WINSLEY MILITALA N.O
and
QV PHARMACIES PRIVATE LIMITED (Under Provisional Judicial Management)
versus
MUTUAL FINANCE PRIVATE LIMITED
and
MESSENGER OF COURT HARARE
and
SHINGIRAI USHEWOKUNZE t/a USHEWOKUNZWE LAW CHAMBERS

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 29 January 2014 and 3 February 2014

Urgent Chamber Application

G. Mlotshwa, for applicant
Ms *F. Mahere,* for 1st and 3rd respondents
Non appearance by 2nd respondent

CHIGUMBA J. This is an urgent chamber application for a provisional order in which the applicants seek the following relief:

TERMS OF FINAL ORDER SOUGHT

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

1. That it be and is hereby declared that applicant, his representatives, employees and invitees are entitled to remain in peaceful and undisturbed possession, occupation and use of Shops 1 and 2, Sam Levy's village (Borrowdale) hereinafter referred to as Borrowdale Shop, until such time as applicant (should it be necessary and expedient) is lawfully evicted in accordance with the due process of law.

2. That the respondents pay the costs of this application jointly and severally, the one paying the other to be absolved on the higher scale of Legal Practitioner and client.

INTERIM RELIEF

Pending determination of this matter, the applicants are granted the following relief:

(a) That 1st, 2nd and 3rd respondents and all other persons claiming occupation or possession through them, jointly and severally, or any other person occupying the so called Borrowdale Shop without the knowledge and consent of the applicants shall forthwith vacate the said property and that such persons shall forthwith remove all property introduced by them thereon so that the status quo ante of the property by the applicant as at 23rd January 2014 be and is hereby restored.

(b) To the extent that it becomes necessary, the Deputy Sheriff is hereby authorized and empowered to attend to the eviction and removal of any person and their property so occupying the so called Borrowdale Shop without the knowledge and consent of applicant. Pursuant thereto, the Deputy Sheriff be and is hereby authorized to enlist the assistance of any member of the Zimbabwe Republic Police who are hereby directed to provide such assistance to the Deputy Sheriff so as to ensure that the provisions of this order are executed and implemented in full.

At the hearing of the matter I directed the parties to address on the merits of the matter, it being trite that the remedy of *mandament van spolie*, by its very nature qualifies to be determined as a matter of urgency. Both parties agreed. Applicants filed a founding affidavit which was deposed to by Mr. Winsley Militala, the Provisional Judicial Manager of the second applicant. He stated that on 8 January 2014, second applicant was placed under provisional judicial management, the effect of which was to automatically stay and suspend all actions and the execution of all writs summonses and other processes against the second applicant company without the leave of the court. He averred that on the 21st of January 2014, the second respondent served the second applicant a notice of removal and eviction from the so called Borrowdale shop. In response to the notice, second applicant wrote a letter to the 1st respondent dated 22 January 2014. Part of the letter reads as follows:

> "Our client advises us that the Messenger of Court (acting under your instructions) served QV Pharmacies with a Notice of removal, Warrant of Ejectment and Attachment of property…In that regard, please be advised that QV Pharmacies Private Limited was placed under provisional judicial management on 8 January 2014. As such, the execution of writs cannot be preceded without leave of the court.

> Kindly advise the Messenger of court to stay execution as a matter of urgency. We respectfully advise you to contact the Provisional Judicial manager Mr. Militala for purposes of lodging your client's claim".

According to the papers filed of record, the letter was received at Ushewokunze law Chambers, legal practitioners of record for the first respondent at 10:12 am on the 23rd of January 2014, by Sandra. Despite the delivery of the letter, on the 24th of January 2014, the second respondent proceeded to remove second applicant's goods and eject it from the Borrowable shop. Applicants averred that prior to the eviction, they had been in peaceful and undisturbed possession of the Borrowdale Shop for several years, and that the shop was strategically placed for its business. Applicants averred further, that the first respondent acted contemptuously by evicting them without the leave of the court, contrary to the terms of the provisional judicial management order. Applicants contended that 1st respondent resorted to self help, and that its actions constitute spoliation, in the absence of express leave to execute as stipulated by the provisional judicial management order.

Two opposing affidavits were filed in response to the application. Third respondent raised a *point in limine* that he had been misjoined to the application. He is the first respondent's legal practitioner of record, and he maintained that he acted in accordance with his client's instructions, firstly in obtaining the order for eviction by consent before the magistrate's court, under case number MC24127/13, on 3 January 2014, and subsequently, in instructing the Messenger of Court to issue a notice of removal. Mr. Ushewokunze averred that when the letter advising that second applicant was now under provisional judicial management was served on him at his offices he had travelled to his farm in Marondera and upon his return on the 24th of January 2014, eviction had already taken place He contended that he only became aware of the provisional judicial management order after the eviction process.

Counsel for the applicants implied that the third respondent was not being candid with the court, that he became aware of the provisional judicial management order and hatched a plot with his client to defeat the provisions of the order by conveniently staying away from his office until eviction had taken place. For that reason applicants were seeking an order for costs on a higher scale against third respondent, for allegedly failing to instruct the Messenger of Court to stay the eviction. The Rules of the High Court on joinder, non- joinder and mis-joinder are clear. Order 13, r 87 of the High Court Rules 1971, provides that:

"***87. Misjoinder or nonjoinder of parties***
(1)….
(2) At any stage of the proceedings in any cause or matter the court may on such terms as it thinks just and either of its own motion or on application—
(*a*) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;"

It was contended on behalf of the third respondent that his inclusion as a party to the proceedings by the applicants smacked of victimization. As an officer of the court, and counsel of record for the first respondent, he was being put in the invidious position of having to plead and possibly betray his client's confidence. This would undermine one of the sacred tenets of the practice of law, attorney –client privilege.

It is my view that, in the absence of more than a gut feeling, or a vague, implied notion that something underhand and untoward took place, there was no justification for the inclusion of the third respondent as a party to the proceedings. There was no evidence adduced by way of the founding affidavit, imputing improper motives to the third respondent. That being the case, there is no basis on which he can be deemed to be an interested party in these proceedings except in his role as counsel of record for the first respondent. Accordingly, I declare that the applicants erroneously joined third respondent to the proceedings, without any basis for his inclusion being laid in the founding affidavit. They caused embarrassment to him as an officer of the court, who is entitled to be believed by the court. No verifiable evidence was adduced, to show that he is misleading the court.

For these reasons, I uphold the *point in limine* raised by the third respondent, and I hereby order that he ceases to be a party to these proceedings, in terms of Order 13- r 87-subrule (2)-sub-sub-rule (a). Counsel for the third respondent contended that the court ought to order costs *de bonis propriis* against applicant's counsel of record for causing embarrassment to a fellow officer of the court. I am not persuaded that Mr. *Mlotshwa*'s motives in citing Mr. Ushewokunze in his personal capacity were purely malicious, or entirely baseless. However, as a mark of the court's displeasure at this sort acrimony between officers of the court, and in a bid to encourage them to extend the necessary courtesies and respect to each other in future, I will allow Mr. Ushewokunze costs on a legal-practitioner-client scale as against the applicants.

He was put to the expense of engaging counsel in his defense when there was no verifiable evidence of any wrongdoing on his part.

Turning to the merits of the matter, first respondent denied that it had evicted the second applicant unlawfully. In the opposing affidavit of Mr. Charles Kapfupi, its managing director, it averred that the letter advising of the provisional judicial management order was served on its legal practitioner of record on the 23rd of January 2014, and not on the 22nd, as contended by the applicants. He averred that when his legal practitioner contacted him to advise him of the contents of the letter he advised him that eviction had already taken place. He averred that his legal practitioner advised him of the effect of the provisional judicial management order, but unfortunately it had been overtaken by events. He reiterated that first respondent was not aware of the provisional judicial management order at the time of the eviction, and that his view was that second applicant had consented to the eviction, so no harm had been done. He averred that the second applicant authored its own misfortune by failing to advise that it was under provisional judicial management on 8 January 2014 when the order was granted, choosing to disclose the fact 15 days later, when the notice of eviction was served on it.

First respondent contended that the balance of convenience now favored it, and the relief sought by the applicants could not be conveniently granted because it had already entered into a lease agreement with a new tenant, Loudergate Investments Private Limited. A copy of the lease agreement was attached and first respondent submitted at the hearing of the matter that it had already received the sum of US$4000-00 from the new tenant, and had started renovations to the property in anticipation of the new relationship. A perusal of the lease agreement showed that it was for a period of five years commencing on 25 January 2014 and terminating on 24 January 2018. A copy of a receipt in the sum of US$4,235-00 was attached, entitled rent deposit, receipt number 35019.

THE ELEMENTS OF SPOLIATION

The law that applies to the remedy of *mandament van spolie* is settled. In *Nino Bonino v Delange 1906 TS 20,* The general principle was stated by INNES CJ as follows:

> "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 his 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."

In *Diana Farm Private limited* v *Madondo N.O & Anor* 1998 (2) ZLR 410 @413 the court set out the authorities as follows:

> "The law relating to the basis on which a *mandament van spolie* will be granted is well settled. In *Davis* v *Davis* 1990 (2) ZLR 136 (H) at 141 ADAM J quoted with approval the following statement by HERBSTEIN J in *Kramer* v *Trustees Christian Coloured Vigilance Council, Grassy Park* 1948 (1) SA 748 (C) at 753*:*
> "... two allegations must be made and proved, namely (a) that applicant was in peaceful and undisturbed possession of the property, and (b) that the respondent deprived him of the possession forcibly or wrongfully against his consent".

The court went on to say that:

> "The onus is on the applicant to prove the two essential elements set out above. Part of the second element is lack of consent. In *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79-80, it was said by GUBBAY CJ:

"It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are:

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

(b) that the respondent deprived him of the possession forcibly or wrongfully against his consent.

It was for the respondent to show that he had not consented to being deprived of possession. No onus rested upon the appellants, as the learned judge perceived, to establish the respondent's consent. Consent to the deprivation may be expressly given, as where the possessor is present at the time, is spoken to and gives his permission. Or it may be implied from the conduct of the possessor both before and after the removal of his property…Furthermore, the applicant's possession must not be mere physical possession. Physical possession must be accompanied by requisite animus or intent"

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This was clearly expressed by ADDLESON J in *Bennett Pringle (Pvt) Ltd* v *Adelaide Municipality* 1977 (1) SA 230 (E) at 233G-H as follows:

> "In terms of all the authorities cited, the `possession', in order to be protected by a spoliatory remedy, must still consist of the animus - the `intention of securing some benefit to' the possessor; and of detentio, namely the `holding' itself .If one has regard to the purpose of this possessory remedy, namely to prevent persons taking the law into their own hands, it is my view that a spoliation order is available at least to any person who is: (a) making physical use of property to the extent that he derives a benefit from such use; (b) intends by such use to secure the benefit to himself; and (c) is deprived of such use and benefit by a third person."

THE ASPECT OF POSSESSION

In *Manduna* v *Mtizwa* 1992 (2) ZLR 90(SC) A man and woman had lived together for some time. The woman then moved out taking with her several items without the man's consent. The man applied for a spoliation order. The woman claimed that these items had been under her sole possession and control whilst they lived together and the man had never used the items and

derived benefit from them. The man disputed this. It was held, that if the woman's claim was correct the man would not be entitled to a spoliation order and as the dispute about this matter could not be resolved on the papers, his application for a spoliation order had rightly been rejected. The court cited the following case with approval:

> In *Stocks Housing (Cape) (Pty) Ltd Chief Executive Director, Department of Education and Culture Services, and others* 1996 (4) SA 231 it was held that:
> ".. the element of unlawfulness of the dispossession which has to be shown in order to claim a spoliation order relates to the manner in which the dispossession took place, not to the alleged title or right of the spoliator to claim possession. The cardinal enquiry is whether the person in possession was deprived thereof without his acquiescence and consent. Spoliation may take place in numerous unlawful ways. It may be unlawful because it was by force, or by threat of force, or by stealth, deceit or theft, but in all cases spoliation is unlawful when the dispossession is without the consent of the person deprived of possession, since consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the possession". (my underlining for emphasis)

In *Gifford Muzire & Ors* HH69/07 it was held that possession which was tainted with illegality could not be peaceful or undisturbed possession, at page 136F-G.
The court stated that:

> " The notice of eviction and his response to it of 16 April 2007 underscored the point that he was no longer in a peaceful and tranquil state of mind The absence of the mental element undermined the physical act…"See *Kama Construction Private limited* v *Cold Comfort Farm Cooperative & Ors* 1999 (2) ZLR 19 (S)…"

Section 301 of the Companies Act [cap 24:03] provides that:

> **"301 Contents of provisional judicial management order**
> (1) A provisional judicial management order shall contain—
> (*a*)…
> (*b*)…
> (*c*) such other directions as to the management of the company, or any matter incidental thereto, including directions conferring upon the provisional judicial manager the power, subject to the rights of the creditors of the company, to raise money in any way without the authority of shareholders, as the court may consider necessary; and may contain directions that while the company is under judicial management, all actions and proceedings and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without the leave of the court."
> (2)…

DISPOSITION

A reading of the authorities will show that it is trite that in order to obtain a "*mandament van spolie*" or spoliation order, an applicant must show that:

(a) he was in peaceful and undisturbed possession of the thing; and
(b) he was unlawfully deprived of such possession.

The only valid defenses 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…"

See Joubert *Law of South Africa* Vol 27 para 78*; Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79E-F.

It is common cause that on 3 January 2014, second applicant gave up its possession of the Borrowdale Shop. It entered into an order before the Magistrates Court, where it agreed to vacate the premises forthwith. A reading of the authorities will show that: "…consent to the giving up of possession of property, if the consent is genuinely and freely given, negates the unlawfulness of the possession". See *Stocks Housing (Cape) (Pty) Ltd* Supra. This is apparently so because, once one consents to be dispossessed, one of the elements of possession will no longer be present "The two elements which combine in the notion of possession are *detentio* (the physical holding of and control over the thing) and *animus* (the intention of securing some benefit for one's self). See *Manduna* v *Mtizwa* Supra. Once second applicant consented not only to vacate, but to vacate forthwith, it no longer intended to derive some benefit from the premises. Although it still had the *detentio*, the physical possession on 24 January 2014, the date of eviction, it could not be said to be in possession of the Borrowdale Shop, at law, when it no longer had the requisite *animus*.

Applicants contended that even if it is clear that, at law, by consenting to vacate the Borrowdale shop the element of unlawfulness of the dispossession would have been negated, in this case it was not. Applicants argued that, as at 8 January 2014 when the second applicant was placed under provisional judicial management, "possession" of the Borrowdale Shop no longer vested in the second applicant, but in the first applicant, the judicial manager, by operation of law. It was submitted that the effect of judicial management is to empower the judicial manager, in terms of s 303(a) of the Companies Act, to: "…assume the management of the company and recover and take possession of all the assets of the company;"

The question that is exercising the court's mind is whether the Borrowdale Shop was still an asset of the second applicant after 3 January 2014 when it agreed to vacate forthwith? The answer, in my view is simple. Second applicant no longer intended to derive any benefit from the Borrowdale Shop. The shop ceased to be an asset to it on that day. Asset, in ordinary English, is defined as: "benefit, advantage, plus point, positive feature" Clearly none of these words apply to a lease agreement that has been terminated by consent, and the agreement is that the lessee vacate immediately. It ceases to be a plus point, or an advantage. Second applicant clearly was not despoiled. It was not in peaceful or undisturbed possession of the Borrowdale Shop on 24 January 2014. Possession was no longer peaceful; it had been disturbed by the consent to vacate forthwith, on 3 January 2014. Its eviction, on the basis of the order to vacate by consent, was not unlawful. It is my view that the 2nd applicant failed to establish the requirements of spoliation.

The first applicant's rights, conferred by operation of statute, pose a different dilemma. The matter could be disposed of by simply finding that on 8 January 2014, when second applicant was placed under provisional judicial management, the Borrowdale Shop was no longer its asset and therefore not capable of being managed by the first applicant, in terms of the Companies Act. Another way of looking at the matter would be to consider the unlawfulness of ignoring a provisional judicial management order, In other words, to consider whether the order of the magistrates court was superceded and trumped by a subsequent order by a superior court which ought to have been complied with.

In order to establish whether the 1st applicant met the requirements of spoliation on 24 January 2014, the date of the eviction, the court must have regard to the provisions of the Companies Act, and to the terms of the provisional judicial management order. The court must consider whether any rights conferred on the first applicant by the Companies Act can accrue where second applicant no longer derives any benefit from the asset. Was the first applicant in peaceful and undisturbed possession of the Borrowdale shop, as from the date of provisional judicial management? Was the eviction of the second applicant, under provisional judicial management, unlawful because the provisional judicial management order stayed all actions and applications and the execution of all writs and processes without the leave of the court?

The provisional judicial management order contained a provision that all actions and proceedings be stayed, and that the leave of the court was required before proceeding. It follows then that I must find that, on 23 January 2014, when the letter was delivered to first respondent's counsel of record advising of the provisional judicial management order, and then at that stage, first respondent could no longer proceed with eviction, without the leave of the court first being sought or obtained. The reason for that would be that the Companies Act required that the leave of the court be sought and obtained first, not as submitted by counsel for the applicants that possession had been restored to the second applicant and now vested in the first applicant, by operation of statute. I respectfully find that argument baseless and am not convinced by it especially when regard is had to the elements of possession.

It is my considered view that, once under provisional judicial management the question of possession no longer arose, the second applicant's assets fell under the authority of the first applicant by operation of statute.. I have already made a finding that the Borrowdale property ceased to be an asset of the second applicant on 3 January 2014 when it consented to vacate forthwith. It follows that neither the Companies Act nor common law could confer rights on the provisional judicial manager to secure non-assets by taking possession and control of them. For that reason, I find that first applicant is not entitled to spoliation. The matter should rest here, but I will proceed to interrogate the defenses raised by the 1st respondent, for expediency.

In the normal course of things, the second respondent would have been instructed to stay the proceedings. In this case he was not. The explanation proffered by first respondent was rubbished by the applicants. There was animosity between the parties, a general lack of trust and loss of respect. There were oblique references to unethical conduct on the part of the first respondent's counsel in failing to stay the eviction. The difficulty I have is an affidavit, a sworn statement by first respondent's managing director, and by first respondent's counsel of record, in which statements are made positively denying having had sight of the provisional judicial management order, before eviction took place.. In the absence of positive averments that the two gentlemen, one an officer of the court, are not being candid with the court, or verifiable evidence that what they swore to is not accurate, I am duty bound to accept their explanations that none of them had sight of the judicial management order until after eviction had taken place.

The second defense that was raised is that restoration is impossible because a third party has already assumed possession of the Borrowdale Shop. Again, unless verifiable evidence to the contrary is provided the contents of first respondent's opposing affidavit stand and must be accepted by the court as prima facie evidence that is unchallenged. The defense that restoration is impossible applies where a third party has acquired possession of the thing. In Silberberg & Schoeman, *The Law of Propertty*, at p 282:

*"*If restoration is objectively impossible, the mandament should not be granted, and the applicant should rely on a delictual claim for damages". See *Moleta* v *Fourie* 1975 (3) SA 999, Potgieter v Davel 1966 (3) SA 555.

The court is required to interrogate the bona fides of the parties, whether the averment that restoration is impossible is bona fide, and whether there is a genuine third party. In this case the lease agreement attached was duly signed. It commenced on the 25th of January 2013. First respondent attached a receipt to show that rent has been paid. No suggestion was made that the lease is not genuine, that no rent was received, or that the third party has not taken possession. There is simply no evidence of *mala fides* on the part of the first respondent in taking physical possession of the Borrowdale shop on 24 January 2014. Mentally, first respondent had regained possession on 3 January 2014. It was entitled to look for another tenant, and in the absence of proof that it had knowledge of the provisional judicial management order and proceeded in defiance of it, no other motive can be imputed to it but that of a commercial entity trying to make money in the normal course of business.

If there had been some evidence which the court could rely on, that the first respondent knew of the provisional judicial management order, then its actions in proceeding with the eviction would have amounted to contempt of court. In my view applicants would NOT have been entitled to spoliation even where the first respondent had been found to be in contempt of court. In my view, once second applicant lost the intention to benefit from the Borrowdale shop, it ceased to be an asset, in terms of the Companies Act, and first applicant could not, as at 8 December 2014 or any other date, purport to take control of something that was no longer an asset of second applicant.

In the result I find that, applicants have failed, both at common law and by operation of statute to qualify for the relief that they seek. Even if they had both fulfilled the requirements of

spoliation, which they did not, 1st respondent's defenses to spoliation would have defeated their claim. I find that restoration is objectively impossible; a bona fide third party is now in occupation of the premises. Applicants have other remedies in delict; in this case, the horse has already bolted. The application is dismissed with costs on an ordinary scale for these reasons. It is directed that Mr. Ushewokunze be removed as the third respondent, and he is awarded his costs as against the applicants, on a higher scale of legal practitioner-client.

G. N. Mlotshwa & Company, applicants' legal practitioners
Ushewokunze Law Chambers, respondents' legal practitioners