STEPHEN ZVINAVAKOBVU
and
ZVINAVAKOBVU LAW CHAMBERS
versus
CITY OF HARARE

HIGH COURT OF ZIMBABWE
MWAYERA & MUNANGATI-MANOGWA JJ
HARARE, 29 November 2016 and 1 February 2017

Civil Appeal

S Furidzo, for the applicant
K Chisekereni, for the respondent

MWAYERA J: The applicant approached the court *a quo* seeking the relief of a spoliation order. The application was dismissed with costs thus occasioning the present appeal.

I must mention at the onset that the application which was before the court *a quo* was for a spoliatory relief. The brief background being that the appellant who operated business at no. 3 Flint Way Close Hillside Harare was aggrieved by removal of its notices, directions and information signs by the respondent. The argument presented before the court *a quo* by the applicant was basically that prior to the removal of the informative signs the appellant was in peaceful and undisturbed possession. The respondent argues that removal of the signs was in terms of the authority bylaws since they had a mandate to control outdoor advertising activities.

The appellant advanced 5 grounds of appeal and one supplementary ground of appeal. In the grounds of appeal which were speaking to the respondent having resorted to self-help the applicant mixed up its claim as *rei vindicatio*. The appellants' heads of arguments extensively spoke to spoliation. The respondent's heads of argument extensively responded to the relevant issue of whether or not the appellant was despoiled. The supplementary heads filed reemphasized spoliation as the issue.

At the hearing Mr. *Furidzo* raised the query of the use of *rei vindicatio* in the grounds of appeal and sought to impune the appeal on the basis of being fatally defective in failure to comply with the Magistrate Court Rules. Mr. *Chisekereni* for the appellant applied to amend the grounds of appeal by deletion of *rei vindicatio* whenever it appeared and pointed out that the record clearly related to spoliation proceedings and so did the supplementary grounds of appeal and heads of argument.

It was apparent the respondent was not prejudiced by the use of the word *rei vindicatio* in conjunction with spoliation. This is more so when one takes into account Mr *Furidzo*'s submissions and heads of argument first para:

> "It may be noted that all the appellants' grounds of appeal save for one are based on the relief of *rei vindicatio.* There is only one ground of appeal contained in the supplementary notice and grounds of appeal which touches on spoliation."

The implication is there is one ground of appeal under the realm of spoliation. Even if one was to decline the proposed amendment the appeal is clear against dismissal of a spoliation relief by the court *a quo*. We did not find any prejudice in granting the amendment sought and further the explanation of it being a typo cannot be said to be far-fetched given all the 5 grounds relate to spoliation or self-help. If anything the grounds of appeal are simply repetitive in a manner which does not warrant imputation of fatality of the appeal. Having allowed the amendment of the grounds of appeal the grounds are tabled below for completeness of record otherwise there is only one ground that the court *a quo* erred in dismissing the spoliatory relief. The 5 grounds seek to explain the effect of the order as perceived by the applicants.

Grounds of appeal:

"1. The court *a quo* erred and misdirected itself on the law and on the facts in dismissing the appellants' claim when the conduct of the respondent in remaining the appellant's directing and neon signs without their consent or notice clearly amounted to self-help.
2. The court *a quo* erred and misdirected itself by dismissing the appellants claim for spoliation when there was no doubt the removal was done without the authority of the appellants and that the appellants were in peaceful and undisturbed possession and use of the property.
3. The order of the court *a quo* is grossly unreasonable in that it has allowed the respondent to hold on to the precedent of an unlawful act. The order is contrary to public policy as it allows respondent to benefit from its wrongful acts.
4. The court *a quo* erred and misdirected itself when it dwelled into the merits of the matter and dismissed the appellant's claim on the basis of the dirty hands doctrine when the relief is simply there to restore the status quo ante. The net effect of the dismissal was

that the despoiler was shielded and rewarded from the consequences of its usurpation of due process.

5. The order of the court *a quo* defies logic and common sense so much that another court properly applying its mind to the totality of the facts of the matter and law would arrive at a different conclusion."

A reading of these grounds of appeal is centered on an attack of the decision of the court *a quo* of dismissal of the spoliation order. Having made a finding that the appeal is valid it is imperative for focus to be on the merits of the matter.

It is not in dispute that the court *a quo* made a determination on an application for spoliation order, wherein it dismissed the application. It is common cause that the appellant erected a neon sign and direction sign to advertise its business on municipal land. Further it is common cause that the respondent removed the advertising signs leading to the chain of approach to court.

Faced with an application for spoliation the primary consideration would be whether or not the facts presented meet the requirements of spoliation. It is fairly settle in our law that for a party to succeed in as spoliation relief it must show that:

1. the party was in peaceful undisturbed possession.
2. the party was forcefully and wrongful against its wish or consent deprived.

In *Mitsotso* and *Ors* v *Commissioner of Police and Anor* 1993 (2) ZLR 329 ROBINSON J, quoting other authorities on the subject of spoliation emphasized the fact that in spoliation applications the court is not concerned with the nature of the applicants' occupation but that the respondent should not take the law into its own hands as such conduct cannot be condoned. In *Mitsoto* case the judge quoted with approval the general principle stated by INNES CJ in *Wino Bonino* v *de Longe* 1906 TS 120 at 122 thus "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 this 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". The law that applies to the remedy of *mandament van spolie* is settled. See also *Dinas Farm Private Limited* v *Madond N.O and Anor* 1998 92) ZLR 410 and *Davis* v *Davis* 1990 (2) ZLR 136 Wherein ADAM J echoed the sentiments of HERBSTEIN J in *Kramer* v *Trustees Christian Coloured Vigilance council Grassy Park* 1948

(1) SA 748 on requirements of the remedy of *mandament van spolie* it was stated "…… two allegations must be made and proved, namely:

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

(b) that the respondent deprived him of possession forcibly or wrongfully against his consent. See *also L.S. Waters (Pvt) Ltd* v *Zimbabwe National Authority and Others* HH 153 J.

In the present case the appellants were in peaceful and undisturbed possession of advertisement signs and neon directions to their law chambers. They certainly had some benefit and held over the property to secure their benefit in a manner entitling them to a spoliatory remedy in the face of unlawful and forceful deprivation. The case of *Bennet Prigle (Pvt) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 cited *Militala N.O and Another* v *Mutual Finance Pvt Ltd and Others* HC 670/14 is instructive. Once it is proved the party was in peaceful and undisturbed possess of property then any forceful; deprivation of such ought to be redressed by a spoliatory order. The appellants' direction and neon signs were strategically positioned to direct and advertise the appellant's clients to the appellant's business premises. Naturally these signs assisted the appellants derive benefit from the said property. Such was the *status quo* disrupted by the respondent's employees and agent between March and April when they took it upon themselves to remove the neon and direction sign without the consent of the appellant. The dispossession was not in terms of the law as the respondent without any court order, took upon themselves to remove the advertisement and directions signs simply because they are the relevant authority in which the property was erected. The saying "no one is above the law" is clear cutting across the board to ensure there is no chaos and anarchy brought about by lawlessness. Given the facts of this case that the appellant were in peaceful and undisturbed possession.

The forceful deprivation at the hands of the respondent ought to have been redressed by a spoliatory order. The court *a quo* in dismissing the spoliatory relief misdirected itself by failing to appreciate the established rationale of the remedy for spoliation which is to preserve law and order to prevent people resorting to self-help. The restoration of the *status quo ante* ought to have been the primary consideration and not the merits of the parties rights.

It is apparent the respondents without due process and in the absence of a court order forcefully dispossessed the appellants. This called for a restoration of the *status quo* order and as such the relief of *mandamus van spolie* ought to have been granted by the court *a quo*.

Accordingly it is ordered that

1. The appeal be and is hereby upheld.
2. The decision of the court *a quo* is set aside and substituted as follows:
    a. The respondent with immediate effect release the direction and neon signs into the custody of the appellants.
    b. The respondent shall pay the costs of suit on attorney client scale.

Zvinavakobvu law Chambers, appellant's legal practitioners
Kanokanga & Partners, respondent's legal practitioners