

MARINDA FENESEY
versus
GATEWAY PRIMARY SCHOOL
and
KM RICQUEBOURG N.O.
and
GATEWAY PRIMARY SCHOOL PARENTS ASSOCIATION
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 17 and 24 May 2017

Urgent Chamber Application

C. Daitai, for applicant
L. Madhuku, for first to third respondents

MUSAKWA J: This is an application for a spoliation order. The draft order reads as follows-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to this Honourable Court why a final order should not be made in the following terms;

1. The 1st, 2nd and 3rd Respondents be and are hereby interdicted from interfering in any manner with the Applicant’s business operations at the tuck shop situated at Gateway Primary School including but not limited to barring her potential customers from buying from the tuck shop.
2. The 1st, 2nd and 3rd Respondents be and are hereby ordered not to unlawfully evict the Applicant from the tuck shop at Gateway Primary School.
3. The 1st, 2nd and 3rd Respondents to pay costs of suit on an attorney and client scale, the one paying the others to be absolved.

INTERIM RELIEF GRANTED

Pending confirmation or discharge of the provisional order, the Applicant is granted the following relief:

1. The 1st, 2nd and 3rd Respondents be and are hereby ordered to remove their additional locks at the tuck shop at Gateway Primary School upon service of this order and take all necessary steps to ensure that the Applicant’s peaceful and undisturbed occupation of the tuck shop is restored failing which the 4th Respondent be and is hereby authorized to remove the locks above said (sic).

2. The 2nd Applicant (sic) be and is hereby ordered to publicly and at an assembly reverse the order he imposed on school pupils and teachers not to buy at the Applicant's tuck shop at Gateway Primary School.
3. The Applicant's legal practitioners are hereby given leave to serve the order on the Respondents."

The background to this application is that the applicant leased a tuck shop that is situated at Gateway Primary School. The agreement was concluded with the Parents' Association Committee of Gateway Primary School. The applicant has been a statutory tenant since 2011. On 6th February 2017 the applicant was given notice of termination of the lease with effect from 6 April 2017. On 5th April 2017 the applicant's legal practitioners wrote to the chairman of the Parents' Association Committee challenging the termination of the lease without good cause.

The applicant claims that she stocked the tuck shop in anticipation of the opening of the second term of schooling. On 9th May 2017 which was the opening day of school, it is alleged that the second respondent barred everyone from buying from the tuck shop. The ban was announced at the school assembly. People were deployed to guard against anyone buying from the tuck shop. The applicant tried to engage the second respondent to no avail.

On 10th May 2017 the applicant found that additional locks had been installed on the tuck shop. As a result she has not been able to access the tuck shop. It is the applicant's contention that she had hitherto been in peaceful and undisturbed possession of the tuck shop. Consequently she was despoiled of her peaceful and undisturbed possession of the tuck shop.

The respondents contend that the applicant accepted the termination of the lease. She only flipped on the 5th April 2017. When she voluntarily gave up possession the Gateway Schools Trust took over the premises. It is also contended that the applicant was never in possession of the premises during the month of April. It is also disputed that she stocked the tuck shop. There is further averment that the second and third respondents did what was in the best interests of the pupils whom the applicant was swearing at.

Although in the opposing papers the respondents had raised some points in *limine*, Mr *Madhuku* abandoned them in favour of the matter being heard on the merits. That is quite commendable as it has become predictable in urgent applications for the opposing side to raise preliminary issues.

Mr *Daitai* submitted that there was no response to the letter of the 5th April, which suggests an admission of the unlawful conduct complained of. He further submitted that in terms of the oral lease, the applicant would not pay rentals during school holidays as there

was no business to be conducted. However, the applicant had access to the tuck shop during the holidays. The denial of access by placing additional locks is in violation of s 24 of the Commercial Premises (Rent) Regulations, Statutory Instrument 676/1983. He further submitted that a tuck shop fits within the definition of commercial premises. Regarding the contention that a spoliation order may not be granted where it is not practicable to do so, Mr *Daitai* submitted that there is no averment that someone else has taken over the premises. In submitting that the requirements for spoliation had been proven, he outlined them as-

- (a) Peaceful and undisturbed possession, and
- (b) Unlawful deprivation.

Whilst conceding the legal requirements for spoliation, Mr *Madhuku* submitted that this is not a case of spoliation. According to him, spoliation is proprietary and does not apply to personal rights. He further submitted that the applicant's possession of the premises ended when the lease was terminated. Thus, possession of immovable property must be factual. Quasi-possession does not apply.

Mr *Madhuku* also submitted that the applicant was misconceived to claim that the Commercial Premises (Rent) Regulations apply to the facts of the matter. This is because Gateway Primary School does not constitute commercial premises.

Mr *Madhuku* further submitted on the authority of *De Jager And Others v Farah And Nestadt* 947 (4) SA 28 that a court has discretion not to grant a spoliation order where it is not practicable to do so. Thus it was his submission that the applicant's return to the premises would poison the learning environment. This is because the relationship between the parties is said to have deteriorated. Reference was made to an incident wherein the applicant is said to have scolded one pupil calling her an idiot.

I do not think that it can be argued seriously that the applicant was not in possession of the tuck shop. Once it is admitted that there was a lease agreement, then the issue of possession is established. The applicant had access to the tuck shop from where she conducted her business. Even though the applicant was not in exclusive possession of the tuck shop as it would be closed during holidays, it cannot be said she forfeited her overall physical control.

I am not persuaded that the tuck shop does not constitute commercial premises. This is because in terms of the Commercial Premises (Rent) Regulations commercial premises are defined as-

“commercial premises” means any premises or part thereof occupied under a lease for the purpose of carrying on therein any industry, business, trade or occupation, and includes any ground, parking-space, garage, outbuilding, workers’ quarters and other improvement let therewith;”

There is no doubt that the applicant was conducting business under a lease with the respondents. This is irrespective of the fact that Gateway Primary School on which the tuck shop is situated may not be commercial premises for other purposes.

For purposes of a spoliation order possession is not dependent on who has better title between an applicant and the spoliator. What is necessary to prove is that the applicant was unlawfully dispossessed or was unlawfully prevented from resuming possession after temporarily relinquishing physical control over the thing where there is reasonable belief that the applicant would be able to resume such control whenever he required the thing.¹

With the requirements for spoliation having been set out, the only valid defences available are that-

- (a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;
- (b) the dispossession was not unlawful and therefore did not constitute spoliation;
- (c) restoration of possession is impossible;
- (d) the respondent acted within the limits of counter-spoliation in regaining possession of the article.

In this respect see the case of *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative And Others* 1999 (2) ZLR 19 (SC).

There is dispute between the parties regarding whether the applicant had relinquished possession of the tuck shop by virtue of the notice that was given by the third respondent. The applicant denies that she acquiesced to the notice, hence the letter of 5th April. The other contention is that if she had voluntarily vacated the tuck shop there would have been no need to install the additional locks. In addition, there would have been no need to make an announcement at assembly. I would therefore, hold that the applicant was unlawfully deprived of possession of the tuck shop. This destroys the respondents’ defence that the applicant voluntarily vacated the tuck shop.

¹ H. Silberberg, *The Law of Property*-1975

It can be noted that the notice of termination did not advance any reasons. This does not accord with s 22 of the Commercial Premises (Rent) Regulations which provides that-

“No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee—

(a) continues to pay the rent due, within seven days of due date; and

(b) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that—

(i) the lessee has declined to agree to an increase in rent; or

(ii) the lessor wishes to lease the premises to some other person.”

The fact that the applicant refused to vacate the premises did not empower the respondents to resort to unorthodox means to gain control of the premises. This runs contrary to the well-established principle that no one must take the law into their own hands. The law on spoliation is aimed at protecting a possessor in retaining physical control or regaining it where he or she has been unlawfully deprived of such possession.² The placing of additional locks on the tuck shop violates s 24 of the Commercial Premises (Rent) Regulations which provides that-

“No lessor of commercial premises shall—

(a) without a lessee’s consent and without reasonable excuse, cause the removal from the premises of any property belonging to the lessee; or

(b) prevent a lessee from using or occupying the premises; unless he has obtained an order of court for the removal of such property, if appropriate, or for the recovery of possession of the premises or the ejectment of the lessee therefrom.”

As regards whether restoration is possible, the contention by the respondents is untenable. The argument that the relationship between the parties has deteriorated was never advanced in the notice of termination. The claim that the applicant verbally abused a pupil cannot be an adequate reason to deny restoration as the aggrieved party has sufficient remedies to pursue. In addition there was no averment by the respondents that a new tenant has since taken over the premises.

Accordingly, a provisional order is granted in terms of the draft.

Magwaliba & Kwirira, applicant’s legal practitioners
Mundia & Mudhara, respondents’ legal practitioners

² Wille’s Principles of South African Law, 7th ed.