

CROCO MOTORS (PVT) LTD
versus
REDAN PETROLEUM (PVT) LTD
T/A PUMA PETROLEUM
and
TOTAL ZIMBABWE (PVT) LTD

REDAN PETROLEUM (PVT) LTD
versus
CROCO MOTORS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 4 September 2015 and 23 September 2015

Consolidated Urgent Chamber Applications

T Magwaliba, for Croco Motors (Pvt) Ltd in HC 8255/15 and in HC 8272/15
RKH Mapondera, for Redan Petroleum (Pvt) Ltd in HC 8255/15 and in HC 8272/15

MUREMBA J: The two urgent chamber applications were consolidated and I heard them together. The parties involved are the same save for Total Zimbabwe (Pvt) Ltd which is the second respondent in the first matter. However, let me hasten to point out that at the hearing Total Zimbabwe (Pvt) Ltd was not in attendance and there was no proof that it had been served with the notice of set down. Croco Motors (Pvt) Ltd being the applicant decided to withdraw its application against it. This was in light of the fact that its claim was mainly against the first respondent, Redan Petroleum (Pvt) Ltd. It then applied to amend its draft order so as to exclude the second respondent, Total Zimbabwe (Pvt) Ltd.

In the first matter in which Croco Motors (Pvt) Ltd is the applicant, it is seeking a *mandament van spolie* against Redan Petroleum (Pvt) Ltd. In the second matter in which Redan Petroleum (Pvt) Ltd is the applicant, it is seeking an interdict against Croco Motors (Pvt) Ltd. The reliefs being sought by the parties emanate from the events of 1 September 2015 which happened at a service station located at Stand 46A Comet Rise Township also

known as Mount Pleasant service Station. The parties are involved in a dispute over the occupation of the said premises.

Initially the parties had raised some points *in limine* against each other in their notices of opposition, but at the beginning of the hearing the parties agreed to do away with the preliminary points and instead deal with the merits of the matters.

On the merits Croco Motors (Pvt) Ltd's version is as follows. In 1996 it sublet the premises from Mobile Zimbabwe (Pvt) Ltd. Mobile Zimbabwe (Pvt) Ltd was leasing the premises from Robert Harold Russet and wife Judith Russet who were the owners. These owners were outside the country.

In 2009 the second respondent, Total Zimbabwe (Pvt) Ltd leased the premises from the Russets represented by Knight Frank. There is a lease agreement to that effect. Total Zimbabwe (Pvt) Ltd as the new lessee contracted with Croco Motors (Pvt) Ltd as a sub tenant. Croco Motors (Pvt) Ltd said it became a statutory tenant after the expiry of the said lease agreement which ran from 1 February 2009 to 31 January 2010.

On 5 February 2013 Croco Motors (Pvt) Ltd and Total Zimbabwe (Pvt) Ltd entered into a Marketing Licence Agreement which was to expire on 30 August 2015. In terms of that agreement Croco Motors (Pvt) Ltd would operate and utilise the service station together with facilities provided by Total Zimbabwe (Pvt) Ltd to sell petroleum based products and other ancillary business permitted by the licence. Total Zimbabwe (Pvt) Ltd knew that the tenure of its lease agreement extended to 30 August 2015.

On 24 October 2013 Total Zimbabwe (Pvt) Ltd issued a notice to Croco Motors (Pvt) Ltd to vacate the premises in terms of Article VIII Clause IV (c) of the Marketing Lease Agreement. Croco Motors (Pvt) Ltd was required to vacate the premises by 31 January 2014. The notice stated that the new owner of the premises, Redan Petroleum (Pvt) Ltd wanted the premises. Croco Motors (Pvt) Ltd said it challenged the notice of termination on the grounds that the fact that the new owner of the premises wanted the premises did not justify the termination of the Marketing Licence Agreement. It also argued that in terms of Article VIII Clause IV (c) of the Marketing Lease Agreement such a ground was not one of the grounds which justified the termination of the contract. Croco Motors (Pvt) Ltd argued that in terms of that clause, termination of the agreement was only allowed in circumstances where acts beyond the control of Total Zimbabwe (Pvt) Ltd prevailed.

On 27 January 2014 Total Zimbabwe (Pvt) Ltd wrote to Croco Motors (Pvt) Ltd again insisting that it vacates the premises by 31 January 2014, this time stating that in terms of Article VIII Clause IV (b) of the Marketing Licence Agreement it was allowed to terminate the agreement if in terms of the lease or other occupancy agreement under which the station is held expires or is cancelled. Attached was also a letter by Redan Petroleum (Pvt) Ltd which was addressed to Total Zimbabwe (Pvt) Ltd confirming that it required the premises for its own use particularly to operate the forecourt and the shop in order to maximise efficiency of its operations.

Croco Motors (Pvt) Ltd states that it was not satisfied with Redan Petroleum (Pvt) Ltd's reasons for wanting to evict it. As a result the two of them entered into rent negotiations aimed at confirming Croco Motors (Pvt) Ltd's stay at the premises. However, Redan Petroleum (Pvt) Ltd asked for exaggerated rentals. As a result nothing materialised between the two parties. On the other hand Total Zimbabwe (Pvt) Ltd which had been charging rentals of US\$4 025-00 per month increased them to US\$ 6 000-00 per month. Croco Motors (Pvt) Ltd challenged the rental increase.

On 20 July 2015 the Total Zimbabwe (Pvt) Ltd wrote another letter giving notice of termination of the Marketing Licence Agreement on 31 August 2015. It asked Croco Motors (Pvt) Ltd to clear all outstanding bills by that date and to handover the premises to it on 31 August 2015.

Further negotiations were held between Croco Motors (Pvt) Ltd and Redan Petroleum (Pvt) Ltd. During those negotiations Redan Petroleum (Pvt) Ltd's Marketing Manager advised Chipu Ndlovu of Croco Motors (Pvt) Ltd that Redan had allocated the service station in question to one of its customers. So it was clear that Redan Petroleum (Pvt) Ltd did not require the premises for its own use but for lease to a third party. Croco Motors (Pvt) Ltd argued that that reason did not give a justification to the owner to repossess the property. It appears to Croco Motors (Pvt) Ltd that Redan Petroleum (Pvt) Ltd was not impressed with its refusal to accept the exaggerated rental or to vacate the premises without just cause.

On 1 September 2015 Redan Petroleum (Pvt) Ltd's operations manager descended on the service station and erected barricades, dug trenches on the two entrances of the service station thereby precluding Croco Motors (Pvt) Ltd employees and customers from gaining access to the premises. This disrupted operations at the service station.

Total Zimbabwe (Pvt) Ltd attempted to remove the pumps at the service station to prevent Croco Motors (Pvt) Ltd from accessing 9 000 litres of fuel worth US\$12 510-00. Croco Motors (Pvt) Ltd argued that Redan Petroleum (Pvt) Ltd is not entitled to self-help and to disturb the *status quo ante* without a court order. Croco Motors (Pvt) Ltd averred that despite the notices of ejectment, it had been in peaceful and undisturbed possession of the premises. Croco Motors (Pvt) Ltd argued that even if Redan Petroleum (Pvt) Ltd might have a clear claim against it (though disputed), it cannot take the law into its own hands.

Croco Motors (Pvt) Ltd avers that as a statutory tenant, it has a right to peaceful and undisturbed possession of the property. It is the prayer of Croco Motors (Pvt) Ltd that the *status quo ante* which prevailed before 1 September 2015 be restored. It also argued that at this stage the court does not need to enquire into the rights of the parties *vis a vis* the premises.

In opposing Croco Motors (Pvt) Ltd's application for a spoliation order and in support of its application for an interdict, Redan Petroleum (Pvt) Ltd indicated that it is the new owner of the premises' having bought them from the Russets. It also produced a lease agreement which was entered into by and between itself as the lessor and Total Zimbabwe (Pvt) Ltd as the lessee. It was entered into on 1 February 2014 terminating on 31 August 2015. It was signed in June 2014.

Redan Petroleum (Pvt) Ltd averred that it has no contractual relationship whatsoever with Croco Motors (Pvt) Ltd. Instead the relationship that was there was between Croco Motors (Pvt) Ltd and Total Zimbabwe (Pvt) Ltd through the Marketing Licence agreement which the two parties signed. This is what entitled Croco Motors (Pvt) Ltd to occupy the premises. Redan Petroleum (Pvt) Ltd argued that it was not aware of any sub-tenancy agreement which existed between Croco Motors (Pvt) Ltd and Total Zimbabwe (Pvt) Ltd. It referred to Clause 22 of its lease agreement with Total Zimbabwe (Pvt) Ltd. The clause clearly prohibited Total Zimbabwe (Pvt) Ltd from subletting the premises whatsoever. Redan Petroleum (Pvt) Ltd said that Croco Motors (Pvt) Ltd was paying licencing fees not rentals as would be paid by a tenant. Redan Petroleum (Pvt) Ltd argued that even if there was a sub-tenancy agreement, Croco Motors (Pvt) Ltd as a sub tenant could not enjoy rights superior to that of the lessee, Total Zimbabwe (Pvt) Ltd. So once the lease agreement between Total Zimbabwe (Pvt) Ltd and Redan Petroleum (Pvt) Ltd terminated, Croco Motors (Pvt) Ltd could not continue as a sub-tenant.

Redan Petroleum (Pvt) Ltd argued that in terms of that Marketing licence Agreement Croco Motors (Pvt) Ltd was given 8months' notice that the agreement would be terminated on 31 August 2015 and was therefore expected to vacate the premises by 31 August 2015. Redan Petroleum (Pvt) Ltd averred that whatever negotiations were subsequently made between Croco Motors (Pvt) Ltd and it were at the instance of Croco Motors (Pvt) Ltd and they were not binding on it.

Redan Petroleum (Pvt) Ltd confirmed that on 1 September 2015 its agents and employees went to the premises. It said it did so because it was relying on the undertaking made by Total Zimbabwe (Pvt) Ltd that the premises would be vacant on 1 September 2015. It said because of this assurance which was given by Total Zimbabwe (Pvt) Ltd it had already contracted agents and contractors to commence the process of rebranding the premises. It said that however, its employees, agents and contractors failed to commence work on 1 September 2015 because it was met with resistance by employees of Croco Motors (Pvt) Ltd who barred them from entering the premises and even assaulted some of them resulting in them making a police report for assault.

Redan Petroleum (Pvt) Ltd said that after Croco Motors (Pvt) Ltd had barred its employees and contractors from carrying out work at the premises on 1 September 2015 it instituted the present proceedings for an interdict to stop Croco Motors (Pvt) Ltd from interfering with its renovation activities at the premises. It argued that it is entitled to the interdict because it has a clear right to the property as it is the owner. It said that what it simply did on 1 September 2015 was to proceed to the premises to take over its property since its former tenant Total Zimbabwe (Pvt) Ltd had indicated that the premises would be vacant by that date. Consequently it brought its contractors and employees to the premises under the belief that the premises were now vacant. It said that it is losing money due to Croco Motors (Pvt) Ltd's illegal conduct of refusing to leave the premises after Total Zimbabwe (Pvt) Ltd had left. It said that it is continuing to lose money in the sense that the contractors who were hired and its employees need to be paid. It averred that under the circumstances the balance of convenience favours an interdict being granted in its favour.

What is apparent in the two matters is that Croco Motors (Pvt) Ltd and Redan Petroleum (Pvt) Ltd had no lease agreement between the two of them. Total Zimbabwe (Pvt) Ltd is the one which had a lease agreement with Redan Petroleum (Pvt) Ltd which is the owner of the said premises. Croco Motors (Pvt) Ltd entered into a Marketing Licence

Agreement with Total Zimbabwe (Pvt) Ltd which agreement resulted in Croco Motors (Pvt) Ltd occupying the premises.

The agreement between Total Zimbabwe (Pvt) Ltd and Redan Petroleum (Pvt) Ltd expired on 31 August 2015. Total Zimbabwe (Pvt) Ltd gave Croco Motors (Pvt) Ltd notice for a period of 8 months that it should vacate the premises by 31 August 2015. That is common cause. It is also common cause that between Total Zimbabwe (Pvt) Ltd and Croco Motors (Pvt) Ltd the company which had physical possession and control of the premises is Croco Motors. It is common cause that on 31 August 2015 Croco Motors did not vacate the premises. On 1 September 2015 when Redan petroleum came to take occupation it was met with resistance by Croco Motors (Pvt) Ltd employees.

In an application for the relief of a *mandament van spolie* the applicant has to satisfy two requirements. These are that he was in peaceful and undisturbed possession of the property and that the respondent deprived him of such possession forcibly or wrongfully against his consent. The court does not look into the judicial nature of the possession claimed: *Shiriyekutanga Bus Service P/L v Total Zimbabwe* 2008 (2) ZLR 37 (h); *Botha and Another v Bannet* 1996 (2) ZLR 73(S).

Innes CJ in *Nino Bonio v de Lange* 1906 Ts 120 at 122 said,

“It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so the court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute.”

In *De Jager and Others v Faraly and Nestadi* 1947 (4) SA 28 (W) at 35, a case where demolition of premises was undertaken without legal process, Millin J said,

“What the court is doing is to insist on the principle that a person in possession of property, however unlawful his possession may be and however exposed he may be to ejection proceedings, cannot be interfered with in his possession except by the due process of law, and if he is so interfered with the court will restrain such interference pending the taking of action against him for ejection by those who claim that he is in wrongful possession. The fact that the applicants have no legal right to continue to live in this slum and would have no defence to proceedings for ejection, does not mean that proceedings for ejection can be dispensed with, nor does it make any difference, to the illegality of the respondents’ conduct that the occupation by the applicants comes with it penal consequences”

Millin J held that the demolitions of the premises without legal process in order to secure the ejection of the occupiers constituted acts of spoliation. The respondents in that matter were interdicted from further demolishing the premises.

Applying the principles of spoliation to the present case it is clear that although Redan Petroleum (Pvt) Ltd is the owner of the premises, at law it is not allowed to repossess its premises without following due process of the law. Mr *Mapondera* argued during the hearing that the defence to spoliation is a counter spoliation application. He said that in this case since the Marketing License Agreement had terminated on 31 August 2015 Croco Motors (Pvt) Ltd employees had no business going to the premises on 1 September 2015. He said by virtue of the expiration of the agreement of 31 August 2015 Redan Petroleum (Pvt) Ltd had taken vacant possession of the premises. So when Croco Motors (Pvt) Ltd employees assaulted Redan Petroleum (Pvt) Ltd employees and contractors and forced them out of the premises it is Croco Motors (Pvt) Ltd which was now despoiling Redan Petroleum (Pvt) Ltd of the premises.

Mr *Mapondera*'s argument that Redan Petroleum (Pvt) Ltd took vacant possession of the premises cannot be true because in case number HC 8272/15 in which Redan Petroleum (Pvt) Ltd is the applicant it is stated in para 9 of the founding affidavit that,

“Today the 1st of September 2015, applicant’s personnel as well as contractors went to the service station to rebrand it and commence repairs to the site. However they failed to do so due to the fact that respondent’s thirty something employees using force and intimidation chased away the applicant’s employees and has denied them access to the service station.....”

The above paragraph clearly shows that although the Marketing Licence Agreement terminated on 31 August 2015 Croco Motors (Pvt) Ltd which was in occupation of the premises never gave vacant possession thereof to Total Zimbabwe (Pvt) Ltd or to Redan Petroleum (Pvt) Ltd. So Redan Petroleum (Pvt) Ltd having never received vacant possession of the premises it has no basis for making a counter spoliation application. It never had access to the said premises in the first place.

Since Croco Motors (Pvt) Ltd refused to vacate the premises on termination of the marketing agreement on 31 August 2015 and despite having been given notice, Redan Petroleum (Pvt) Ltd should have sought an order for its ejection. Redan Petroleum (Pvt) Ltd argued that Croco Motors (Pvt) Ltd cannot be entitled to a *mandament van spolie* because it was not in peaceful and undisturbed possession of the property before 1 September 2015. It had been given notice on two occasions to vacate the premises and the second notice given in January 2015 was 8 months long. Mr *Mapondera* argued that since Croco Motors had been given notice to vacate, that disturbed its peaceful possession of the premises. For this

assertion he relied on the case of *Gifford v Muzire & Others* HH 69/07. I however agree with Mr *Magwaliba* that the fact that Croco Motors (Pvt) Ltd was given notice to vacate on 2 occasions, firstly in 2013 and secondly in 2014 did not give Redan Petroleum (Pvt) Ltd the right to forcibly eject Croco Motors (Pvt) Ltd from the premises. I do not hold the view that the mere giving of notices constituted the disturbance of peaceful possession thereby disentitling Croco Motors (Pvt) Ltd from the remedy of spoliation as Mr *Mapondera* argued. I hold the view that even after giving the notice to vacate, the person claiming the right to occupation of the premises should apply for a court order for the eviction of the unlawful occupier if he does not vacate. To hold otherwise would be to sanction people to resort to self-help, the very thing that the remedy of spoliation tries to fight.

Even if there is no contractual relationship between the parties that does not entitle Redan Petroleum (Pvt) Ltd to take the law into its own hands by ejecting Croco Motors (Pvt) Ltd without due process of the law. Spoliation is a remedy which is available even to a thief. See *Chisveto v Minister of Local Government and Town Planning* 1985(1) ZLR 248 (H) 250 A – D; *Bok Estates (Pvt) Ltd v Hubert Masara and Others* 2009 (2) 466 (H). Even in land matters a person claiming right to land is not entitled to evict an occupier without legal process. The possession of an offer letter does not negate the right of an unlawful occupier to seek a *spoliation order* – see *Dodhill (Pvt) Ltd and Another v Minister of Lands and Another* 2009 (1) 182 (H).

In respect of the second matter in which Redan Petroleum (Pvt) Ltd is the applicant Mr *Mapondera* argued that Redan Petroleum (Pvt) Ltd was seeking a final interdict against Croco Motors (Pvt) Ltd on the basis that Redan Petroleum (Pvt) Ltd has managed to show that it has a clear right to the premises as it is the owner thereof and that Croco Motors (Pvt) Ltd no longer has the right to occupy the said premises, the Marketing lease agreement having expired on 31 August 2015. Mr *Mapondera* made this submission despite the fact that in its application Redan Petroleum (Pvt) Ltd had indicated that it was seeking a provisional order for an interdict. However, a look at the terms of the final order sought and the terms of the interim relief sought shows that there is no difference between the two reliefs. In essence Redan Petroleum (Pvt) Ltd is seeking a final order on an urgent basis. A final interdict cannot be sought on an urgent basis. For this reason I cannot grant the application by Redan Petroleum (Pvt) Ltd. In any case having granted a spoliation order in favour of Croco Motors (Pvt) Ltd it is not possible to grant the relief being sought by Redan Petroleum (Pvt) Ltd.

Under the circumstances the two reliefs are mutually exclusive. The granting of one precludes the granting of the other.

In the result, it is ordered that

1. In case HC 8255/15 in which Croco Motors (Pvt) Ltd is the applicant, pending confirmation or discharge of this order:
 - a. Redan Petroleum (Pvt) Ltd and all other persons acting through it, be and are hereby interdicted and ordered not to interfere nor disturb Croco Motors (Pvt) Ltd's peaceful possession of a certain immovable property being a service station situate at stand 46A Comet Rise Township, Salisbury Township known as Mount Pleasant service station without a valid court order.
 - b. To that effect, Redan Petroleum (Pvt) Ltd shall within 24 hours of this order remove such barricades which hinder Croco Motors (Pvt) Ltd to gain access to the aforesaid premises.

Service of the provisional order:

That leave is hereby granted to Croco Motors (Pvt) Ltd's legal practitioners to attend to the service of this order forthwith upon Redan Petroleum (Pvt) Ltd in accordance with the rules of this Honourable Court.

2. In case HC 8272/15 in which Redan Petroleum (Pvt) Ltd is the applicant, the application is dismissed with costs.

Atherstone and Cook, legal practitioners for Croco Motors (Pvt) Ltd
Mapondera and Company, legal practitioners for Redan Petroleum (Pvt) Ltd