, the respondent demolished Chamunorwa Mberengwa's homestead who falls in the same predicament as ours (*sic*) and the same victim is now staying in shacks by the riverside and he reported the matter to the police but nothing happened.
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> 12. On the 17th of April 2019, the respondents came to our place or homestead and demolished my bedroom with a bulldozer and told me leave (*sic*) with my family.
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> 13. I reported the matter to the police at ZRP Kenzamba but he has not been arrested to date. The respondents have the money and Kenzamba police will never arrest him.
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> 14. The respondents hired thugs on the 19th of April 2019 and chased us out of our homestead and as we speak we are staying with other villagers after the respondents took over our homestead claiming that it was part of their claim.
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> 15. We have planted our crops and our fields need to be worked on but we cannot do that anymore since the respondents have taken over everything including our fields.
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> 16. This has left me with no option except to approach this court on urgent basis as the respondents took the law into their own hands and resorted to self-help.
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> 17. The respondents have never produced any documents which entitle them to demolish our homes and to evict us without a court order.
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> 18. The respondents are very violent and always use violence to move us from our homestead. We have no protection whatsoever. The respondents claim that my kitchen is where he wants to put his staff to his mine and that if we resist we will die.
>
> In the result, I pray for an order in terms of the draft."

The remedy sought is final both in form and substance. No return date is contemplated. The essential part of the draft order is as follows:

"IT IS ORDERED THAT:

1. The respondents be and are hereby ordered to restore the *status quo ante* as at 17th April 2019 and to release and return the control and possession of Kudzanai Roti homestead, Ward 17 Mwembezi Village Chief Nemakonde Makonde, Kenzamba, to the applicants forthwith.
2. The respondents are barred from interfering with applicants' stay at their homestead in whatever manner.
3. The respondents are ordered to vacate the applicants' homestead and their fields forthwith.
4. The respondents are ordered to pay costs of suit on a client-attorney scale jointly and severally, one paying the others to be absolved."

In determining this matter, I considered the matter of *Blue Ranges Estates (Pvt) Ltd* v *Muduviri and Another* 2009 (1) ZLR 368 (S). The words of MALABA DCJ (as he then was) are pertinent in this regard.

This is what His Lordship said at 377 A – E:

> "In this case, it was common cause that the order made by the learned judge was a spoliation order. When the applicant made the application for the order to the High Court, it placed three issues of fact before it for determination. The first was that it was in peaceful and undisturbed possession of the property at the time the first respondent appeared on the scene. The second was that the first respondent deprived it of such possession unlawfully (without due legal process) and without its consent. In other words, the first respondent arrogated to himself the right to take property out of the possession of the applicant. the third was that it was entitled to be restored to the possession of the farm.
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> All these facts in issue had to be determined in favour of the applicant for the spoliation order to have been made in applicant's favour. The issue between the parties was therefore whether there was spoliation. By making the spoliation order the learned judge confirmed that, on the affidavit evidence placed before her, she found that the three elements of spoliation had been established. The spoliation order was the authority for the restoration of the applicant to the possession of the property.
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> The finding of the fact in issue was a final and definitive determination of the fact in question. There would have been no other final determination of the issue of spoliation on the return day. A clear right in the applicant to be restored to the possession of the property would have been established. A spoliation order cannot be granted on evidence of a *prima facie* right.
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> If the learned judge was not satisfied or was somehow doubtful that the affidavit evidence established a clear right in the applicant to be restored to the possession of the property, she should not have made the spoliation order."

At 377 G – 378 A His Lordship continued:

> "It has been the realisation of the fact that a spoliation order disposes of the issue or portion thereof between the parties that authorities say that it is a final and definitive order. Herbstein and van Winsen *Civil Practice of the Supreme Court of South Africa* 4 ed state at p 1064 that:
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> > "a mandament van spolie is a final order although it is frequently followed by further proceedings between the parties concerning their rights to the property in question. The only issue in the spoliation application is whether there has been a spoliation. The order that the property be restored finally settles that issue as between the parties."

Respondents denied dispossessing the applicants in the manner alleged or at all. They averred that applicants have always been in peaceful and undisturbed possession of the property.

Further, in submissions to buttress their position, Mr *Matapura* for the respondents invited me to conduct an inspection in *loco* at the homestead in question. It was submitted that the inspection will show that applicants' bedroom still stands on the piece of land, undemolished. The allegation that a caterpillar was used to demolish the bedroom was thus hotly disputed.

Finally, documents tendered by the respondents were used to persuade me to find no favour with the allegations of dispossession. The first was a determination dated 4 October 2018 made by the Acting Provincial Mining Director Mashonaland West for the Secretary for Mines and Mining Development. The determination was in favour of first respondent. it was simply that first respondent's registered mining claim overrode Takunda Mining Syndicate's pending application for registration of a mining claim as the latter over-pegged the former. Apparently, second applicant is a member of Takunda Mining Syndicate.

Dissatisfied, second applicant made several complaints to the same office. This birthed another determination on 11 March 2019. The same decision was arrived at. It was that second applicant's cultivated land and homestead are situate within first respondent's mining claim and that suspension of mining operations thereon, effected by the Secretary for Mines and Mining Development on 17 January 2019, was therefore lifted.

Still dissatisfied, applicant appealed to the Minister of Mines and Mining Development on 21 March 2019. That appeal is still pending.

The last paragraph of the letter of appeal makes it clear that the three applicants want to be issued with a certificate of registration of a mining claim over the land on which their homestead and field stand.

I was asked by the respondents to find it as not only improbable but outright untrue that, having submitted themselves to the authorities whose decisions have so far all gone in their favour, they would, in April 2019, while the appeal before the Minister of Mines and Mining Development was still pending, suddenly take the law into their own hands by dispossessing the applicants.

In my view, this matter turns on the complete absence of evidence to substantiate the allegations of dispossession.

It is trite that an application stands or falls on the founding affidavit. In my judgment, this application falls on the founding affidavit.

That affidavit, to which the supporting affidavits added completely nothing, did not contain any evidence to substantiate the serious but bare allegations made therein.

Legal practitioners should always bear in mind the difference between action and application proceedings. As is well known, pleadings in action proceedings should not contain evidence. Allegations and other averments are housed therein. The leading of evidence is the province of the trial proper.

On the other hand, in application proceedings, both the pleadings and the evidence should be contained in the affidavits.

That is why there is reference to affidavit evidence in the Blue Ranges Estates (Pvt) Ltd case supra.

There was not even a single document annexed to the founding affidavit to prove the allegations made.

Unless either admitted or not denied, allegations made in a founding affidavit are not automatically transformed to the status of evidence by mere virtue of having been stated under oath.

Because applicants wanted to prove dispossession, I would have expected them to attach photographs of the rubble of the bedroom, among other pieces of real evidence, to prove the dispossession.

I draw a parallel with the destruction wrought by Cyclone Idai in 2019 in the Chipinge and Chimanimani districts of Zimbabwe. One does not have to go to Chimanimani and Chipinge to see the destruction there to satisfy oneself that the Cyclone devastated the two districts. The evidence hits one wherever one may be via electronic, print and other media.

Although applicants acceded to the invitation extended by the respondents to the Court for an inspection in *loco*, I did not accept that invitation myself. Firstly, the respondents in essence wanted to prove that they did not dispossess the applicants, that they did not destroy the applicants' bedroom. The respondents do not have any such onus.

The requirements of a *mandament van spolie* are clear. Among other things, the onus was on the applicants to satisfy me that they met all three requirements of a spoliation order. They came nowhere near satisfying me that they were dispossessed.

Chamunorwa Mberenga was also exhibited before me. Applicants' counsel invited me to direct that oral evidence be led from Chamunorwa. There was no supporting affidavit from this person. In any event, it is the duty of an applicant to place evidence before the Court. In my view, I could not take over the applicants' case by directing how they should have gone about proving their case. Accordingly I made no such directive.

Further, a reading of para 14 of the founding affidavit discloses that applicants could have attached supporting affidavits from the unnamed villagers they are allegedly currently staying with to lend credence to the allegations of dispossession. That was not done. No reason was given.

I observe also that no evidence was put before me to prove that a police report was made against the respondents and the unnamed thugs. That was necessary because demolition of someone's bedroom without their consent constitutes the criminal offence of malicious damage to property. Copy of the police report, if any, was not produced.

In light of all the foregoing, it is my finding that the affidavit evidence put before me failed to prove that respondents despoiled the applicants. The application fails on this basis.

Before concluding this judgment, I must express my thoughts on the two preliminary points raised and persisted with by the respondents.

Both find no favour with me.

Applicants alleged that dispossession was effected on April 17th and 19th 2019.

The application for a spoliation order was filed on April 23rd 2019.

That was a mere four and six days later. By all accounts, this application was clearly urgent. The only reason why it has failed is that applicants failed to satisfy me that they were despoiled.

Finally, I agree with Mr *Mugiya,* for the applicants, that there was no material non-disclosure on the part of the applicants.

The decisions by the officials of the Ministry of Mines and Mining Development as well as the pending appeal before the Minister really have nothing to do with the applicants' cause of action. The cause of action is the alleged dispossession of April 17th and 19th 2019. No one, besides

this Court, was seized with determination of that matter. The mining disputes between the parties are not germane to the determination of this application.

I accordingly dismiss the two preliminary points.

However, in view of the findings I have made on the merits, the following order will issue:

1. The application is dismissed
2. The 1st, 2nd and 3rd applicants shall, jointly and severally the one paying the others to be absolved, bear the 1st, 2nd and 3rd respondents' costs of suit.

Mugiya and Macharaga, applicants' legal practitioners
Dondo and Partners, respondents' legal practitioners