MEGA PETROLEUM (PVT) LTD
versus
EXODUS CAR HIRE (PVT) LTD

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 14 May 2015

**Urgent Chamber Application**

Ms *R Gwanali*, for the applicant
*D Mehta*, for the respondent

MATHONSI J: No matter how the applicant has couched the interim relief that it seeks, in essence what it craves is spoliatory relief.

This is because the applicant claims to have been in occupation of Stand 225 Gleneagles Road, Willowvale, Harare (the premises) on which it has been operating a service station, by virtue of a lease agreement entered into with the respondent on 23 August 2014, which lease agreement was to subsist from 1 October 2014 to 31 September 2016 in terms of the provisions of its clause 2.

Whatever may have been the differences between the parties, on 15 April 2015 the respondent gave written notice to the applicant to rectify certain alleged breaches that it complained of relating to the unavailability of danger warning signs and valid fire extinguishers at the service station. On 18 April 2015, the respondent again gave the applicant written notice to rectify another alleged breach. This time it complained of an alleged subletting and gave the applicant 48 hours to do so. The applicant must have been naive not to read the tale signs.

Although the applicant frantically tried to comply by bringing an urgent application to this court, HC 3923/15, and obtained an order removing what it claims to have been an illegal occupant, who was forced out kicking and screaming, the respondent did not relent. On 5 May 2015 the respondent instituted summons action against the applicant in HC 4061/15 seeking an order confirming the cancellation of the lease agreement on the ground that the

applicant was subletting the premises. It is not clear at what point the lease had been cancelled as to warrant a request for the court to confirm the cancellation. The letter in which the respondent claimed to have cancelled the lease is dated 5 May 2015, the same date that summons was issued.

It would appear that the respondent could not wait for due process. It quickly repossessed the premises without a court order. The applicant was forced to file this urgent application seeking interim relief interdicting the respondent from barring it from occupying and conducting business at the premises and from interfering with its activities there.

The respondent has opposed the application stating in the opposing affidavit of Rochford Munjoma, its managing director, that the applicant is not in occupation of the premises and therefore cannot conduct business there. It claims to have cancelled the lease at a time when that applicant was not in occupation of the premises. Although the applicant obtained an order against the illegal occupant, one Roland Muchengwa restoring its possession, that order had been overtaken by events as "the respondent had meanwhile repossessed its premises." For that reason the applicant must suffer grief.

In my view this matter resolves itself from the respondent's own admissions. Anything else will unduly cloud an otherwise straight forward matter. In para 1.1 of the opposing affidavit, the deponent states:

> "Firstly, the applicant is not in occupation of the premises in issue and is not conducting any business on the premises. Secondly, the respondent is as a matter of fact in occupation of the premises and already operating business while also effecting certain renovations. Accordingly, the respondent cannot possibly interfere with what is not happening nor can it be interdicted from doing what it is already doing. It can only be ordered to stop rather than be interdicted."

Arrogance writ large. How could the respondent be in occupation of the same premises it is leasing to the applicant until September 2016? The same premises at which it was asking the applicant to remedy breaches at a few weeks ago and the same premises at which it was seeking confirmation of the cancellation of a lease agreement by court action on 5 May 2015. There can only be one explanation, it is that the respondent resorted to self-help.

The requirements for spoliatory relief are twofold and have to be established for a spoliation order to be granted. They are:

(a) that the applicant was in peaceful and undisturbed possession of the property.
(b) that the respondent deprived the applicant of the possession forcibly or wrongfully against his consent.

See *Botha and Anor* v *Barnett* 1996 (2) ZLR 73 (5) 78C; *Van den Berg and Anor* v *Lang* 2010 (1) ZLR 469 (H) 472 H; 473 A.

For a respondent to successfully repel spoliation application he must raise essentially 2 defences namely that:

(a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of deprivation; and

(b) the respondent has not committed spoliation.

It occurs to me that if the applicant was not in possession the respondent would not have sent the notices I have referred to above. The applicant must have been in possession which of course was being disturbed by Roland Muchengwa, but peaceful and undisturbed possession was restored by the provisional order granted by Chatukuta J in HC 3923/15. The respondent has clearly committed an act of spoliation by resorting to self-help instead of bidding his time for his court action to be decided. He has not succeeded in establishing any of the defences available to him.

Accordingly the provisional order is hereby granted in terms of the draft order.

*Messrs Mushangwe & Company*, applicant's legal practitioners
*Messrs M. Hongwe, Dzimirai & Partners*, respondent's legal practitioners