

REPORTABLE (119)

QUICKLINK INVESTMENTS (PRIVATE) LIMITED
v
(1) CMAL (PRIVATE) LIMITED (2) THE SHERIFF OF
ZIMBABWE

**SUPREME COURT OF ZIMBABWE
BHUNU JA, CHIWESHE JA & MUSAKWA JA
HARARE, 8 JULY 2022 & 7 NOVEMBER 2023**

B. Magogo, for the appellant

A.Y. Saunyama, for the first respondent

No appearance for the second respondent



MUSAKWA JA: This is an appeal against the whole judgment of the High Court (the court *a quo*) wherein it granted a spoliation order sought by the first respondent against the appellant.

FACTS

The appellant and the first respondent are companies incorporated in terms of the laws of Zimbabwe. The first respondent is the owner of a certain piece of land, being two thirds shares of the Remaining extent of Teviotdale (hereinafter referred to as 'part of the farm') held under Deed of Transfer 8935/90. The appellant is the registered holder of a mining block consisting of ten gold reef claims named Forest K of Forest View (hereinafter referred to as 'Forest K claims') which block is situated on the respondent's farm.

The first respondent filed an urgent chamber application for a spoliation order in which it sought that the appellant and one Kumbirai Kangai, be ordered to return peaceful, quiet, undisturbed possession, occupation and use of two thirds shares of the remaining extent of Teviotdale. In the application, the first respondent averred that sometime in April 2021 the appellant invaded part of its farm. In resisting the application, Kumbirai Kangai deposed to an opposing affidavit in which he claimed to be the director of the appellant. He further averred that the appellant was the registered holder of ten gold reef claims situated on the first respondent's farm. A provisional order was granted only against Kumbirai Kangai on 21 April 2021 and subsequently confirmed on 26 January 2022 under case number HC 1604/21. It is not clear how the order was only granted against Kumbirai Kangai.

On 9 February 2022, the second respondent executed the order granted under HC 1604/21 by serving a notice of eviction on Kumbirai Kangai's employee, one Tongesai Maregere. On 14 February 2022 the second respondent evicted Kumbirai Kangai and all those claiming occupation through him and restored possession to the first respondent.

On 14 February 2022 at around 5.00 pm, the first respondent instructed its guards to clear off a squatter camp, which clearance was carried out and the squatter camp was burnt down. On 15 February 2022, the first respondent further deployed a bulldozer and grader to restore the degraded land by filling holes that had been dug and knocking off stone and mortar structures that had been erected. At around 3.00 pm the bulldozer operator was informed by the appellant's employees that he could not enter the site as they were already fencing the site off.

The first respondent engaged legal counsel regarding the spoliation by the appellant. It turned out that on 14 February 2022 an application for an injunction against the first respondent had been filed by the appellant with the Provincial Mining Director for Mashonaland Central Province and served on the first respondent's legal practitioners. The first respondent further averred that the appellant failed to await the outcome of the application for injunction and resorted to self-help and despoiled it of its property. The first respondent thus prayed that it be restored occupation and use of part of the farm and that the appellant be evicted therefrom.

The appellant and Kumbirai Kangai opposed the first respondent's application. The first respondent however, amended its draft order at the hearing and deleted the name of Kumbirai Kangai. As such, only the appellant opposed the application. In its opposing affidavit the appellant raised a preliminary point to the effect that the matter was not urgent as the first respondent had been aware of the mining claims since 2013. Reference was made to its opposition to the application under HC 1604/21, stating that it had claims over the same land belonging to the first respondent. The appellant further averred that it possessed a certificate of registration of a mine situated on part of the farm and that the first respondent had not done anything to challenge the appellant's possession of part of the farm. It also averred that the eviction order granted under HC 1604/21 was made against Kumbirai Kangai and not against it. The appellant thus averred that it was not evicted from the property as the first respondent did not institute any action for its eviction.

On the merits, the appellant averred that the first respondent was seeking to evict it through the back door and by way of an urgent chamber application. The appellant further averred that the first respondent was never in peaceful, quiet and undisturbed possession and

occupation of part of the farm. In addition, it contended that it had issued a notice of application for an injunction in terms of s 354 (1) of the Mines and Minerals Act [*Chapter 21:05*] on the first respondent on 10 February 2022. The appellant further averred that its certificate of registration of the mining claims was still valid and as such, it had a right to carry out mining activities on the farm.

The appellant also averred that the provisional order granted in favour of the first respondent had been granted by the consent of the parties in the hope of reaching a settlement. Further, the appellant contended that it was not before the court when the order evicting Kumbirai Kangai was granted and as such it could not be evicted on the basis of such eviction order as it was a separate legal persona from its director Kumbirai Kangai. The appellant maintained that its structures and equipment situated on part of the farm had not been demolished by the first respondent and that such action showed that the first respondent was never in possession of the piece of land where the appellant carried out its mining activities. In addition, it contended that the first respondent could not seek to enter the appellant's site to evict it after the second respondent had left. The appellant thus prayed for the dismissal of the first respondent's application as it averred that the application was simply one of eviction made under the guise of a spoliation application.

DETERMINATION BY THE COURT A QUO

The court *a quo* found that the matter was urgent. It reasoned that the appellant had not established that it was in occupation of the farm since 2013 whereas the first respondent had established that it had obtained an extant order under HC 1604/21 over the same portion of land and from which the application for spoliation arose. The court *a quo* found that the first respondent acted expeditiously in seeking the spoliation order as the eviction by the second

respondent had been carried out on 14 February 2022 and the appellant had started the process of fencing off the area in dispute on 15 February 2023 prompting the first respondent to seek the spoliation order on 17 February 2023, three days later. The court *a quo* thus dismissed the preliminary point raised by the appellant.

On the merits, the court *a quo* found that following the execution of the order granted under HC 1062/22 the first respondent was left in peaceful and undisturbed possession of that part of the farm. The court *a quo* further found that when the appellant proceeded to occupy the land and fenced it and barred the first respondent from accessing part of the farm, it was forcibly depriving the first respondent of part of the farm. The court *a quo* noted that the fact that the appellant may have been in occupation of part of the farm and was a holder of a certificate of registration of mining blocks was a different issue altogether as the certificate of registration related to a different farm and not the farm at the centre of the dispute. The court *a quo* further noted that the appellant's certificate of registration was for a mine called Forest K situated on Forest View and not two thirds share of the remaining extent of Teviotdale.

The court *a quo* noted that having realised that its director Kumbirai Kangai had been lawfully evicted, the appellant decided to occupy part of the farm in dispute as the order made under HC 1604/21 had not been made against it. In the result, the court *a quo* found that the first respondent had established that it was despoiled of part of its farm by the appellant. The court ordered the appellant to restore the first respondent's status *quo ante* prior to the spoliation and authorized the second respondent to eject, demolish any structures and raze down fencing erected by the appellant and all those claiming occupation through it and that the appellant pay costs of the application.

Aggrieved by this decision the appellant noted the present appeal on the following grounds of appeal:

GROUNDS OF APPEAL

- “1. The court *a quo* grossly misdirected itself in finding that the execution of the order under HC 1604/21 left 1st respondent in peaceful possession of the disputed mining location yet Appellant was not a party to that cause and considering that Appellant’s employees, accommodation and mining equipment remained on the registered mining location.
2. The court *a quo* grossly misdirected itself in finding that appellant was not in occupation and possession of the mining location in the face of evidence that it had been in occupation of the disputed land since 2013.
 - a. A *fortiori*, the court *a quo* erred in finding that the issue of the Appellant’s occupation of the mining location pursuant to a certificate of registration was inconsequential to the spoliation cause.
3. The court *a quo* erred in affording first respondent final ejection relief in an urgent spoliation cause in circumstances where such relief was neither justified nor motivated in the first respondent’s founding papers.
4. As an alternative to ground number 3 above, and in granting the eviction order, the court *a quo* erred;
 - a. in finding without rational or legal justification that Appellant’s registered mining location was not located within first Respondent farm; and, b in ordering Appellant’s eviction without regard to the pending proceedings in terms of section 354 (1) of Mines and Minerals Act [*Chapter 21:05*].

WHEREFORE appellant prays for the following relief;

- i. That the appeal succeeds with costs.

ii. That the judgment of the court *a quo* be and is hereby set aside and substituted with following: -

‘The application be and is hereby dismissed with costs.’”

ISSUE FOR DETERMINATION

One issue arises from the grounds of appeal and submissions made by counsel before this Court. The issue for determination is as follows:

Whether or not the first respondent was in peaceful and undisturbed possession of part of the farm and whether the appellant despoiled the first respondent of such possession.

THE APPELLANT’S SUBMISSIONS ON APPEAL

Mr Magogo, for the appellant submitted that when the order under HC 1604/21 was executed by the second respondent, Kumbirai Kangai and his employees were evicted as evidenced by the Sheriff’s return. Counsel argued that after the eviction, the appellant’s employees remained on the first respondent’s part of the farm and hence decided to fence off the portion of the farm which they were occupying. Counsel thus maintained that the appellant was already in possession of part of the farm and as such, could not have despoiled the first respondent of any peaceful possession which it never had.

Mr Magogo also argued that the eviction order in HC 1604/21 did not relate to the appellant, but to Kumbirai Kangai and others acting through him. Counsel further argued that since the appellant was not a party to the proceedings in HC 1604/21, the court *a quo* erred when it granted the eviction order against it. He further argued that the court *a quo* failed to establish a link between the appellant and Kumbirai Kangai and that it made an error by making a determination that when eviction was carried out on Kumbirai Kangai, the appellant was also

evicted. With that counsel maintained that the appellant did not despoil the first respondent of peaceful possession of part of the farm.

As regards the effect of the orders in HC 1604/21, counsel submitted that the appellant had no problem with removing the fence it erected as the relief it sought on appeal was that there be co-possession of the farm between it and the first respondent. Counsel further submitted that the demolition of its structures presupposes that the rights of the parties have been effectively resolved. At the end of his submissions counsel, however, conceded that the first respondent had peaceful possession of part of the farm.

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

Ms *Saunyama*, for the first respondent argued that the question of whether or not it was in peaceful possession of part of the farm prior to 14 February 2022 could not be disputed as the appellant had made a concession that the first respondent had possession of part of the farm. Counsel submitted that the act of erecting a fence by the appellant on 15 February 2022 amounted to an act of spoliation which warranted an order of eviction as granted by the court *a quo*. Counsel argued that the issue of joint possession was never pleaded by the appellant and that in any event the appellant ought to have proved before the court *a quo* that there was joint possession between it and the first respondent in respect of part of the farm in dispute but it failed to do so.

Counsel further argued that spoliation orders by their very nature are final and aimed at restoring the *status quo ante* and as such the court *a quo* could not be faulted for ordering that the appellant vacate the property in dispute together with all those claiming occupation through it. It was also counsel's argument that when the second respondent

enforced the order granted in HC1604/21 the first respondent was given possession of part of the farm. Counsel maintained that by erecting a fence and taking occupation of the land on 15 February 2021, the appellant despoiled the first respondent of part of the farm. Counsel thus submitted that the judgment of the court *a quo* was unassailable and prayed that the appeal be dismissed with costs.

ANALYSIS

The first respondent approached the court *a quo* seeking a spoliation order against the appellant. The court *a quo* granted the order sought by the first respondent. The court *a quo* restored possession of part of the farm to the first respondent by ordering the second respondent to demolish structures and raze down the fence erected by the appellant and all those claiming occupation through it from part of the farm. The question to be determined by this Court relates to whether or not the first respondent was in peaceful possession of part of the farm and was despoiled by the appellant when it fenced part of the farm on 15 February 2021.

The law on spoliation is well settled. Spoliation is the wrongful deprivation of another's right of possession. The purpose of a spoliation order is to prevent self-help. The remedy entitles a wronged party to approach a court of law to obtain an order that he/she/it be returned to the status *quo ante*. In *Zondiwa Nyamande v Isaac Tamuka & Ors* SC 445/23 at p 19 the court discussed the effect of a *mandament van spolie* as follows:

“Spoliation proceedings hail from the common law remedy which is meant to discourage members of the public from taking the law into their hands (see *Mswelangubo Farm (Pvt) Ltd & Ors v Kershelmar Farms (Pvt) Ltd & Ors* SCB 69/21, *Chiwenga v Mubaiwa* SC 86/20). The remedy encourages members of society to follow due process in obtaining or acquiring any *res* he believes belongs to him. The *mandament van spolie* is therefore a possessory remedy aimed at the restoration of possession where a party is unlawfully deprived of its prior peaceful and undisturbed possession of property. The facts of each matter determine whether or not spoliation or unlawful disposition has occurred. It is trite

that in spoliation proceedings the lawfulness or otherwise of the possession challenged is not an issue. Spoliation simply requires the restoration of the status *quo ante* pending the determination of the dispute between the parties (see *Augustine Banga & Anor v Solomon Zawe & Ors* SC 54/14)."

The learned authors Silberberg and Schoeman in *The Law of Property*, Second Edition at pp 135-136 state the following with regards to this principle:

"... the applicant in spoliation proceedings need not even allege that he has a *ius possidendi: spoliatus ante omnia restituendus est* All that the applicant must prove is that he was in peaceful and undisturbed possession at the time of the alleged spoliation and that he was illicitly ousted from such possession It is not sufficient to make out only a *prima facie* case ..."

In the celebrated case of *Botha & Anor v Barrett* 1996 (2) ZLR 73 (S) GUBBAY CJ stated as follows at p 79 D-E:

"It is clear law that in order to obtain a spoliation order two allegations must be made and proved. These are: That the applicant was in peaceful and undisturbed possession of the property; and, that the respondent deprived him of the possession forcibly or wrongfully against his consent."

In *Minister of Mines and Mining Development & Others v Grandwell Holdings (Pvt) Ltd* SC 34/18 at p 17 the court held that:

"It has been stated in a number of cases that issues of rights are irrelevant in spoliation proceedings. In *Yeko v Oana* 1973 (4) SA 735 (AD) at 739 G it was stated that:

'The fundamental principle of the remedy is that no one is allowed to take the law into his own hands. All that the spoliata has to prove, is possession of a kind which warrants the protection accorded by the remedy, and that he was unlawfully ousted.'"

In the case of *Chisveto v Minister of Local Government and Town Planning* 1984 (1) ZLR 248 (H) the court remarked:

"Lawfulness of possession does not enter into it. The purpose of the *mandamus van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these principles, it is necessary for the status *quo ante*

to be restored until such time as a competent court of law assess the relative merits of the claims by each party.”

And, in *Streamsleigh Investments (Pvt) Ltd v Autoband (Pvt) Ltd* SC 43/14 at p 10 GOWORA JA (as she then was) held as follows:

“It has been stated in numerous authorities that before an order for *mandament van spolie* may be issued an applicant must establish that he was in peaceful and undisturbed possession and was deprived illicitly. In *Scoop Industries (Pty) Ltd v Longlaagte Estate & GM Co Ltd (In Vol Liq)* 1948 (1) SA 91 (W) LUCAS A.J said at pp 98-99”

‘Two factors are requisite to found a claim for an order for restitution on allegation of spoliation. The first is that the applicant was in possession and the second that he has been wrongfully deprived of that possession against his wish. It has been laid down that there must be clear proof of possession and illicit deprivation before the order is granted... It must be shown that the applicant had free and undisturbed possession...’ (see also *H J Voster (Pvt) Ltd and Anor v Save Safaris (Pvt) Ltd and Ors* SC 41/22)

The above authorities are instructive that in spoliation proceedings the determining factor is not the lawfulness or otherwise of the possession but whether the applicant was in peaceful and undisturbed possession and that he/she/it was wrongfully deprived of that possession against his/her/its consent.

In case number HC 1604/21 the first respondent obtained a provisional order against Kumbirai Kangai and all those claiming occupation of part of the farm belonging to the first respondent. The order granted in HC 1604/21 was enforced by the second respondent on 14 February 2021 whereupon Kumbirai Kangai and his employees were evicted from the mining site. On the same day, the first respondent took occupation of the site and proceeded to clear off Kumbirai Kangai’s squatter camp by burning all the temporary grass structures. It is also common cause that on 15 February 2021 when the first respondent’s workers sought to

fill in holes and knock off stone and mortar structures, they were denied access by the appellant's employees who were already in the process of fencing off the site.

The court finds that the facts of the matter clearly show that the appellant despoiled the first respondent of its undisturbed possession of part of the farm. This finding is made on the basis of the following points. Firstly, the order granted in HC 1604/21 gave the first respondent vacant possession of its part of the farm. The eviction of Kumbirai Kangai and his employees resulted in the first respondent possessing part of the farm, which possession it held peacefully. Secondly, the first respondent proceeded to clear the site as a mark of establishing its peaceful possession of part of the farm. Lastly, on 15 February 2021, the appellant with no consent of the first respondent, entered part of the farm and proceeded to erect a fence over the area upon which the first respondent had been given vacant possession by the court under HC 1604/21.

The appellant clearly despoiled the first respondent of its peaceful possession of part of the farm. Counsel for the appellant conceded at the hearing of this appeal that the first respondent was in possession of part of the farm, but however sought to make the argument that such possession ought to be viewed as co-possession between the appellant and the first respondent. This argument was never pleaded by the appellant before the court *a quo* as correctly noted by counsel for the first respondent. The authors AC Cilliers, C Loots and HC Nel in *The Civil Practice of the High Courts of South Africa* (5th ed, J) at p 558 quoting *Halsbury's Laws of England* 4th ed (Reissue) vol 36 (1) para 1, state the following in relation to a pleading:

“The term ‘pleading’ is used in civil cases to denote a document in which a party to proceedings in a court of first instance is required by law to formulate in writing his case in preparation for the hearing.”

In *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94(A), at 108 D-E, the court cited with approval the case of *Robinson v Randfontein Estates GM Co. Ltd* 1925 AD 173 where at p 198 the following was stated:-

“The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. For pleadings are made for the court, not the court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.”

Pleadings are meant to mark out the parameters of the case sought to be advanced and define the issues between litigants. In this regard, it is a basic principle that an issue should be clearly stated in pleadings at the initial stages when a matter is filed. This enables the opposing party to answer to such issues and also ensures that the court determines all issues raised before it. The Court finds merit in the submission by counsel for the first respondent that the issue of co-possession was never related to or pleaded by the appellant in its opposing affidavit before the court *a quo*. Further, the appellant did not produce any evidence to show that there was co-possession of part of the farm.

In any event it was not disputed by the appellant that its registered mining claim relates to a block consisting of ten gold reef claims named Forest K situated in Forest View whereas the first respondent is the registered owner of a certain piece of land being two thirds shares of the Remaining extent of Teviotdale. The court *a quo* found that the appellant failed to prove that co-existence existed as the certificate of registration for the appellant related to a different area than that claimed by the first respondent. The finding of the court *a quo* is correct and puts the issue of co-possession to rest. The appellant did not prove any co-possession and as such cannot seek to occupy the first respondent’s part of the farm on such basis.

Counsel for the appellant also sought to justify the presence of the appellant on part of the farm on the fact that the appellant had made an application for an injunction and that on the basis of the mining rights it possesses it could occupy part of the farm without the consent of the first respondent. The submission by counsel again falls short on the basis that spoliation proceedings have nothing to do with rights of ownership, but is concerned solely with possession and the unlawful deprivation thereof (see *Magadzire v Magadzire* SC 197/98).

What matters is the fact that as at 14 February 2021, the first respondent was in undisturbed and peaceful occupation of part of the farm. The appellant despoiled the first respondent by camping on that part of the farm and proceeding to erect a fence. Such conduct could not be allowed to continue and hence the court *a quo* granted the spoliation order sought by the first respondent and ordered that the status *quo ante* be restored to the first respondent and that in restoring the status *quo ante* the second respondent eject, demolish and raze down any structures and the fence erected by the appellant and all those claiming occupation through it, on the farm.

The order of the court *a quo* should not in any way be read as an eviction order of the appellant from part of the farm. The appellant in its third ground of appeal has raised the argument that the court *a quo* erred in affording the first respondent final ejectment relief in an urgent spoliation cause in circumstances where such relief was neither justified nor motivated in the first respondent's founding papers. The argument made by the appellant is without merit. Spoliation orders are meant to restore the *status quo ante* of a situation and in restoring such status. A despoiled party must be restored to his/her/its original position before anything else. (See *Ngukumba v Minister of Safety and Security & Ors* 2014 (7) BCLR 788 (CC) para 10). This therefore means that in restoring the despoiled party, the despoiler must be removed from

the property forming the centre of the dispute and the despoiled party must be restored to the state of affairs that existed before the spoliation. The order of the court *a quo* must therefore not be read as an eviction order as it does not speak of eviction but rather speaks to the restoration of the status *quo ante*.

DISPOSITION

The court *a quo*, correctly found that the appellant resorted to self-help by placing itself at the mining site immediately after Kumbirai Kangai had been evicted. The court *a quo* was alive to the fact that the order under HC 1604/21 had given the first respondent peaceful possession of part of the farm and that by erecting a fence the appellant had despoiled the first respondent of its land.

The court *a quo* thus properly restored possession to the respondents by granting the spoliation relief. The requirements for a spoliation order were clearly satisfied. The decision of the court *a quo* is unassailable. The appeal is without merit and must fail.

As regards costs, there is no reason why we should depart from the normal trend that costs follow the result.

Accordingly, it is ordered that the appeal be and is hereby dismissed with costs.

BHUNU JA



CHIWESHE JA : I agree

Messrs Marume & Furidzo, appellant's legal practitioners

Jarvis.Palframan, 1st respondent's legal practitioners