CHURCH OF THE PROVINCE OF CENTRAL AFRICA
and
BOARD OF TRUSTEES FOR THE DIOCESE OF MANICALAND
and
MUSIWA MWASHITA.
versus
ELSON MADODA JAKAZI
and
BOARD OF TRUSTEES FOR THE DIOCESE OF MANICALAND
and
REVERAND BERNARD MAUPA
and
REVERAND VUSUMUZI NDLOVU
and
AND REVERAND KATANGA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 4, 6, and 10 October 2011.

Urgent Chamber Application

H Zhou, for the applicants
T. M. Kanengoni, for the respondents

UCHENA J: The first applicant is the Church Of The Province Of Central Africa, commonly known as the Anglican Church. The second applicant is the first applicant's Board of trustees charged with the responsibility of looking after diocesan property in its Manicaland Diocese. The third applicant is the first applicant's warden at All Saints Zimunya Church.

The first respondent is the Bishop of the Diocese of Manicaland for a faction of the first respondent now affiliated to the Anglican Church in the Province of Zimbabwe. The second respondent is a board of trustees for the Diocese of Manicaland falling under the first respondent's faction. The third to the fifth respondents are Reverend's of the first respondent's faction.

The parties had, on 12 October 2009, appeared before BHUNU J in HC 4804/09, before whom they consented to an order which allowed each party to remain in charge and control of the church's property which was in their respective possession at the time of the consent order. The parties complied with the consent order until the applicant's filed an urgent chamber application claiming that they had been despoiled of their All Saints Zimunya Church, by the respondents.

The applicants narrated their dispossession through the supporting affidavit of Musiiwa Mwashita the third applicant. He explained how the third to fourth respondents approached him demanding the keys for the All Saints Zimunya church. He refused to give them possession of the church after which the respondents sought the help of the police, who helped them to force the third applicant to surrender the keys to them. After they had been despoiled the applicant's sought the co-operation of the respondents in returning the church to them through their lawyers who wrote to the respondents' lawyers. When the last letter was not responded to by the date the applicants' lawyers had given as the dead line for the respondent's response, they filed this urgent application.

In their opposing papers the respondents do not dispute that they dispossessed the applicants in the manner explained by Mwashita, but claim that they had possession of the Zimunya church when parties entered into the consent order before BHUNU J. They claim to have been acting in counter spoliation when they dispossessed the applicants as alleged in Mwashita's supporting affidavit They sought to prove that by tendering documents in which the Zimunya priest communicated with the first respondent and his predecessors, and a voucher through which the priest was paid a stipend by the respondents' faction.

The applicants filed an answering affidavit through which they disputed the respondents' allegation that they had possession of the Zimunya church at the time the consent order was entered into. They produced documents which proves that the Zimunya priest Reverend Rondozai was in their faction.. They also filed a supporting affidavit by Reverand Rondozai's widow in which she categorically denied that she and her husband were in the respondents' faction. A parishioner Agnes Chipangura also deposed to an affidavit in which she stated that Reverand Rondozai was in the applicant's

faction. She also stated that the Zimunya parish has always been under the applicants until the respondents despoiled them.

The evidence in the applicants' affidavits tends to support their claim that they always had possession of the Zimunya church. This is especially so in view of the affidavits of Moreen Virginia Rondozai, Musiiwa Mwashita, Agnes Chipangura and Reverand Chigwanda. These are persons who are directly connected with the Zimunya church and are expected to know under whom their parish was operating. Mrs Rondozai was the deceased Reverand Rondozai's spouse. She and her husband were shepherding the parish. She can not be mistaken as to which faction they pledged their loyalty. She is supported by the parishioners, Mwashita and Agnes, and the fact that the respondents had to force Mwashita to give them the keys to the church. The applicants' position is strengthened by the respondents' failure to explain convincingly how if they had always been the possessors of the Zimunya Church, they ended up having to force the church's warden to give them the key's. There is also no explanation as to why Mrs Rondozai with the concurrence of other parishioners would turn against them. The probabilities favour the applicants' claim that they were despoiled by the respondents.

The affidavit of Reverand Chigwanda confirms that the Zimunya parish was being administered by the applicants through himself and Reverend Waiziweyi as they alternated in conducting Sunday services at the All Saints Zimanya church. This raises the question of why the respondents would have allowed this to happen from the time Reverend Rondozai died in May 20011 till 6 September 20011. The respondents said they had appointed a priest to work with Reverend Rondozai because of his ill health. They did not have the confidence of stating his name. More importantly they do not say where he was for the keys to end up in the custody of the church's warden. This also raises questions as to how if there was an assistant priest Reverands Chigwanda and Waiziweyi could have been conducting services at this church since the death of Reverend Rondozai.

The documental evidence also favours the applicants' .position. There is Annexure G, a declaration of allegiance to the applicant by Reverand Rondozai, dated 27

June 2008, which is supported by his wife's affidavit. The fact that it is dated June 2008 means by the time the parties entered into the consent order the applicants had possession of the Zimunya church. There is Annexure H the contract of employment between the applicants and Reverend Rondozai dated 22 November 2009. This contract was entered into soon after the consent order of 12 October 2009. It seems the applicants were through the allegiance and contracts of employment, confirming who was and was not on their side. Annexure I, dated 1 December 2009, proves that applicant issued Reverand Rondozai with a licence to officiate in the Anglican Diocese of Manicaland at All Saints Zimunya Chapelry.

On the other hand all the respondents could do to prove Reverend Rondozai's allegiance to them was tendering Annexure D a petty cash voucher for the payment of a stipend to him, dated 17 April 2009, and Annexure F a letter dated 15 January 2008 in which the first respondent advised Reverand Rondozai of his appointment of an interim priest because of Reverand Rondozai's ill health. While Annexure D tends to show the respondents could have paid Reverand Rondozai on 17 April 2009, it is not supported by documents proving persistent and continuous payments to prove that Reverand Rondozai was their priest. Mr Zhou for the applicants submitted that at the beginning of factionalism papers from one faction could have found their way to the other faction. This renders the solitary proof of payment to be of limited to no value. The letter on the appointment of the interim priest came from the first respondent. There is no proof that it was received at the Zimunya church. It is thus not a strong link between the respondents and Reverand Rondozai. It pales into insignificancy, when viewed in the light of the priest's name not being given and there being no evidence of such priest having been posted to the All Saints Zimunya church. The other documents tendered refer to periods before factionalism started and are not relevant to the determination of this application.

The facts of the case therefore favours the applicant's application, but the application can not be determined without considering Mr Kanengoni's submission that the respondents' conduct is nothing more than a counter spoliation, an immediate reaction to the applicants' act of unlawfully depriving them of their possession of the church, after the death of Reverand Rondozai. This submission was premised on the first

respondent's deposition that his faction was in charge of the Zimunya church when the parties entered into a consent order before BHUNU J, and that the applicants took advantage of Reverend Rondozai's death to despoil his faction of that possession.

Mr Kanengoni for the respondents submitted that counter spoliation is a recognised defence to an application for a spoliation order. He relied on the Namibian case of *The Three Musketeers Properties (PTY) LTD and Another vs Ongopolo Mining and Prossessing LTD and Others Case No SA* 3/2007, in which MUTAMBANENGWE AJA at p 19 to 20 of the cyclostyled judgment said;

> "SMUTS AJ cited a number of cases in support of his statement at p 44 of his judgment that counter- spoliation is accepted by the common law as a defence to an act of spoliation , to mention but one, in *Mans v Loxton Municipality and Another* 1948 (1) SA 966 (CPD) STEYN J considered the question at length (pp 976-978) citing a number of authorities including common law writers on the subject to illustrate various formulations of the doctrine: (Van Leeuwen; Voet; Salkowski; Savigny and Huber) and ended with the following statement (at 977-978)
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> > 'Breaches of the peace are punishable offences and to prevent potential breaches the law enjoins the person who has been despoiled of his possession even though he be the true owner with all rights of ownership vested in him, if the recovery is *instanter* in the sense of being still a part of the *res gestae* of the act of spoliation then it is a mere continuation of the breach of the peace which already exists and the law condones the immediate recovery, but if the dispossession has been completed, as in this case where the spoliator, the plaintiff, had completed his rescue and placed his sheep in his lands, then the effort at recovery is, in my opinion, not done *instenter* or forthwith but is a new act of spoliation which the law condemns'
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> SMUTS AJ pointed out that in *Ness and Another v Greef*, *supra*, a full bench at 648 approved of a statement by Van der Merwe in Sakereg at 93 "that a Court has a wide discretion to approve an act of counter-spoliation and to refuse the original spoliator against the original possessor" and "in that matter even though a period of 11 days had elapsed between the appellant's occupation until he was locked out by the respondent, the Court held that the respondent's conduct amounted to an *instanter* recovery of the premises".

Mr *Kanengoni* also referred the court to the South African cases of *Mans v Loxton Municipality & Anor* 1948 (1) SA 966 (CPD), *De Beers v Firs Investments Ltd* 1980 (3) SA 1087 (W) and *Ness and Another v Greef* 1985 (4) SA 641 (CPD).

He submitted that counter spoliation can be allowed even after a considerable time has lapsed after the first spoliation. He relied on the case of *Ness and Another v Greef* (*supra*) where a tussle over immovable property continued over a period of eleven days during which the owner was resisting being despoiled by a spoliator, where VIVIER J @ 649 D – H said;

> "It is true that in the present case, a much longer time elapsed from Ness' first occupation of the premises until he was finally locked out by the respondent. Can it be said however, that, having entered the premises on 5 March 1984, against the owner's explicit prohibition, having ignored the notice put up by the respondent that day, having replaced the locks installed by respondent's locksmith on 7 March 1984 to keep him out, all the time well knowing that he had no right to be on the premises nor to trade there, Ness had become so firmly established or ensconced in his possession that his spoliation of the premises was complete? I think not. That would be as COETZEE J said in De Beer's case, an unrealistic evaluation of the situation. I think it is far more realistic to describe the situation existing on the premises in the days which followed Ness' first intrusion on 5 March 1984 as "one indivisible transaction, in which the previous possessor defended his possession by force". (See) Savingy' treaties on possession (Perr's translation), which is quoted in Man's case at 976. Respondent did not only use force, as is shown by the letter, written by her attorneys on 9 March 1984. In my view the tussle for possession of the premises, commenced on 5 March 1984 and continued until, 16 March 1984 when respondent finally succeeded in ousting Ness from the premises. The events which followed after 5 March 1984 were all part of the *res gestae* of the original act of spoliation and a continuation of the breach of peace committed by Ness on 5 March 1984. On the facts of the present case, therefore, I am of the view that respondent's conduct of 16 March 1984 amounted to *instanter* recovery"

Relying on these authorities Mr *Kanengoni* argued that respondents discovered that the applicants had despoiled them by taking over the Zimunya church after the death of Reverend Rondozai. He submitted that as stated in Mwashita's affidavit they tried to get the keys from him on 6 September 20011. He resisted them, causing them to seek police assistance through which they managed to get the keys from him 3 days later on 9 September 2011. He argued that from the time the respondents started demanding the keys on 6 September and their obtaining them on 9 September the tussle for the keys was on going. That may be so but the real issue in this case is if the applicants had despoiled the respondents, when had they done so, and had their spoliation been completed by the

time the respondents discovered it. If it had been completed the respondents would not be entitled to the defence of counter - spoliation, as that defence can only be successful if it is *instanter* and forms part of the *res gestae* of original spoliation.

Mr *Zhou* for the applicants, relying on the South African cases cited by Mr *Kanengoni* for the respondents and the case of *Abbott v Von Tholeman* 1997 (2) SA 848 (CPD) @ 852 F, submitted that counter spoliation should be part of the *res gestae* of the original spoliation and can not be relied upon after the initial spoliation has been completed. He argued that in this case the applicants' warden Mwashita had the keys and therefore possession of the Church. He had been in such possession since the death of Reverend Rondozai, who had possession of the church before the consent order. He therefore submitted that even if it was possible, that the respondents believed they had been despoiled, at the time of Reverend Rondozai's death in May 2011, they could not have been counter-spoliating five months later in September 2011, as the first spoliation would have been completed in May 2011. He referred the court to Silberberg and Schoeman's "The Law Of Property" third edition, at page 144 where the learned authors said;

> "As a general rule a possessor who has been unlawfully dispossessed cannot take the law into his own hands to recover his possession. Instead, he will have to make use of one of the remedies provided by the law, for example the *mandament van spolie*. But if the recovery is *instanter* (forthwith) in the sense of being still a part of the *res gestae* of the act of spoliation, then it is regarded as a mere continuation of the existing breach of the peace and is consequently condoned by the law. This is known as counter spoliation (*contra spolie*). However if the victim of the first act of spoliation fails to act *instanter* and takes the law into his own hands to regain possession of the thing after the dispossession has been completed, his conduct would constitute a new breach of the peace and would be regarded as a separate act of spoliation, entitling the first spoliator to a spoliation order against him".

Counsels for both parties, agree on the requirements of counter spoliation. They however disagree on the effect of the lapsing of time between the acts of spoliation and counter spoliation. Mr *Kanengoni* for the respondents submitted that a delay of three days does not defeat the defence of counter spoliation. Mr *Zhou* for the applicants relying on Silberberg's discussion of the case of *Ness v Greeff* at p 145 of their book already

referred to above, argued that that case was wrongly decided, when it was held that recovery after a period of eleven days was *instaner* recovery.

In my view the parties' different views on whether the eleven day tussle for possession in Ness (*supra*) was *instanter* or not is not material for the resolution of this application. In the Ness Case (*supra)* the tussle for possession started when the first spoliation commenced. It thus disturbed the completion of the first spoliation and thus laid the basis of counter spoliation. In this case the respondents simply allege that applicants despoiled them when Reverend Rondozai died. Reverend Rondozai died in May 2011. Reverends Magwanda and Maiziweyi of the applicants, then took over the priestly duties at the All Saints Zimunya church. They alternated in conducting church services. Mwashita had physical possession of the keys, since the death of Reverend Rondozai. This means if the respondents ever had possession of All Saints Zimunya church, they were despoiled soon after Reverend Rondozai's death in May 2011. That spoliation was well settled and completed by the 6th of September 2011 when the respondents demanded the keys from Mwashita. Their conduct can not be described as *instanter* to the alleged despoliation of May 2011. It thus cannot qualify as a counter spoliation. It is clearly a new spoliation which the applicants are entitled to ward off through this urgent application.

Mr *Kanengoni*'s reliance on the period 6th to 9th September 2011 as a continuous tussle similar to that in the Ness case (supra) misses the fact that the respondents allege that they were despoiled soon after Reverend Rondozai's death. The tussle for the keys, between the 6th and 9th September 2011 therefore took place long after the alleged first spoliation and can not be a basis for a defence of counter spoliation. Counter spoliation can only succeed if the despoiled, acts by resisting the on going spoliation. It like self defence can not be condoned in circumstances where the initial spoliation has been completed, and the initial spoliator, now has firm control and possession of the despoiled property. Revenge spoliation cannot be disguised as counter spoliation, just as revenge can not be disguised as self defence

Counsels for both parties referred to case law from other jurisdictions to prove that counter spoliation is a defence to an application for a spoliation order, and as to the

circumstances under which such a defence would be accepted. They did not refer to a case from this jurisdiction to show that the defence of counter spoliation has been accepted by our courts. My own research has however established that it has. In the case of *Kama Construction (Pvt) Ltd v Cold Comfort Farm Co-Operative & Ors* 1999 (2) ZLR 19 (SC) at p 21 F-H McNALLY JA commenting on the requirements for obtaining a spoliation order and the defences which can be raised against such an application said;

> "The relief applied for was in essence a spoliation order. It is trite that in order to obtain a "mandament van spolie" or spoliation order, the applicant must show that:
> (a) he was in peaceful and undisturbed possession of the thing; and
> (b) he was unlawfully deprived of such possession.
>
> See Joubert Law of South Africa Vol 27 para 78; *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) at 79E-F.
>
> The only valid defences that may be raised 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."

Mr *Kanengoni* for the respondents submitted that the respondent's conduct was not unlawful as they used police to take the keys from Mwashita Mr *Zhou* for the applicants referred the court to the case of *Mutsotso & Ors v Commissioner of Police & Anor* 1993 (2) ZLR 329, at 332 H to 333 A-C, where Robinson J held that the use of the police in the dispossession of the applicants in that case, did not clothe the respondent's conduct with legality, as dispossession must, be through the due process of the law. I agree with Mr Zhou's submission, and find that the use of the police by the respondents to cow Mwashita into surrendering his possession of the church's keys to them does not make their dispossession of the applicants lawful.

I am satisfied that on the facts placed before me the applicants have provisionally, proved that they were despoiled. They had undisturbed possession, until the respondents

forced Mwashita to surrender the keys to them. They proved that the respondents were not acting in counter spoliation, as their acts were not part of the res gestae of the alleged original spoliation and were not *instanter to it*. They are therefore entitled to a provisional order restoring the *status quo.*

In the result it is ordered that;

Pending determination of this matter the applicants are granted the following relief;

The respondents are ordered to forthwith restore to the applicants possession, control and use of the All Saints Zimunya church.

Gill Godlonton & Gerrans, applicants' Legal Practitioners
Chikumbirike & Associates, respondent's Legal Practitioners