DISRUPTIVE INNOVATION (PVT) LTD
versus
CITY OF HARARE
And
MBARE DISTRICT OFFICER
and
OFFICER COMMANDING POLICE-MBARE DISTRICT
and
TRISH MUKUDU
and
HARARE METROPOLITAN PROVINCE
PROVINCIAL DEVELOPMENT COODINATOR

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 21 and 24 January 2022

Urgent Chamber Application

Mr TR Mugabe, for the applicant
Mr C Kwaramba, for the respondents

MANYANGADZE J: After hearing argument from both parties, I delivered an *ex tempore.* judgment in which I granted the relief of a spoliation order as sought by the applicant. A request for full reasons for judgment has been made. These are they:

This is an urgent chamber application for a spoliation order. It arises out of a dispute between the applicant and the first respondent over the possession and control of public toilets at Mbare Musika and Market Square Bus terminus.

The applicant alleges that it was in peaceful and undisturbed possession of those toilets, which it was managing in terms of a lease agreement it entered into with the first respondent. The first respondent, without any lawful authority, removed the applicant from both premises i.e. Mbare Musika and Market Square bus termini, effectively shutting down its business operations at these premises.

At the commencement of the hearing, the first respondent took a point *in limine*. It was to the effect that the application was not properly before the court, in that it contains a defective notice which does not give the respondent(s) the time within which to file opposing papers.

The respondents aver that it constitutes respondents a fatal defect if the requisite notices are not given to the respondents to file opposing papers.

In countering the point *in limine*, the applicant averred that the court ought to deal with the substance of the application rather than its form.

Further to that, the applicant averred that any failure to give notice to file opposing papers on the face of the application is cured by the notice contained in the draft provisional order. This argument is misplaced and need not detain the court. The standard draft provisional order calls upon the respondent to file a notice of opposition within 10 days of service of the notice, if it intends to oppose confirmation of the provisional order. The notice in the draft order is *within the context of a provisional order and its subsequent confirmation or discharge*. The applicant's reference to this notice, in response to the point raised by the respondents, is therefore misplaced. It cannot rely on such notice *in lieu* of the notice that should be on the face of the application itself.

I am however persuaded to lean in favour of the applicant's earlier contention. This was to the effect that the court should, in the interests of justice, prefer substance over form. There are numerous decisions of this court where this approach has been adopted.

In the case of *Keshelmar Farms (Pvt) Ltd & Ors* v *Mswelangubo Farms (Pvt) Ltd & Anor* HB 39/22, KABASA J faced a similar situation, where the respondents raised the point *in limine* that the application was fatally defective for want of form. The applicants had, in an urgent chamber application, used Form 25 instead of Form 23 of the High Court Rules, 2021. The learned judge remarked, at p 2 of the cyclostyled judgment:

> "I am of the considered view that rules of court are not to be slavishly followed just for the sake of it. Granted rules are there to serve a purpose, otherwise why have them. That said however it is important not to stifle court proceedings by putting emphasis on form over substance, especially where there is no prejudice to the other party."

The judge went on to cite a passage from a matter MATHONSI J (as he then was) dealt with, *Telecel Zimbabwe (Pvt) Ltd* v *Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) and 3 Ors* HH 446-15:

> "I take the view that the rules of court are there to assist the court in the discharge of its day to day function of dispensing justice to litigants. They certainly are not designed to impede the attainment of justice. Where there has been a substantial compliance with the rules and no prejudice is likely to be sustained by any party to the proceedings, the court should condone any minor infraction of the rules. In my view to insist on the grounds for the application being incorporated in form 29 B when they are set out in abundance on the body of the application is to worry about form at the expense of substance…."

Further reference was made to the case of *Kershelmar Farms (Pvt) Ltd and 3 Ors* v *Dumisani Madzivanyati* HB 190/21, were MAKONESE J stated:

> "It is trite that where an urgent chamber application is instituted there is no need to insert the *dies induciae* on the application. Accordingly, urgent chamber applications are served on interested parties unless they are filed in accordance with the provision of Rule 60 (3) (a) to (e). Once an urgent chamber application is placed before a Judge, the Judge dealing with the matter may decide to hear the matter, in which event, he will cause the matter to be set down for hearing, on notice to all interested parties. In terms of Rule 60(8) the Judge is empowered to direct how the matter should proceed …. The rules are designed to ensure that litigants are heard and that they be given the opportunity to advance their argument. Failure to use Form 23 in urgent (applications) where such application is served on the affected party, does not *pe se* render the application defective."

A significant point to note in the cited cases is that an urgent chamber application is essentially judge driven. Having regard to the nature of the case and the interests of justice, the Judge directs how the matter should proceed.

In casu, the respondent was served with a notice of set down and the application. Both parties appeared before the judge on 18 January 2022. The respondent even sought a postponement which was granted, to allow it to file its opposing papers.

On the next hearing date, 21 January 2022, the respondent then raised the preliminary point in issue. There was no prejudice at all to the respondent in the manner in which the proceedings were conducted. It is my considered view that the point *in limine* pays undue deference to form at the expense of substance. It is devoid of merit and is accordingly dismissed.

I now turn to the merits of the matter. The following established facts are pertinent. I refer to the facts as established as they are not in dispute.

The first respondent, as the municipal authority for the Harare Metropolitan area, owns the public toilets at the Mbare Musika and Market Square bus termini. In pursuance of a public private partnership policy, the first respondent concluded a lease agreement with the applicant, in terms of which the latter took possession and control of the public toilets, and managed them as pay toilets. The first respondent received agreed monthly rentals from this arrangement.

The arrangement has been in place since 2015. Some disputes arose along the way, caused by, *inter alia,* arrear rentals, as often happens in lease agreements. This led to the first respondent issuing summons against the applicant, on 11 September 2017, under Case No. HC 8400/17. The first respondent sought eviction of the applicant from the public toilets.

The litigation was abandoned after the parties found each other. They concluded a Deed of Settlement which was filed of record on 2 August 2019. A perusal of the Deed of Settlement shows that it provides, in clauses 8 and 9, for due legal process in the event of its breach. The clauses read:

> "In the event of the default mentioned in para 6 above Plaintiff shall be at liberty to cancel the lease agreement, and in addition to obtaining the Defendant's eviction, to apply to the High Court for the registration of the Deed of Settlement as an order by consent and further to execute against Defendant.
> In addition to the remedy provided for in para 7 above Plaintiff shall also be entitled to cancel the agreement and seek Defendant's eviction in the event of any breach of the terms of this agreement."

After conclusion of the Deed of Settlement the applicant continued to occupy and manage the premises in question.

There was no allegation of breach of the terms of the Deed of Settlement from the first respondent.

On the morning of 8 January 2022, the second and fourth respondents, as officials of the first respondent, descended on Mbare Musika bus terminus and ordered employees of the applicant off the premises. They replaced them with employees of the first respondent. They displaced the applicant and took over possession of the premises, thus effectively shutting down its business.

The same process was repeated at the Market Square Bus Terminus on 15 January 2022. It appears the second and fourth respondents, assisted by the third respondent, acted on the verbal instructions of top officials of the first respondent, acting in concert with the fifth respondent.

There was no court document cancelling the parties' Deed of Settlement and ordering the removal of the applicant from the Mbare or Market Square bus terminus.

The events outlined above establish dispossession of the applicant of property in respect of which it was in peaceful and undisturbed possession. They reflect all the essential features of a spoliation. Those features or essential requirements are clearly set out in the case authorities.

In order to succeed in an application for a *mandament van spolie*, the applicant must prove, on a balance of probabilities, that; he/she /it

(i) was in peaceful and undisturbed possession or occupation of the property, and

(ii) the respondent unlawfully deprived him/her of such possession or occupation.

See. - *Botha & Anor* v *Barret* 1996(2) ZLR 73(S) at 79D -E

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

In casu, the first respondent was at pains to dispute that a spoliation had taken place. The facts starkly point to that occurrence, as shown above.

In his responding submissions, respondent's counsel, Mr *Kwaramba,* all but conceded that indeed his client had despoiled the applicant. The remarks he made during oral submissions are instructive:

> "After reading the papers, as an officer of the court, I must take a position that is legally tenable. The point I wish to make is that, difficult as it may be to accept, the facts in this matter tend to suggest circumstances of spoliation……."

I must commend counsel for adopting this stance, given the facts of the matter. However, instead of making an outright concession and consenting to the relief sought by the applicant, counsel indicated that he had no institutions to consent.

The reason given for this somewhat ambivalent approach was that the applicant failed to disclose an incident where the conduct of its employees triggered the ire of the public. Sometime in November 2021, it is alleged the applicant's employees, strictly adhering to the applicant's pay toilet business, denied an elderly lady access to the toilets. This resulted in the lady messing herself . There was a public outcry, which erupted in violent demonstrations by some youths. It is only after the intervention of the first respondent that order was restored.

The alleged public outrage has made the respondent rethink its policy of contracting a private entity to run its public toilets. In this regard, Mr *Kwaramba* submitted:

> "The public outcry has disturbed the contractual arrangement between the first respondent and the applicant. This is the basis upon which, notwithstanding my advice, the client will not consent to the order of spoliation being sought.
> As an officer of the court, that is as far I can go in respect of the relief of a spoliation order."

If indeed the incident referred to took place, it was badly handled by the applicant's employees. Though it is not within the remit of this court to tell the applicant how to run its business, the elderly woman in desperate need of a toilet could have been assisted without insisting on payment. Any business concerned with its corporate image is likely to have done so.

The critical legal question however, remains-does the alleged failure by the applicant's employees to handle this unfortunate situation justify the first respondent taking the law into

its own hands? Certainly not. First respondent could have engaged the applicant, with whom it had a binding contract and the applicant could have dealt with its employees accordingly.

The incident referred to allegedly took place in November 2021. The dispossession complained of took place in January 2022. There is a tenuous link between the two. It hardly affords any defence. It seems the first respondent has mentioned it more for the purpose of gaining moral rather than legal mileage.

I am fully in agreement with the averments made by Mr *Mugabe*, counsel for the applicant. He submitted during oral argument that the circumstances alluded to by the respondent do not justify resort to self-help. He pointed out, correctly, that dispossession of the applicant by the respondent was all but confirmed. He further contended that if the first respondent no longer required the applicant on the premises in question, it must lawfully seek eviction. This indeed is what the Deed of Settlement provided for in clear and unambiguous terms.

What happened was simply a matter of the first respondent taking the law into its own hands. It dispossessed the applicant, without any lawful authority, who was in peaceful and undisturbed possession of the said premises. This entitles the applicant to the remedy of a *mandament van spolie*.

The propriety of the applicant seeking an interim interdict in an application for a spoliation order was raised. The draft order was inelegantly drawn out, as it fails to take into account that a spoliation order is in the nature of a final interdict. It was drafted along the lines of an interim interdict.

The applicant conceded this irregularity. It however, submitted that the court is not bound by the terms of an improperly crafted draft order. It is at large to grant that which accords with the law, that is, a *mandament van spolie* as a final interdict. In *Dreamoss Investment (Pvt) Ltd t/a Develop Communities in Africa* v *National Housing Delivery Trust Housing Finance and Ors* HH 490/13, at pages 2-3 of the cyclostyled judgment, ZHOU J explained the unique nature of a *mandament van spolie*. He stated:

> "The *mandament van spolie* is a unique and summary procedure by which a dispute must be resolved expeditiously in order to prevent self-help……
> A spoliation order is a final order. Before it is granted the respondent must be allowed to state his case. *Shagan Bros* v *Lewis* 1911 TPD 417. The applicant on the other hand must, just in as in other civil cases, prove on a balance of probabilities that he is entitled to the order for the return of property."

In my view, if the founding papers clearly disclose the relief being sought, and properly establish its basis, the court con grant the relief. It is clear the relief sought is that of a *mandamus van spolie*. The facts, virtually undisputed, establish the basis for granting the relief. The application must in the circumstances, be upheld.

In the result, it is ordered that:

1. **The application for a spoliation order be and is hereby granted.**
2. **The Respondents and all those acting through them, within 48 hours of this order, restore to the Applicants peaceful and undisturbed possession of the Mbare Musika and Market Square Bus Terminus toilets.**
3. **The Respondents shall not remove or threaten to remove the Applicant from Mbare Musika and Market Square Bus Terminus toilets except in terms of a lawful process.**
4. **The Respondents shall bear the Applicants' costs jointly and severally, the one paying the others to be absolved.**

Tafadzwa Ralph Mugabe Legal Counsel, applicant's legal practitioners
Mbidzo, Muchadehama & Makoni Legal Practitioners, respondent's legal practitioners