UPENYU MASHANGWA
versus
BLESSING MASHANGWA

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 23 February 2022 and 18 March 2022

Urgent Chamber Application

M. Ndlovu, for the applicant
The respondent in person

MANYANGADZE J: This is an urgent chamber application for spoliation relief. This is a somewhat peculiar application. The applicant and the respondent are husband and wife who are sharing accommodation at their matrimonial home, No. 655, Brooke Drive, Borrowdale Brooke, Harare. They are in the process of divorcing, the respondent having issued divorce summons in 2019. The case is pending in this court under Case No. HC 2252/19. The said matrimonial home is the subject of the spoliation proceedings.

The applicant alleges that the respondent is partitioning the matrimonial house so as to restrict his access to key facilities such as the kitchen, dining room and lounges. The applicant further alleges that the respondent, on or around 11 February 2022, started constructing a durawall on the jointly owned residential premises, without his consent. He avers that the respondent wants to alienate the property from the applicant, by entering into a lease agreement with a third party. The applicant avers that these actions have barricaded or restricted his access to the house and its facilities. As such, they constitute an act of spoliation. This has prompted the applicant to seek the remedy of a *mandament van spolie*, in terms of which he seeks restoration of unrestricted, peaceful and undisturbed possession or occupation of the matrimonial property.

In countering the applicant's averments, the respondent avers that no spoliation has taken place. She asserts that she has not carried out any partitioning of the house that restricts applicant's access to the house or any of its facilities. As for the wall, the respondent indicated that she

constructed this on a small section of the yard. She intends to use this section for some fundraising functions to augment income for the children's upkeep.

The respondent further avers that the applicant is under bail conditions that prohibit him from staying at the matrimonial home. If at all his access to the matrimonial home has been restricted, it is due to these bail conditions, and not any tampering with the structure of the property on her part as alleged by the applicant.

It emerged, from both parties' submissions, that the applicant was arrested on charges relating to domestic violence. He was placed on remand, on bail conditions that included an order that he stays away from the matrimonial property. Documents tendered by the respondent shows that the applicant appeared on initial remand on 11 January 2022. His next remand date is 28 February 2022.

The court notes that the applicant, who represented herself at the hearing, tended to conflate issues relating to the pending divorce, the pending criminal matter, and the spoliation proceedings. All these court proceedings indicate that the relationship between the parties is indeed strained. They are dragging each other to court. The respondent has made some rather sleazy allegations against the applicant of unbridled infidelity, embezzlement of funds from the family's businesses, and relentless physical violence. The estranged spouses have kept separate bedrooms since 2019. These issues are not before me. They are most likely to be ventilated in the pending divorce or criminal case.

In the instant case, what needs to be resolved is whether there is a basis for granting the relief of a spoliation order.

The requirements for a *mandament van spolie* are well established. They have been clearly set out in the cases. These cases include;

Botha & Anor v Barret 1996 (2) ZLR 73 (S)

Kama Construction (Pvt) Ltd v *Cold Comfort Farm Co-operative & Ors* 1999 (2) ZLR 19 (S)

Mutsahuni & Anor v *Minister of Lands, Agriculture, Fisheries, Water and Ruraral Ressettlement & Anor* HH 407/21,

Karori (Pvt) Ltd & Anor v *Mujaji,* HH 23/07,

Blue Ranger Estate (Pvt) Ltd v *Muduviri & Anor* SC 29/09.

In *Mutsahuni & Anor, supra*, MUZOFA J stated;

> "Spoliation is a common law remedy meant to discourage members of the public from taking the law into their hands but to follow due process. It has been described as a wrongful deprivation of possession. The essential requirements for spoliation are set out in *Botha & Anor v Barre*t [9] where the court stated that:
> "It is clear that in order to obtain a spoliation order, two allegations must be made and proved. These are:
> 1.that the applicant was in peaceful and undisturbed possession of the farm, and
> 2.that the respondent deprived him of the possession forcibly or wrongfully against his consent.''

From the principles set out in the cases cited above, an important hurdle the applicant must overcome is that he must show that he was in peaceful and undisturbed possession of the property concerned at the time he was despoiled. First and foremost, peaceful and undisturbed possession of the property must be established.

Herein lies the applicant's predicament with this matter. It is common cause he has appeared at the Magistrates' Court, on charges involving contravention of the Domestic Violence Act [*Chapter 5:16*]. He has been placed on remand, and, as part of his bail conditions, he must not reside at the matrimonial property. As a consequence of that condition, he cannot access the matrimonial home. It is said that he is staying at the Bronte Hotel in Harare.

In the present proceedings, the court is not concerned with the merits or demerits of the domestic violence allegations. It is also not concerned with the reasonableness or otherwise of the bail conditions imposed on the applicant by the Magistrates' Court. If the applicant is aggrieved by those conditions, there are procedures through which they may be challenged.

What is significant to note is that there is an extant order of a court of competent jurisdiction, barring the applicant's access to the matrimonial home, which is the subject of the spoliation relief he seeks. He cannot, in the circumstances, be said to be in peaceful and undisturbed possession or occupation of the property. Thus, a fundamental requirement of the relief sought has not been met.

In the case of *Augustine Bango & 2 Ors v Solomon Zawe & Ors* SC 54/14, GWAUNZA JA (as she then was) dealt with the question of possession as a requirement for the relief of *mandament van spolie*. A brief outline of the facts in that case is necessary to illustrate the context in which the issue of possession turned out to be decisive.

The first respondent had been granted a spoliation order against the appellants in the High Court. The subject of the spoliation order was a farm on which the first respondent occupied a certain portion where he carried out a poultry business. He had been doing so since 2004. In 2011,

the Provincial Administrator for the Harare Metropolitan Province wrote the first respondent a letter directing him to vacate the premises to allow full use thereof by the registered owner. The first appellant, purportedly under a power of attorney from the registered owner, locked the first respondent out of the premises, prompting the latter to file an application for a spoliation order in the High Court. The High Court granted the application.

One of the grounds of appeal was that the first respondent was no longer in possession of the property at the time he was allegedly despoiled. He had vacated the premises as a result of, *inter alia*, receipt of the letter from the Provincial Administrator. It was on the basis of this particular ground that the Supreme Court allowed the appeal, and overturned the High Court decision.

GWAUNZA JA made reference to Silberberg and Schoeman's definition of the concept of possession. The judge stated, at page 6 of the cyclostyled judgment;

> "According to the learned authors *Silberberg and Schoeman's "The Law of Property*"; Second Edition at page 114:
> "Possession has been described as a compound of a physical situation and of a mental state, involving the physical control or *detentio* of a thing, by a person and a person's mental attitude towards the thing.....whether or not a person has physical control of a thing, and what his mental attitude is towards that thing, are both questions of fact.''

The judge then went on to look at the facts of the matter, in resolving the question of whether or not the first respondent was in possession of the property at the time of the spoliation. These facts included the letter from the Provincial Administrator, the first respondent's absence from the premises thereafter, among other aspects of his conduct that tended to show that he was no longer in physical control of the property for purposes of substantiating his application for a spoliation order. After this analysis, the judge concluded, at pages 11 – 12 of the cyclostyled judgment:

> "In the final result, it is the finding of this court that the 1st respondent failed to discharge the *onus* he bore, to prove the compound referred to by the cited authority, of a physical situation and of a mental state, involving the physical control or *detentio* of the thing, that is the premises in question, at the time of the alleged spoliation. Accordingly, not having been in possession of the premises at the relevant time, he could not have been unlawfully dispossessed. In view of the fact that the alleged possession has not been proved, it follows that the need to qualify it as either peaceful or undisturbed falls away."

It is my considered view that the instant application is similarly afflicted by applicant's failure to pass the first hurdle. On that basis alone, the application cannot be upheld. The issue is not about his entitlement to possession of the matrimonial home. It is about whether or not he was in fact in possession thereof, in the sense clarified in the authority cited above. In this regard, GWAUNZA JA, *supra*, at p 8 of the cyclostyled judgment, remarked;

> "It is evident that the court *a quo* premised its conclusion that the first respondent was in possession of the disputed premises on his claim to *ius possidendi*, that is, the right of possession. This is clearly a misapprehension of the principle authoritatively enunciated by Silberberg and Schoeman above."

By his own admission, the bail order barred the applicant's access to the property. He alleges the bail condition is "questionable" and "blatantly unlawful and irregular", and he has engaged "another counsel" to challenge it. I have already adverted to this issue. Whatever its merits or lack thereof, the bail condition is an extant order of court, unless and until it is successfully challenged and set aside.

Even if it is accepted that the applicant was, for some reason, in possession of the property, he still has to surmount the second hurdle. As indicated in the authorities referred to, the applicant must also prove that he was forcibly or wrongfully deprived of his possession of the property.
In this regard, the applicant avers that the house has been partitioned so as to bar him from accessing the kitchen and other key facilities. This suggests that some internal partitions have been erected to block these facilities and render them inaccessible to the applicant. The respondent denies that she put up any such barricades.

The applicant, in my view, made broad and general averments that the house was partitioned so as to block his access to the said facilities. Nothing was placed before the court to show the nature and extent of the alleged partitions. It was incumbent upon the applicant to demonstrate or indicate the specific and exact nature of the alleged demarcations. The court cannot figure out, on its own, how the internal design and layout of the house was altered to block the applicant's route to the kitchen, dining room or lounges.

The respondent implored the court to carry out an inspection – in – loco at the premises, which would show that no such partitions have been done. This is tantamount to gathering evidence, which evidence the applicant must have placed in his papers to substantiate his application. The onus was on the applicant to prove the alleged partitions. The applicant's papers

contained no such evidence. It means on this important aspect, there were material disputes of fact which could not be resolved on the papers.

The applicant dwelt at length on the construction of the wall by the respondent. He was emphatic in his averment that the respondent admits constructing the wall, and therefore admits despoiling the applicant. Again, there is an evidential gap in the applicant's papers. He has not demonstrated how this wall, constructed in the yard, *outside the house*, obstructs his way to facilities like the kitchen and dining room. There simply is no evidence on how this wall blocks his access to the house.

The applicant also alleges that the wall constitutes unlawful subdivision of the property. He avers that the respondent requires a subdivision permit from municipal authorities. He further avers that it is part of a scheme by the applicant to alienate the property by entering into a lease agreement with a third party. No lease agreement was shown to have been concluded. So the averment is basically that the respondent intends to lease the property to a third party. Emails attached to the applicant's papers show that the respondent at some point *intended to lease* the property, and was looking for tenants. It appears there were challenges in securing a lease agreement with prospective tenants.

The court must be wary not to be drawn into aspects of the dispute that fall outside the purview of a *mandament van spolie*. The alleged illegal subdivision of the property, it seems to me, is a matter that can be taken up with the relevant municipal authority. There could be issues of the adduction of evidence as to whether the construction constitutes an impermissible subdivision.

As for the alleged lease agreement, it is not clear how *an intended lease agreement* has despoiled the applicant. If need be, the applicant can seek appropriate legal remedies to prohibit the conclusion of such an agreement. I do not see how an intended action, which may or may not materialise, can be said to have dispossessed the applicant for the purposes of a spoliation order. In this regard, applicant is asking the court to restore possession that has not yet been lost, which he fears might be lost if the applicant succeeds in her plans to lease the property.

As I have indicated at the outset of this judgment, the application arises out of a peculiar background, in which the parties are locked in what appears to be acrimonious divorce proceedings. Resolution of the marital dispute will inevitably involve determination of their

respective rights in the matrimonial property in question. It is up to the parties to expedite those proceedings, so that their substantive rights in the matrimonial property are determined. The requirements of a *mandament van spolie*, as set out in the cited cases, have not been met.

In the circumstances, I find that the case for the relief of a spoliation order has not been satisfactorily established.

In the result, it is ordered that:

1. **The application be and is hereby dismissed.**
2. **Each party bears his/her own costs.**

Thoughts Deme Attorneys at Law, Applicant's Legal Practitioners