FIDELITY LIFE ASSURANCE COMPANY OF ZIMBABWE LIMITED

versus

CFI HOLDINGS LIMITED

HIGH COURT OF ZIMBABWE

FOROMA J

HARARE, 16 & 29 April 2021

**Urgent Chamber Application**

*D. Tivadar*, for the applicant

*T. Mpofu with R Mabwe,* for the respondent

 FOROMA J: This is an urgent chamber application in terms of which the applicant Fidelity Life Assurance of Zimbabwe Limited hereinafter referred to as Fidelity seeks a provisional order whose terms of the final order sought and interim relief granted are as follows:

 “TERMS OF THE FINAL ORDER SOUGHT

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

 1. That a final interdict barring respondent from carrying out developments and construction activities on the property being a certain piece of land situate in the District of Salisbury being the remaining extent of Langford measuring 2061,7256 acres and held under Deed of Transfer number 212/63 be and is hereby granted.

 2. That the respondent shall pay the costs of suit on the higher scale of legal practitioner and client

 INTERIM RELIEF GRANTED

 Pending determination of this matter the applicant is granted the following relief:

 1. An order of spoliation be and is hereby granted against the respondent

 2. Applicant shall have its possession and all access restored in respect of the property being a certain piece of land situate in the district of Salisbury being the remaining extent of Langford measuring 2061,7256 acres and held under deed of Transfer number 212/63 within 24 hours of the service of this order.

 3. In the event of non-compliance with the order under paragraph 2 above the Sheriff of the High Court of Zimbabwe is ordered to enforce this interim order to allow applicant to regain possession of the property being a certain piece of land situate in the District of Salisbury being the remaining extent of Langford measuring 2061,7256 acres and held under deed of Transfer number 212/63

 4. That the respondent be and is hereby interdicted from carrying out developments and construction activities on the property being a certain piece of land situate in the District of Salisbury being the remaining extent of Longford measuring 2061,7256 acres and held under deed of transfer number 2121/63 pending the determination of the dispute between the applicant and the respondent in relation to their shareholding in Langford estates (1962) Private Limited.

 5. Costs be costs in the cause

 Service of the Provisional Order

 This provisional order shall be served upon the respondent by the applicant’s legal practitioners.”

 The brief background to this urgent application according to the applicant’s papers is that the parties are shareholders in a company called Langford Estates 1962 (Private) Limited (hereinafter referred to as Langford) wherein applicant holds 80,77 percent issued share capital. Langford is the owner of a property described as a certain piece of land situate in the District of Salisbury being the remaining extent of Langford measuring 2061,7256 acres and held under deed of Transfer number 212/63 (hereinafter referred to as the property).

 Applicant acquired the 80,77 percent issued share capital in Langford on 30 June 2015 in a sale of shares agreement with respondent occasioned by some financial fix that respondent found itself in together with Langford and Crest Poultry Group (Private) Limited. The sale of shares agreement was entered into to assist the respondent raise finances to the settle financial fix aforesaid.

 Applicant claims that after the conclusion of the transaction (share sale agreement) it was granted possession and control of the property as the majority shareholder. Applicant also claims that on 17 March 2021 applicant’s employee one Evas Chitute was forcibly and unlawfully barred from entering into the property by armed personnel contracted by respondent despite having duly identified himself as a person in applicant’s employ.

 Applicant thus brought this application as it considered that respondent had despoiled it. Respondent strongly opposed the applicant’s application and in its opposing affidavit raised the following points in *limine:*

 (a) Must pay costs

 (b) matter not urgent

 (c) invalid relief sought

 (d) interim and final relief

 (e) no cause of action and

 (f) disputes of fact and sought the dismissal of the application with costs on the higher scale

 This matter initially came before Tsanga J who dismissed the matter on the technical ground that applicant had not used the correct form as provided in the rules of the court. Applicant immediately returned to court still on an urgent basis having removed the cause of the technical objection.

 At the hearing of this application respondent which was represented by *Advocate T Mpofu* took up all the points in l*imine* except for (a) which though not expressly abandoned was not addressed in arguments.

 I can only assume that the respondent did not find its prospects on this point in *limine* to be reasonable after considering applicant’s response to it in the answering affidavit.

 I deal with the argument addressed by each party in respect of the remaining points in *limine* taken seriatim.

(b) Matter not urgent

 The respondent considered that the matter was not urgent as the situation prevailing at the property had so prevailed even before the putative and now challenged agreements purportedly concluded in 2015. In addition respondent argued that it has at all times had management rights and applicant has never taken any occupation as indeed the applicant as a shareholder is entitled to no occupation. As indicated before, Applicant claimed under oath that its employee had been barred from entry. *Prima facie* the court without having to resolve the disputed legal rights associated with the substantive claim of spoliation must accept the applicant’s assertion under oath that it was forcibly barred from entry onto the property. Despoiling can either take the form of forcible ejection from premises or forcible exclusion from entry. Respondent did not dispute that applicant’s employee was forcibly excluded from entry on 12 March 2021. I therefore find that the matter is urgent on account of the events of 12 March 2021 as deposed to by the applicant’s employee under oath.

(c) Invalid Relief Sought

 Respondent’s argument is that applicant has applied for spoliatory relief as interim relief based on a provisional order which order is obtainable on proof of a *prima facie* case. An order *mandamen van spolie* is a final order which can only be obtained on proof of a case on the normal standard of proof in civil matters i.e proof on a balance of probabilities. Applicant whilst accepting the legal position that a spoliation order is a final order argued that the applicant did not seek an interim order in respect of spoliation but in respect of an interim interdict. A consideration of the terms of the final order sought by applicant reveals that no reference is made to the interim order of spoliation suggesting that the spoliation order was intended to be a final order. However seeking or obtaining a final order as a provisional order is contradictory in terms. In paragraph 3 of the interim relief of the provisional order applicant worded the relief sought as follows:

 “In the event of non compliance with the order under paragraphs 2 below, the Sheriff of the High Court of Zimbabwe is ordered to enforce this interim order to allow applicant to regain possession of the property…” (underlining for emphasis)

 It is clear that applicant sought an order of spoliation as interim relief under a provisional order contrary to the law. See *Blue Rangers Estates P/L* v *Muduvuri and Anor* 2009 (1) ZLR 368 (S). Applicant did not help its situation in the answering affidavit when it averred as follows:

 “6.1 It is denied that the relief sought is invalid. Whilst spoliatory relief is final in nature the same can only be in the provisional order being sought.”

 Clearly the respondent is on firm ground in its argument that the relief sought is invalid.

(d) Interim and final relief

 The respondent also argued that the application is also invalid on account of the substantive similarity in the terms of the interim and final relief sought in so far as the interim interdict is concerned. Citing the case of *Rolland Electro Engineering P/L* v *Zimbank* 2003 (1) ZLR 226 *Advocate Mpofu* submitted that the reason for the prohibition of the similarity is clear and it is to prevent a party from securing final relief on proof of a *prima facie* case. Applicant readily acceded this point in *limine*.

(e) No cause of Action

 This was premised on the fact that applicant while claiming to be a major shareholder acknowledged that the owner of the property was Langford in which he held shares and it (applicant qua shareholder) could not enforce the right of possession which belonged to an owner. Applicant sought to argue that by reason of its being the majority shareholder more than 80 percent it was granted the right of control of the property. Respondent strongly disputed applicant’s claim in this regard. This issue is so inter linked to the last point in *limine* (disputes of fact) it is not possible to resolve it on the papers least of all in an urgent chamber application

(f) Disputes of Fact

 The applicant conceded that although there were material disputes of fact the relevant one being whether or not applicant was in physical control of the property prior to the alleged despoiling, this could be resolved by the judge taking a robust view of the evidence. Applicant’s counsel accepted that the parties’ positions were so diametrically opposed one of them must have lied under oath. Asked who between the deponents the judge should believe Mr *Tivadar* (counsel for the applicant) urged the court to believe the applicant on the basis that it (applicant) had placed before the court evidence of activity on the property which was consistent with control of the property against respondent who made bare denials under oath. The respondent disputed that correspondence allegedly showing activity was addressed to applicant. Respondent’s counsel argued that the only way to resolve material dispute of fact in the circumstances is by hearing evidence which entailed the court making findings on credibility which cannot be done in an urgent chamber application. Applicant ought to have appreciated this real and material dispute of fact when the issue was raised at the time the matter appeared before TSANGA J and should not have insisted on bringing back the matter as an urgent chamber application but as an urgent court application-*Andrew John Pascoe* v *Ministry of Lands and Rural Resettlement* *and W Bungu and the Attorney General* HH 391/17

COSTS

 Respondent urged the court to dismiss applicant’s application and award it costs on the higher scale of legal practitioner and client. Counsel for respondent argued that applicant did not argue why such order should not follow in view of the same points in *limine* having been raised about 3 weeks earlier before Tsanga J. Applicant succeeded on the issue of urgency. It however lost in respect of the other points in *limine* raised not because they persisted on a hopeless argument. For example the concession on the substantially similar relief in the final order sought and interim relief granted was a proper one. Applicant’s argument on invalidity of relief sought was one that arose from the documents filed even though it did not succeed on it. In the circumstances I do not find costs on the higher scale to be justified.

DISPOSITION

 It is ordered that for the foregoing reasons applicant’s application be and is hereby dismissed with costs.

*Mawere Sibanda Commercial Lawyers*, applicant’s legal practitioners

*Nyawo Ruzive*, respondent’s legal practitioners