

REDAN PETROLEUM PRIVATE LIMITED
and
SPRING AND AUTUMN PRIVATE LIMITED
versus
SHUMBA HOLDINGS PRIVATE LIMITED
and
OUTSIDE IN LEISURE PRIVATE LIMITED
and
TEMBA MLISWA
and
THE MINISTER OF LANDS AND RURAL RESETTLEMENT

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 6 May 2016 & 15 June 2016

URGENT APPLICATION

G Gapu, for the applicant
T Madotsa, for the 1st & 3rd respondents
D Mwonzora, for 2nd respondent
K Hwarinda, 4th respondent

DUBE J: The object of this application is to compel the respondents, their directors, agents, employees or any third party from disturbing the applicant's peaceful enjoyment and possession of Redan Service Station, Karoi and for restoration of the *status quo ante*. The applicant also seeks a contempt of court order against the first and third respondents for failure to comply with an order granted under HC 3737 /16.

The applicants' case is based on the following allegations. The first applicant claims that it bought shares in a company called Spring and Autumn Oil (Pvt) Ltd, the second applicant. The second applicant owns and operates Redan Service Station, Karoi. Through its shareholding in the second applicant, the first applicant claims that it is the economic beneficiary in the business of the second applicant. The first respondent used to own shares in the first applicant. The shares were sold to the first applicant in May 2013. The third respondent is the owner of Spring Field Farm on which the service station is located. He is also a director of the first respondent and ceased to have any interest in the service station when the first respondent sold its shares. The fourth defendant is the Minister responsible for

land acquisitions and is a nominal defendant. He offered the farm on which the service station is located to the third respondent through the land reform programme.

The applicants aver that they were in peaceful and disturbed occupation of the Karoi Service Station when they were despoiled by the first and third respondents on 3 April 2016. On 9 April 2016 the applicants filed for a spoliation order under HC 3737/16 and a provisional order was duly granted on 16 April 2016. On 19 April 2016, the Messenger of Court Karoi served the order upon the respondents in this application. The respondents ignored the order and continued to operate at the service station. The applicant sought the intervention of the Sheriff of the High Court. The Sheriff enforced the order and restored possession to the applicants on 23 April 2016. On 28 April 2016, the Sheriff, Mr Madega, attended at the service station and unlocked the premises and the second respondent occupied the premises. The applicants' bone of contention is that respondents have without a court order or any lawful excuse taken control of the service station. The applicants challenge the reopening which they allege was done by the Sheriff simply because he bowed to pressure as his "fingers were getting burnt from the top".

The applicants assert that they have been despoiled of the service station and that they have a *prima facie* right to remain in peaceful, undisturbed possession and use of the service station. Further that there is real and threatened danger of irreparable harm and a risk of harm to limb and life of the applicants' directors, employees and agents, given the threats of physical harm made by the third respondent. The applicants contend that there is no other alternative remedy available to the applicants to compel the respondents to desist from continuing with their illegal actions and to restore the *status quo ante*. That the balance of convenience favours the granting of the order in favour of the applicants.

The first respondent took issue with the authority of the deponent to the applicants' founding affidavit to depose to the affidavit as well as its joinder to the proceedings. It claims that it was improperly joined as it was not involved in the dealings of the applicants and respondent and in the lease agreement. Its position is that it was not in the premises at the time of the alleged second spoliation and was prepared for an order against it. The claims against it and fourth respondent were later withdrawn and the preliminary points were not pursued. The third respondent submitted that he was not in occupation of the premises and was also prepared to have an order compelling him to vacate the premises made against him.

The respondent defends the application. For ease of reference it will be referred to as the respondent. It submitted as follows. The applicants were tenants at the service station whose

lease agreement expired on the 31 March 2016. After this, the respondent entered into a lease agreement with the third respondent. The respondent was in place on 1 April 2016. There was an amicable handover takeover on 5 April between first applicant's management and the second respondent. It was already in possession of the premises well before the first application was made on 9 April 2016. The respondent contended that the complaint in the first application for spoliation was not against it but the first respondent because it was not cited and that it is not covered by the order. The respondent did not despoil the applicants on that occasion but that such was done by third parties. It submitted that it was locked outside the premises through a mix-up. This resulted in the fuel tanks being reopened after the Sheriff realised that the order had been enforced against a wrong person. It reoccupied the premises and there was no spoliation that ever took place as it was allowed in by an officer of court.

The respondent challenged the urgency of the matter and the relief of contempt of court sought by applicants. The respondent submitted that the proper remedy against the other respondents is contempt of court as the court cannot grant another spoliation order over and above the one of Muremba J. Further that there is an alternative remedy available to the applicants in that they can enforce the order. It submitted that the application cannot be urgent against it because it took over the premises on the 1st of April and occupied the service station on 5 April 2016 and no complaint was raised against it until 4 May. That the period taken to bring the application shows that the matter is not urgent.

In *Mangala v Mangala* 1967 (2) SA 415 the court held that it does not follow that because an application is one for a spoliation order, the matter automatically becomes one of urgency. In addition, the court held that where an applicant brings an application for spoliation on an urgent basis, he must make out a case for urgency in accordance with the rules. In *Karori (Pvt) Ltd v Mujaji* HH 23- 2007 a judgment of Kudya J where on p 8 he said the following;

“I also find that an application for spoliation is urgent by its very nature. It exists to preserve law and order and stop and reverse self- help in the resolution of disputes between parties. Its primary aim is to restore the *status quo ante*. See *Chisweto v Minister of Local Government and Town Planning* 1984 ZLR (1)248(HC)”

Another case in point is *Zululand Gas and Outdoor Co v Morris Centre(Pvt) Ltd* 2009 ZAKZAH 18 where it was held that, a spoliation order is an urgent remedy and aims to restore unlawfully deprived possession at once in order to prevent people from taking the law into their own hands.

The approach adopted by our courts has not shifted from that adopted in the case of *Mangala*. Our law recognises that the relief of *mandamus van spolie* is by its nature urgent simply because the remedy sought has the effect of preserving the law and reversing self-help and thereby restoring the *status quo ante* and affording a speedy remedy. This approach does not automatically make every application of this nature urgent. Whether such an application is urgent depends on how it has been handled and brought to court for redress by the litigant. The *mandamus* may by itself be a speedy remedy, but it ought to be subjected to the ordinary rules governing urgent applications. A litigant who alleges that he has been despoiled is required to assert himself timeously and seek urgent redress. A litigant, who has been sluggish and defers seeking redress, cannot expect to get automatic redress on an urgent basis when he finally decides to approach the court for redress. Such a litigant is still required to show that the matter is urgent and that he did treat the matter as urgent.

In this case, I formulated the view that the matter was urgent for the following reasons. The applicant seeks to protect commercial interests, See *Silver Trucks (Pvt) Ltd & Anor v Director of Customs and Excise* 1999 (1) ZLR 490. A litigant who manages to show that his commercial interests are at stake is entitled to have his matter dealt with on an urgent basis in order to have his interests protected, for as long as he is able to show that he treated the matter as urgent. The applicants aver that they were restored back into the premises on 16 April and that the Sheriff reopened the service station on 28 April 2016 leading to the respondent occupying the premises. The applicants averred that they only became aware of the respondent's occupation or reoccupation of the premises on 28 April 2016 when the premises were unlocked. A litigant who is unaware of circumstances requiring him to get redress in the courts cannot be penalised for failing to take corrective action timeously. The need to act arises only when a litigant becomes aware of all the pertinent details enabling and requiring him to act. The applicants filed this application on 4 May 2016, barely three days after they aver that they became aware of their predicament. The need to act with respect to the respondent arose when the applicants became aware that the respondent was in occupation of the service station. I am satisfied that the applicants asserted themselves timeously with respect to the respondent.

The applicant seeks an order for contempt of court based on the order of Muremba J. The respondent contended that the relief sought is incompetent. Contempt of court is an appropriate remedy against a party who unlawfully and intentionally refuses to comply with a court order. In *Herbstein and Van Winsen*, in *The Civil Practice of the High Courts of South*

Africa 5th ed p 1102, the authors state that on-going contempt of court by its very nature, introduces an element of urgency in the proceedings. The authors also remark that because contempt of court has implications on the effectiveness and legitimacy of the legal system, there is a public interest element in every such case where it is alleged that a party has wilfully failed to comply with a court order and hence every such case has an element of urgency. See also, *Protea Holdings Ltd v Wriwt* 1978 (3) SA 865(W), *Victoria Park Ratepayers' Association v Greyvenouw CC* [2004] 3 All SA 623(SE).

Proceedings for contempt of court have implications on the effectiveness and legitimacy of the legal system and hence have a public interest element to them, and are therefore urgent in their nature. For contempt of court proceedings to be brought on an urgent basis, a litigant has to show that the contempt complained against is on-going. The applicants' case is that they have a court order which is being violated by the respondents and the contempt is continuing. For these reasons, this application is urgent and deserves to be dealt with on an urgent basis.

A *mandamus van spolie* is a common law possessory remedy available to a person who has been dispossessed of property he occupies and possesses. The justification for the relief was stated in *Nino Bonino v de Lange* 1906 B TS 120 at 122 as follows,

“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.” See also *Shoprite Checkers Ltd v Pangbourne Properties* 1994 (1) SA 616(W), *Administrator, Cape and Anor v Ntshwagela and Ors* 1990 (1) SA 205 (AD). In these cases, the courts held that the purpose of the *mandamus* is to protect possession without having first to embark upon an enquiry into the question of ownership of the person dispossessed.

An applicant seeking to rely on this remedy does not have to prove that he is the owner of the property he was dispossessed of before he is restored to possession. He has an onus on a balance of probabilities to prove the following,

1. That he was in peaceful and undisturbed possession of the property in dispute.
2. That he was unlawfully deprived of such possession See *Diana Farm (Pvt) Ltd v Madondo* 1998 (2) ZLR (4) 410 (SC), *Forrester Estate (Pvt) Ltd v Edgar Chidavaenzi*

The law is clear that where spoliation has taken place, “it is not necessary that the spoliator himself should acquire possession of the thing, Spoliation rather being any act whereby the possessor is unlawfully prevented from dealing with the thing in his possession”. See Silberberg and Schoeman’s Law of Property, 3rd Ed, p130. An officer of the court can only act lawfully where he acts in terms of a court order. In *The Church of the Province of Africa and Ors v Jakazi and Ors* HH 238/11, the respondents obtained assistance from the police to obtain possession of premises without a court order. Their conduct was held to be unlawful and the court held that “the use of the police in the dispossession of the applicants in that case, did not cloth the respondent’s conduct with legality, as dispossession must be through the due process of law”.

A number of disputes of fact arise in this matter. These can be resolved by weighing the probabilities of the parties’ cases. The respondent avers that it took over the premises on 1 April 2016 by virtue of a lease agreement it entered into with the third respondent after the applicant’s lease agreement had expired. Ownership or lease rights have no place in spoliation matters. Only two issues require being resolved, one is possession at the time of the alleged spoliation and the deprivation of possession.

The applicant alleges that it was despoiled on the first occasion on 3 April by the first respondent. The respondent initially submitted that it occupied the premises on 1 April 2016. It later submitted that the date is unknown. The respondent seeks to rely on the affidavit of Mr Kasonde of Redan which states that the premises were handed over for occupation to the respondent on 5 April 2016. That fact seems to be common cause. In its opposing affidavit the respondent states that “a proper handover takeover took place after which the respondent took occupation”. It is clear that at the time that the applicants were despoiled the respondent was not in occupation of the premises. The respondent wants to give the impression that the applicants consented to their possession because the first applicant’s manager was involved in the handover take over. The applicants had at that stage already been despoiled. I suppose that the manager had no choice realising that they had already been kicked out. The more probable version seems to be that of the applicants, which is that the applicants were in occupation of the premises on 3 April 2016 when they were despoiled by the third respondent and first respondent.

When the applicants were despoiled on 3 April, the alleged despoilers did not occupy the premises. Instead, the premises were handed over to the respondent on a supposed lease agreement. In order for spoliation to take place, it is not a requisite that the spoliator himself

take possession of the despoiled property. The third and first respondents did not take possession of the premises after the alleged spoliation. This explains why the hand- over take- over was only done on 5 April 2016. The initial order was granted only against the first and fourth respondents because the applicants were unaware of the presence of the respondent on the premises. The respondent occupied the premises on 5 April, after the applicants had already been forced out. In this case the actual spoliator in the first instance did not get occupation of the premises after despoiling the applicants. Where a person aides a dispossession and he does not subsequently himself acquire possession and occupation of the premises, and gives possession to a third party, courts will restore the *status quo ante*. Thus, in a case where A unlawfully dispossesses B of property and gives it to C, B is entitled to recover the property from both A and C. The court in such circumstances is entitled to restore possession to B. It is of no consequence that B was despoiled by a third party being A. For as long as the possessor is deprived of his possession, that act amounts to spoliation. It is immaterial that the actual spoliator did not occupy the premises. The rationale behind the relief is purely to re-establish the lawful condition that was momentarily disturbed. The respondent was not entitled to remain in the premises after the order of Muremba J; this is despite that the respondent is not specifically mentioned in the order.

The effect of Muremba J's order was to restore possession of the premises to the applicants. The Messenger of Court Karoi served the order on the respondents. It was not disputed that the applicants made arrangements to reopen their business with the assistance of the Sheriff. They secured the premises and left security guards on site. The applicants requested that premises be locked by the Sheriff so that they would be able to resume their operations later. It is inescapable that the act of the Sheriff had the effect of restoring the applicants back into the premises on 23 April 2016. They were restored to peaceful and undisturbed possession from that moment henceforth, thus from 23 to 28 April 2016.

In a sudden turn of events the Sheriff unlocked premises on 28 April. The confusion with the Sheriff seems to have stemmed from advice he received that he had locked out the respondent instead of the first respondent. The Sheriff also seemed to have bowed to "some pressure from above". In the mix up, the Sheriff reopened the tanks at the Service Station resulting in the second respondent reoccupying the premises.

The Sheriff is an officer of the court. He is required to act in accordance with the law and enforce court orders. He is required to act in accordance with instructions of the court and not to go on a romp of his own. The facts of this case are similar to those in the case

Jakazi case where respondents got assistance from the police and dispossessed an applicant. Where the Sheriff acts on his own initiative without a court order, he acts illegally. The Sheriff had no right to reopen the premises or tanks without a court order to that effect. He acted unlawfully by re-opening the service station albeit from political pressure. Once he restored the applicants into the premises his mandate was complete. He had no right to reverse his action without a lawful court order or directives from the court. The Sheriff helped to dispossess the applicants from the premises out of his own mere authority and without the intervention of the law or due process of law. The Sheriff's act in unlocking the premises had the effect of aiding the dispossession of the applicants from the premises. The Sheriff's act in reopening the premises does not clothe the respondent's conduct with legality as the dispossession was not done in accordance with the due process of law. The applicants have to be restored to possession to their former position first in terms of the order of Muremba J before the merits of this case can be dealt with. That has not happened.

What complicates the respondent's case is that it was aware that the applicants had obtained an order restoring them into the premises. It was served with a copy of the provisional order on 19 April 2016. The respondent had no reason to come back into the premises after it had been locked out. It is clear that the second respondent took advantage of the melee to reoccupy the premises. The respondent acted *mala fide*. A litigant who being aware of a court order for restoration of the *status quo ante* against a third party, acts unlawfully when he goes on to occupy the same premises without recourse to the legal process. The respondent has no entitlement to reoccupy the premises without a court order. What the respondent ought to have done is to seek to be joined as a party in HC 3737/16 and to anticipate the return date for determination of its rights. The respondent took the law into its own hands. The conduct of the defendant in taking advantage of the confusion that ensued amounts to self-help and that innovation does not entitle it to possess the premises. The conduct of the respondent together with the Sheriff amounts to spoliation of the applicants.

I am satisfied that the applicants have established a *prima facie* entitlement to the spoliation order. The applicants stand to suffer irreparable harm as they continue to lose more business. The respondent has just started its business operations at the premises. The balance of convenience favours the applicants who have always been in possession and operating the service station. The applicants are still entitled to have possession restored to them.

The respondent is not specifically covered by the order nor is it covered by the description of the people covered by the order. It is neither an agent, director, employee nor

third party working on the instructions or interests of the first respondent. It has also not been shown that the third respondent participated in the spoliation or that he is in the premises. The contempt of court part of the application fails. In the result is ordered as follows:

Pending confirmation or discharge of the final order the applicants are granted the following interim relief:

1. That the 3rd and 2nd respondent, its Directors, agents, employees or any third party working on its instructions or those of the aforementioned persons, or such same third parties working in its interests be interdicted from summarily disturbing the applicants peaceful enjoyment, beneficiary ownership, possession and use of Redan Karoi located at Spring Farm, their shareholding and equipment and portion of Spring Farm, upon which the said fuel station and its appurtenances are located, respectively, unless on the strength of an order of a competent court, with a final effect.
2. That the 3rd and 2nd respondent, its Directors, agents, employees or any third party working on its instructions or those of the aforementioned persons, or such same third parties working in its interests, be and are hereby ordered to unlock and remove all their blocks which they have barred the applicants with, from accessing Redan Karoi Service Station and its purporting fixtures and fittings.
3. That leave is hereby granted to the applicant's legal practitioners or the Deputy Sheriff to attend to the service of this order forthwith upon the respondents in accordance with the rules of the High Court.

Scanlen & Holderness, applicant's legal practitioners

Chitewe & Partners, 1st & 3rd respondent's legal practitioners

Mwonzora & Associates, 2nd respondent's legal practitioners