CROWHILL COMPANY PVT LTD
versus
CYNTHIA MAADZA
and
THE ZIMBABWE WAR VETERANS ASSOCIATION

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 2 and 5 January 2015

Urgent Chamber Application

T.S.T Dzvetero, for applicant
Advocate S. Hashiti, for respondents

MUREMBA J: On 2 January 2015 the applicant made an urgent chamber application for a provisional spoliation order against the respondents which I granted on 5 January 2015. I have been asked for the full reasons for my judgment and these are they.

It is common cause that there has been a legal wrangle over the ownership of subdivision 1 of Lot J, of Borrowdale Farm measuring 416,25 hectares (Crowhill farm) which has been on-going for years between the applicant and the first respondent. Each party claims ownership thereof.

The brief history of this property which culminated in the present application for a spoliation order is as follows. Before 2003 it was the applicant which was in occupation of this property. The said property was gazetted in 2003 for agricultural purposes during the land reform and resettlement programme. On 10 November 2003 the first respondent was given an offer letter over the said property. She took occupation thereof. On 2 May 2014 following the Presidential Proclamation 1 of 2012 which turned the property in question from an agricultural land to an urban land meant for urban development, the Ministry of Lands, Agriculture and Rural Resettlement withdrew the offer letter it had granted to the applicant in 2003.

Meanwhile on 17 March 2004 the applicant had obtained an eviction order against the first respondent from this court. Apparently the parties had continued to fight after the first

respondent had been given the offer letter in 2003. So following the withdrawal of the first respondent's offer letter on 2 May 2014, the applicant had a writ of ejection issued by the Registrar of this court on 7 May 2014. This writ was based on the eviction order of 17 March 2004 by this court. Following the writ, the applicant successfully evicted the first respondent from the property on 13 May 2014.

Having been disgruntled by the eviction, the first respondent came to this court on 2 July 2014 and obtained an order by default, which order set aside the eviction order of 17 March 2004 and the writ of ejection of 7 May 2014. Having obtained this order, the first respondent tried without success to have a writ of ejection issued by the registrar of this court in order to evict the applicant who had taken occupation on 13 May 2014. Apparently the default judgment of 2 July 2014 was inadequate in that it did not direct the Sheriff of the High Court to enforce that judgment. The first respondent tried to have the order amended by Justice CHIGUMBA who had granted it, but she indicated that the first respondent ought to make a court application to effect the amendment, suffice to say the first respondent never made that application.

In its papers, the applicant averred that on 28 December 2014 the first respondent enlisted the services of the second respondent and both respondents came to the property armed with knobkerries, iron bars, assaulted the occupants and forcibly evicted them. The applicant stated that following the proclamation by the President, it had been given title to develop the land and it had developed the said land into residential stands. Apparently it had sold some of the stands to individuals. When the respondents came on 28 December 2014 they ordered everyone out including employees of the applicant and individual title holders who had bought stands.

The foregoing resulted in the applicant rushing to this court with the present application. In response to the application, the respondents' counsel Advocate *Hashiti* raised some points *in limine.*

Points *in limine*

1) Non-compliance with r 241(1)

Advocate *Hashiti* argued that the application was not accompanied by form 29B as is required by r 241 (1) of the High Court Rules, 1971. I dismissed this point *in limine*. Urgent chamber applications should be accompanied by form 29B which form requires that the applicant sets out the grounds upon which the application is based in summary form. In *casu*

the applicant as correctly submitted by its counsel complied with the rule. The applicant stated the nature of relief sought, that is, the restoration of the *status quo ante* of its unlawfully deprived possession of subdivision 1 of Lot J of Borrowdale by the respondents on the grounds that:

a) the applicant was in peaceful and undisturbed possession of the property and

b) the respondents deprived the applicant forcibly and wrongfully against its will.

The applicant laid sufficient basis for its application.

2) Conflict of interest by applicant's lawyer

It was submitted that Mr *Dzvetero* who was representing the applicant was conflicted because in matters preceding this matter that involved the same parties Mr *Dzvetero* represented the first respondent and as such he was privy to personal information about the first respondent. In *Mutanga* v *Mutanga* 2004 (1) ZLR 475 (H) it was held that the conduct of a legal practitioner acting first for one party, then the other, in litigation should be discouraged.

In *casu* Mr *Dzvetero* argued that while it was true that he once worked in the law firm which used to represent the first respondent it was not him, but Mr Mlotshwa who used to receive instructions and act on behalf of the first respondent. He said personally he never received instructions from the first respondent nor did he ever represent her or assist Mr Mlotshwa in matters involving the first respondent.

Mr *Dzvetero*'s explanation left me convinced. Furthermore, Annexure A3 which is attached to the respondents' opposing papers which is a letter of complaint written to the Law Society by the first Respondent makes it clear that the person who was representing her in her cases was Mr Mlotswa. In that letter the first respondent was categorical that she had taken offence against Mr *Dzvetero* because he was working with Mr Mlotshwa. I am sure that if it was Mr *Dzvetero* who had personally represented her she would have stated so. At the time this application was made Mr *Dzvetero* and Mr Mlotshwa were no longer working together as Mr *Dzvetero* is now with a different law firm. Obviously the scenario in the *Mutanga* case is distinguishable from the scenario in the present case. Again, I dismissed this point *in limine.*

3) *Locus standi*

It was argued that the applicant had no *locus standi* to bring this application as it had indicated in its papers that it had sold part of the land to private individuals, so this land no longer belonged to it but to those individuals. It was argued that the applicant had not laid the basis or authority for representing these individuals who should have represented themselves. Further it was argued that the applicant did not state what portion of the land it was occupying.

The counter-argument by the applicant's counsel which I found satisfactory was that although the applicant had sold ¾ of the land it still had ¼ which had not yet been sold. He added that the applicant was still servicing the whole piece of land including the stands that had been sold. He added that some of those stands that had been sold were still unoccupied by their owners and it remained the applicant's duty to hand over the stands to the buyers.

I pointed out that we were not dealing with the issue of ownership here, but the issue of possession. So the question was not whether or not the applicant owned the whole piece of land or had sold part of the land, but whether or not the applicant had possession of the land in question at the time it alleged to have been despoiled. The applicant stated that it was still servicing the whole piece of land. The whole piece of land was still under its control. To me that established *locus standi*. Again I dismissed the point *in limine.*

4) Urgency

It was argued that the matter was not urgent because the cause of action arose in July 2014 when Justice CHIGUMBA gave an order setting aside the writ of ejection which had authorised the applicant to take occupation of the property. Advocate *Hashiti* argued that it is at the time that the order was granted that the applicant ought to have taken some action to have that order rescinded.

As correctly argued by the applicant's counsel I found no merit in this point *in limine.* This is because after the order by Justice CHIGUMBA on 2 July 2014, the first respondent did not go on to repossess the property from the applicant. It is not in dispute that at the time Justice CHIGUMBA set aside the writ of ejectment the applicant had already taken possession and occupation of the property on 13 May 2014 pursuant to that same writ which was later set aside. The life-span of that writ had already expired. So after obtaining the order

of 2 July 2014 the first respondent should have had a writ of ejectment issued in her favour to enable her to evict the applicant.

As already stated above, the first respondent tried without success to have a writ of ejectment issued. This was simply because the order by CHIGUMBA J did not direct the sheriff to enforce it. The first respondent tried in vain to have Justice CHIGUMBA amend her order in chambers to include a directive to the sheriff to enforce the order. Justice CHIGUMBA indicated that for such an amendment to be effected the first respondent needed to make a court application which application the first respondent never made. Advocate *Hashiti* in his own words made submissions that in a bid to enforce the order the first respondent approached various political offices and the second respondent. He said that she did this because the wheels of justice were proving to be unhelpful and were taking too long to turn. To confirm his submissions there is a letter dated 19 December 2014 which the advocate produced which letter was written by the second respondent to its national chairman. In that letter the second respondent said that the first applicant who is its member was unceremoniously ejected from her farm and that she had successfully appealed to the High Court and the previous order to remove her had been set aside. The second respondent went on to say, "it is against this background that War Veterans are now assisting the veteran to repossess her farm. Anytime the veterans will descend on the farm to repossess it." This letter was date stamped 23 December 2014 by the second respondent and was copied to the Minister of Home Affairs, the Propol and the Officer in charge of Borrowdale Police Station. Advocate *Hashiti* went on to submit that following that letter, on 28 December 2014 the second respondent went on to stage a peaceful demonstration at the property in question. He also submitted that on that same day the second respondent had also learnt that the applicant was demolishing the farm house.

All these submissions by Advocate *Hashiti* showed that the applicant had always been in occupation of the property since the time it took occupation on 13 May 2014 before Justice CHIGUMBA's order up to the 28th of December 2014 when it allegedly demolished the farm house. It was the applicant's averment that its possession and occupation of the property was interfered with on 28 December 2014 and not any time before that date. My own analysis of the sequence of events led me to the conclusion that the applicant started having problems with the respondent on 28 December 2014 and not any time before that. That is when the second respondent descended on the farm as it had threatened in its letter of 19 December 2014. It was my conclusion that the cause of action arose on 28 December 2014. By 30

December 2014 the applicant had filed this application. The applicant acted when the need to act arose. I thus made a finding that the matter was urgent. I dismissed this point *in limine.*

5) Material dispute of facts

It was submitted that there were material dispute of facts which did not enable this matter to be decided on paper, but through action procedure. Advocate *Hashiti* said that there was need to lead oral evidence to resolve issues that are were in dispute, for example, the dispute on who had title to this property since the Reserve Bank of Zimbabwe was also claiming ownership. He submitted that while Cephas Msipa alleged assault there was no medical confirmation to it and he did not identify the individuals who assaulted him.

As correctly argued by Mr *Dzvetero,* the material dispute related to ownership, but this application was not meant to decide who had title to this property. It was simply to deal with the issue of possession and spoliation. It was an issue that could be decided on affidavit evidence. This point *in limine* was also dismissed.

Having dismissed all the points *in limine* I went on to deal with the merits of the matter.

THE MERITS

Advocate *Hashiti* argued that Justice CHIGUMBA's order of 2 July 2014 restored the first respondent's ownership rights to the property and as such the applicant's application ought to be dismissed. I did not attempt to make a pronouncement on this issue of ownership at all as it was not decisive of the matter. As correctly submitted by the applicant's counsel the purpose of a *mandament van spolie* is to preserve law and order and to discourage people from taking the law into their own hands. In short it is meant to prevent anarchy or lawlessness. To give effect to this the *status quo ante* has to be restored irrespective of who has title to the property in question.

In a similar application in *Fredericks and Another* v *Stellenbosch Divisional council* 1977 (3) SA 113 (c) at H 117C it was stated the court is not concerned with the nature of the applicant's occupation but with the issue that the respondent should not take the law into its own hands. It was further stated that such conduct cannot be condoned. See also *Karori (Pvt) Ltd & Another* v *Mujaji* 2007 (1) ZLR 80 (H) at 109 D-E.

In *Botha and Another* v *Barrett* 1996 (2) ZLR 73 (S) at 79-80 GUBBAY CJ as he then was said that in an application for a spoliation order the applicant only has to satisfy the following two requirements.

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

See also *Krammer* v *Trustees Christian Coloured Vigilance Council Park* 1948 (1) SA 748 (C) at 753.

The respondent may raise the following defences.

a) That the applicant was not in peaceful and undisturbed possession of the property at the time of deprivation,
b) That the respondent has not committed spoliation.

In *casu* as already stated above, when CHIGUMBA J gave her order the applicant was already in occupation of the property and the first respondent had been evicted following the writ of ejectment which was subsequently set aside by that order. So what it means is that first respondent having obtained an order in her favour she had the right to enforce it. She was supposed to enforce it by following due process of the law. In *Dodhill (pvt) Ltd & Another* v *Ministry of Lands & Another* 2009 (1) 182 (H) it was held that a person claiming right to land is not entitled to evict the occupier without following legal process.

From the narration that was given by advocate *Hashiti* on the issue of urgency it is clear that the second respondent did not follow due process of the law in evicting the applicant on 28 December 2014. She enlisted the services of the second respondent because according to her the wheels of justice were turning very slowly. The second respondent's letter is clear and unequivocal. It put it in black and white that it intended to and was going to descend on the farm to repossess it.

The second respondent as a War Veterans Association has no *locus standi* to enforce the orders of this court or any other court. The sheriff is the one who has that duty. On 28 December 2014 the second respondent in solidarity with their member, the first respondent proceeded to the farm. It is not in dispute that following the respondents' presence on the farm on this day the applicant left the farm. While the applicant's counsel made submissions that it was the second respondent's members who were now on the farm, Advocate *Hashiti*

submitted that the farm was now being manned by the police. Whichever way one looked at these submissions what they showed or proved was that the applicant who had been in possession and occupation of the property was despoiled of it on 28 December 2014. The applicant did not dispute that when the respondent came to the farm on 28 December 2014 it was in the process of demolishing the farm house. It was submitted that the demolition of the house had been ongoing as part of the renovation process that the applicant had been carrying out as it was also claiming ownership of the same land. However, as I have already stated, it was not my mandate to decide on the question of ownership. The fact that the applicant was found demolishing the farm house showed that it was the applicant who had been in possession of the property prior to 28 December 2014.

The respondents raised the defence that prior to 28 December 2014 the applicant was not in peaceful and undisturbed possession of the property. It was submitted that from the time Justice CHIGUMBA gave her order, the first respondent had always had access to the farm. She still had her property there in the form of the farm house, business equipment and livestock. It was submitted that 4 of her workers and a niece had been staying on the farm. The first respondent herself would visit the farm time and again although she would not put up for the night there. It was also submitted that the first respondent was constantly communicating with the applicant *vis-a vis* her access to her property. Let me point out that during the hearing Mr Dzvetero did not comment on this issue probably because the hearing was protracted. This could be the reason why he made an oversight. I also made an oversight, otherwise I would have asked him to comment on the issue.

Be that as it may, assuming that Advocate *Hashiti* was correct, I am of the view that the manner in which the first respondent used to access the land was without violence and was with the consent of the applicant. It was done peacefully and without the involvement of the second respondent. The violence only started at the time the second respondent descended on the farm on 28 December 2014 upon being enlisted by the first respondent. This is what resulted in the forceful eviction of the applicant. The fact that the first respondent had to seek the assistance of the second respondent was clear testimony that the first respondent had not managed to eject the applicant. Having failed to obtain a writ of ejectment she turned to the second respondent and they resorted to violence.

Even if the first respondent had obtained a judgment in her favour, she still had to employ lawful means to evict the applicant from the said property. I need not emphasise that

court orders are supposed to be enforced lawfully by following due process of the law. I thus dismiss the defence by the respondents.

The order by Justice CHIGUMBA is the latest one in the legal wrangle that has been on-going between the applicant and the first respondent and it has not been challenged by the applicant. The first respondent is allowed to take lawful action for the ejectment of the applicant if she so wishes. What she is not allowed to do is to resort to self-help. The applicant managed to satisfy the two requirements that ought to be satisfied in an application of this nature. It is only fair under the circumstances to restore the *status quo ante.*

In the result, I granted the interim relief of a *mandament van spolie* which was sought by the applicant. The order was as follows:

> That pending the determination of this matter, the applicant is granted the following relief:
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> 1. The 1st and 2nd respondent and all other persons claiming occupation or possession through them, jointly and severally., or any other person occupying Subdivision 1 of Lot J of Borrowdale Estates without the knowledge and consent of the applicant shall forthwith vacate the said property and that such persons shall forthwith remove all property introduced by them thereon so that the *status quo ante* of the property by the applicant as at 26th December 2014 be and is hereby restored.
> 2. (b) To the extent that it becomes necessary, the Deputy Sheriff is hereby authorized and empowered to attend to the eviction and removal of any person and their property so occupying the said Subdivision 1 of Lot J of Borrowdale Estates without the knowledge and consent of applicant. Pursuant thereto, the Deputy Sheriff be and is hereby authorized to enlist the assistance of any member of the Zimbabwe Republic Police who are hereby directed to provide such assistance to the Deputy Sheriff so as to ensure that the provisions of this order are executed and implemented in full.

Messrs Antonio & Dzvetero, applicant's legal practitioners
Messrs Chinawa Law Chambers, respondents' legal practitioners