LANDELA SAFARIS ADVENTURE (PRIVATE) LIMITED
versus
NATIONAL RAILWAYS OF ZIMBABWE
and
THE VICTORIA FALLS TRADING POST (PRIVATE) LIMITED
and
DEDICATION COLLECTIONS (PRIVATE) LIMITED
and
VICTORIA FALLS ADVENTURES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 17 & 24 April 2024

Opposed Application – Spoliation and Interdict

Mr *E Mubaiwa with M Tarugarira*, for the applicant
Mr *A K Maguchu with N Katsande,* for the 1st respondent

MUSITHU J: This urgent court application was filed in terms of r 59(6) of the High Court Rules, 2021. The applicant seeks spoliatory relief and other interdicts pending the resolution of a shareholder dispute that is currently before arbitration tribunal. That dispute is concerned with a joint venture arrangement between the applicant and the first respondent that involves the affairs of the second respondent. The second, third and fourth respondents were cited as interested parties. They did not oppose the application and were not represented at the hearing.

The Applicants' Case

The applicant's case is set in the founding affidavit as follows. The first respondent owns immovable properties in Victoria Falls known as House Numbers EL12, EL13 and EL14 (hereinafter referred as the properties). In terms of an agreement signed between the applicant and the first respondent (hereafter referred to as the parties) on 27 November 1998, the first respondent agreed to lease the said properties to the applicant. The applicant agreed to construct three houses and two lodges at its expense as consideration for the lease of the properties. The applicant also agreed to develop a Commercial Centre on the same land. The first respondent came in as development partner which entailed the acquisition of shares in the second

respondent (also referred to hereunder as the company). That arrangement gave birth to the second respondent, in which the parties were the sole shareholders.

The properties were leased to the company in terms of an agreement signed between the parties on 8 October 1999. In terms of clause 4 of the agreement, the lease had a tenure of 8 years from the date of signing. There was an option to renew the lease for a maximum of two further periods of eight years and four months. According to the applicant, the first phase lapsed on 8 February 2008. There was the first renewal which lapsed on 8 June 2016. There was a second renewal which the applicant contends must be lapsing on 8 October 2024.

The commercial structures set up by the applicant were to be rented to third parties. The applicant and the first respondent were to share the rental income at agreed ratios. The management of the joint venture was reposed in the second respondent as the parties' investment vehicle. This tripartite arrangement was further consummated through a shareholder's agreement that was signed by the three entities on 13 December 2006. That agreement endorsed the second respondent's right to manage the properties whilst the applicant and the first respondent enjoyed the shareholding, directorship and dividends when declared. In terms of clause 19.2 of the agreement, such arrangement was to continue until the date of the commencement of the winding up of the company. One of the structures developed by the second respondent was an Administrative Block, which the said party occupied at all material times.

A dispute arose between the parties concerning the status of the lease and the shareholders agreement signed by the parties. that dispute was referred to arbitration by the first respondent in terms of the aforementioned constitutive documents. Ten issues arise for determination at arbitration. The critical ones that are relevant to this matter are whether the lease and the shareholders agreement lapsed, and whether the second respondent should vacate the premises it occupies.

The applicant claims that notwithstanding the pendency of the dispute at arbitration, the first respondent took the law into its own hands. It locked the second respondent out of the Administrative Block at the Commercial Centre. Heavy locks were used to seal the doors to prevent access into the premises. Pictures of the locks were attached to the applicant's founding affidavit. The first respondent is alleged to have threatened to lock out the tenants from the premises. The threats were made on the basis that occupation of the premises was supposed to be done in terms of lease agreements signed by the first respondent as the landlord. The first

respondent had since signed lease agreements with some other tenants that included the third and fourth respondents herein. It had also demanded and received rentals from some tenants who included the third and fourth respondents. Receipts of rental payments made by the third and fourth respondents to the first respondent were attached to the founding affidavit.

The applicant contends that the act of locking the second respondent out of the premises was an act of spoliation which was contrary to the rule of law. That conduct effectively undermined the lease, joint venture and the shareholders agreement. The first respondent's conduct also negated the arbitration proceedings which were under way. The applicant averred that it had bright prospects of success in the arbitration proceedings. It argued so because the lease was set to expire in October 2024, and the shareholders agreement only lapsed on the liquidation of the second respondent. The applicant also argued that it was entitled to recoup its investment in the Commercial Centre. It had not yet done so because of the hyper-inflationary environment and the COVID-19 pandemic. It intended to file a counterclaim at arbitration. The applicant also claimed that the first respondent had erred in not joining the second respondent to the arbitration proceedings.

The applicant averred that a case for the granting of an interdict had been made on the basis that the first respondent had entered into lease agreements with some tenants contrary to the joint venture arrangement between the parties. Those leases had to be suspended with the tenants being directed to continue paying rentals to the second respondent. The status *quo ante* needed to be preserved pending the conclusion of the arbitration proceedings. The balance of convenience favoured the granting of the relief sought since there was no conceivable prejudice to the first respondent.

As regards the question of urgency, it was averred that the second respondent was locked out of the premises on 15 March 2024. It could not come to court because of the paralysis caused on its board of directors owing to the disputes between the applicant and the first respondent. On 18 March 2024, the second respondent made a complaint to the Zimbabwe Republic Police. The present application was made within ten days from the date a complaint was addressed to the police. The delay was therefore not inordinate.

The court was urged to grant the application with an order of costs on the punitive scale. The act of spoliation accompanied by the misappropriation of funds that were due to the joint venture justified such an order.

The First Respondent's Case

The opposing affidavit raised three preliminary points, which are absence of *locus standi* on the part of the applicant to institute the current proceedings, absence of jurisdiction on the part of this court and an inadmissible founding affidavit. I shall deal with these later in the judgment.

As regards the merits, the first respondent averred that the applicant had not satisfied the requirements for the granting of a spoliatory relief. Spoliatary relief was granted to a party that had been despoiled. The party that was allegedly despoiled was the second respondent. The applicant was never in peaceful and undisturbed possession of the premises. It could not have been deprived of possession that it never had. The party that was granted the lawful right of possession over the Commercial Centre was the second respondent. It was also the party that was given authority to manage the said premises.

The first respondent denied despoiling the applicant. The premises in dispute were commercial premises. The second respondent was allocated two offices at the premises. It was currently in occupation of the premises. If it vacated the premises, then it did so voluntarily without informing the first respondent. The first respondent also denied removing the tenants from the premises. It insisted that the tenants remained in occupation of the premises. The first respondent claimed that it informed the tenants of the ongoing dispute between the shareholders. The tenants formed the view that the possession of the Commercial Centre would be restored to the first respondent. Out of their own volition, the tenants elected to make rental payments to the first respondent. That could not be termed spoliation.

The first respondent disputed the authenticity of the pictures of locks placed on some doors, arguing that they may or may not belong to the Commercial Centre and that they could not be attributed to it. The first respondent also denied the allegations of lease agreements between it and some unmentioned tenants. It also dismissed the receipts attached to the applicant's affidavit showing some rental payment, arguing that they established no causal link with the premises and the first respondent.

The first respondent claimed that it had instituted arbitration proceedings in good faith. The present application was therefore unnecessary and a waste of time and misplaced. This was because the applicant was in one breath seeking to assert a right to receive rental income from the second respondent, but at the same time it also sought to have that right suspended as part of the interim relief pending the final award. The applicant had also failed to establish the

requirements of an interdict. There was no conceivable apprehension of irreparable harm as would befall the applicant. As a shareholder, the applicant had no material interest in the day to day running of the business affairs of the second respondent.

The applicant's quest to have the first respondent render an account for all monies that were collected was dismissed on the basis that a shareholder cannot request a rendering of an account and debatement of a fellow shareholder. The first respondent had no duty at law to account to the applicant on how to conduct its business. Further, it was averred that the applicant had no right to receive rental income for the Commercial Centre.

It was also averred that if the ancillary relief sought was granted, its effect would be academic for purposes of enforcement. This was because the arbitrator had undertaken to render his award on or before 21 May 2024. The interim relief would therefore be enforceable almost at the same time that a final award would have been rendered. For that reason, the application itself was academic.

The Applicant's Reply

The applicant's answering affidavit raised a preliminary point which challenged the validity of the opposing affidavit. The submission was that the deponent to the opposing affidavit was granted authority to depose to the affidavit from an invalid board resolution. The meeting that purportedly passed the resolution was held on 14 February 2024, while the present application was issued and filed on 28 March 2024. The resolution could not have been conceivably passed before the proceedings to which it related had not been instituted. There was therefore no valid opposition before the court.

Commenting on its *locus standi* to institute proceedings, the applicant averred that it had not sued to assert its rights, but those of the second respondent in which it had a shareholding. It did not require the second respondent's authority to do so. Its rights to do so arose by operation of law and by virtue of its status as shareholder in a distressed entity.

The applicant disputed all the factual averments and contentions of law insisting that it had made a good case for the granting of the relief sought.

Case Management and The Submissions

The parties first appeared before the court for a case management meeting in order to agree on the timelines within which further pleadings were to be filed. At the same meeting the court implored the parties to try and reach some consensus on the dispute in view of the pending arbitration proceedings that had a bearing on the current matter.

Regrettably, at the resumption of the hearing, the parties had failed to make any headway. The first respondent had filed a supplementary affidavit in which it sought to explain the circumstances under which the maligned board resolution was passed. Mr *Mubaiwa* for the applicant objected to the filing of the resolution as being irregular and an infringement of the rules of court. Mr *Maguchu* for the first respondent sought the leave of the court to file a proper board resolution that addressed the applicant's concerns. That request entailed a postponement of the matter to allow the procurement of a board resolution authorising the deponent to the first respondent's affidavit to depose to the opposing affidavit on its behalf. The supplementary affidavit was expunged from the record by consent.

The Preliminary Points

Jurisdiction

The court was urged to decline jurisdiction in this matter on the basis that clause 14 of the lease agreement and clause 15.2 of the shareholders agreement required that all disputes between the parties be referred to arbitration. It was also submitted that clause 15.13 of the shareholders agreement required that pending the outcome of any arbitration, the company's auditors could determine, in their sole discretion, how the business of the company should be conducted. In his oral submissions, Mr *Maguchu* further submitted that the jurisdiction of this court was ousted by statute. He referred to Article 9(3) of the Model Agreement to advance that point. Counsel also referred to the dictum in *Gwanda Rural District Council v Botha*[1], in which the court cautioned against interference by courts in arbitration proceedings unless authorised by the law.

Mr *Maguchu* further argued that arbitrators were endowed with wide powers to grant interim measures. He referred to the UNCITRAL 2012 Digest of Case Law on the Model on International Commercial Arbitration, as defining interim measures widely to include orders that may be made against the disposal of property. Reference was also made to the case of *Union India & Ors* v *Wadia & Sons*[2] in which the court interpreted the arbitrator's powers so widely as to include the granting of relief that courts could also grant.

In response, Mr *Mubaiwa* submitted that no arbitrator or auditor had jurisdiction to determine a complaint of spoliation. Such a complaint was delictual and not contractual in nature and therefore not subject to arbitration by reason of s 4 (1) of the Arbitration Act. It was

[1] SC 174/20
[2] 2009 (2) ARBLR p 238

further submitted that arbitration could not resolve questions of constructive contempt of arbitration proceedings. Also, the relief sought was preservatory of the status *quo ante* and of the jurisdiction of the arbitrator. It fell within the jurisdiction of the court by virtue of Article 9(2) of the Arbitration Act.

It was also submitted that as a domestic remedy, an approach to the auditors would be ineffective since they could not issue enforceable orders capable of urgently arresting spoliation, contempt of the arbitration proceedings and restoring the *status quo*.

The Constitution of Zimbabwe in s 171(1)(a) confers on this court original jurisdiction over all civil and criminal matters. Section 174(1)(d) of the Constitution recognises the existence of tribunals for arbitration, mediation and other forms of alternative dispute resolution. Indeed, in the *Gwanda Rural District Council* v *Botha* matter, the court noted that courts of law are precluded by operation of law from intervening in voluntary arbitration matters unless they are duly authorised by the Act or the model law. Those views were expressed on the back of an attempt by the appellant's legal practitioners to invite the appeal court to deal with the merits of the award under the guise of objecting its registration.

I found nothing in the lease agreement that specifically precludes this court from granting the kind of relief that is sought in the present matter. The same goes for the shareholders agreement. Further, the intervention by the company's auditors in terms of clause 15.13 of the shareholders agreement relates to the conduct of the company's business pending the outcome of the arbitration proceedings. Auditors cannot determine and render a determination on the kind of dispute that is before this court. The arbitration agreement in the both the lease and the shareholders agreement must be read subject to the provisions of the law. Article 9 of the Model Law provides as follows:

> "Arbitration agreement and interim measures by court
> (1) It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from the High Court an interim measure of protection and, subject to paragraphs (2) and (3) of this article, for the High Court to grant such measure.
> (2) Upon a request in terms of paragraph (1) of this article, the High Court may grant—
> (a) an order for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or
> (b) an order securing the amount in dispute or the costs of the arbitral proceedings; or
> (c) an interdict or other interim order; or
> (d) any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual.
> (3) The High Court shall not grant an order or interdict in terms of paragraph (1) of this article unless—
> (a) the arbitral tribunal has not yet been appointed and the matter is urgent; or
> (b) the arbitral tribunal is not competent to grant the order or interdict; or

> (c) the urgency of the matter makes it impracticable to seek such order or interdict from the arbitral tribunal;
> and the High Court shall not grant any such order or interdict where the arbitral tribunal, being competent to grant the order or interdict, has determined an application therefor.
> (4) The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal." (Underlining for emphasis)

From my reading of the above provisions, this court may grant "an interdict or other interim measure or any other order to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual". Such relief can be granted where the arbitral tribunal is not competent to grant the order or the interdict, or where the urgency of the matters makes it impracticable for the tribunal to intervene on an urgent basis. It is in that context in which this court has been invited to intervene. The law as couched provides for the intervention of this court on condition the provisions of Article 9 are satisfied. It was not the first respondent's argument that the provisions of Article 9 above were violated. The law seeks to complement the arbitration process by delineating the circumstances under which this court may interfere.

The court finds the preliminary point devoid of merit and it is accordingly dismissed.

Locus Standi

It was submitted that the applicant lacked the *locus standi* to institute the current proceedings. It was further submitted that the applicant could not claim a right to institute the proceedings under a derivative action on behalf of the second respondent in terms of the common law or alternatively in terms of s 61 of the Companies and Other Business Entities Act (the COBE)[3]. It was also argued that at common law, a shareholder could only institute a derivative action where the wrong complained of involved conduct that was either fraudulent or *ultra vires*, and where the wrong was committed by majority directors or shareholders who control the company. The applicant was the majority shareholder in the second respondent and had exercised exclusive control of the entity for the past 20 years. The first respondent was a minority shareholder. Relying on the dictum in *Minister of Mines and Mining Development & Ors* v *Grandwell Holdings (Private) Limited & Ors*[4], it was argued that the common law derivative action was not available to the applicant.

As regards the alternative s 61 route, it was submitted that that course was only limited to an action against an officer, manager or director of the company only. It was also available

[3] *[Chapter 24:31]*
[4] SC 38/18

where one was claiming damages caused to the company because of the violation of duties by the manager, officer or director to the company. In *casu*, it had not been alleged that the first respondent was either a manager, officer or director of the second respondent. Further, the present lawsuit was not a damages claim and neither was it intended to enforce the first respondent's duties under the COBE or any other law.

In response, the applicant submitted that the circumstances of the matter were such that it was impossible for the second respondent to vindicate its rights given the dispute between the applicant and the first respondent. It was further submitted that the right to sue under a derivative action was dependent on the applicant being a shareholder of the entity concerned. Once one was a shareholder, they acquired the requisite *locus standi* to approach the court on behalf of the entity.

Mr *Mubaiwa* submitted that the argument that the derivative action was only available to the minority shareholders was contrary to the principle laid down in the *Grandwell Holdings* judgment. Counsel further submitted that s 61 of the COBE did not just confine the derivative action to a claim for damages. It also extended to the enforcement of the duties of directors or officers. Whoever sat on the board of the second respondent was a nominee of the applicant and the first respondent. The obligations imposed on these officials also attached to the parties on whose behalf they were nominated. The directors of the second respondent had no personal interest in the entity but were answerable to the applicant and the first respondent. It was further submitted that s 61 must be read together with ss 54 and 55 of the same Act. The obligations imposed by the law did not attach to nominees, but to the principals. It followed therefore that the first respondent was, in the context of s 61 as read with s 55, an officer of the second respondent.

The question of the applicant's *locus standi* to bring the present application is tied to its right to bring a derivative action. Such right was pleaded by the applicant as being founded in the main on the common law or alternatively in terms of s 61 of the COBE. A derivative is one of the common law and statutory exceptions to the general rule of company law that where a wrong has been done to a company, then the company itself is the proper plaintiff or applicant. That rule was pronounced in the case of *Foss* v *Harbottle*[5].

That the derivative action is part of our law is not in dispute. That position was restated by both the High Court and the Supreme Court in the *Minister of Mines & Mining Development*

[5] [1843] 2 Hare 461, 67 ER 189.

& Ors v *Grandwell Holdings & Ors* case which was cited by counsel in this matter.[6] The circumstances of that case were that Grandwell Holdings signed a commercial agreement with the Government of Zimbabwe for the purpose of mining diamonds in the Chiadzwa area of Manicaland Province. Sometime in 2009, Marange Resources (Private) Limited, a wholly owned subsidiary of the Zimbabwe Mining Development Corporation and Grandwell Holdings (Private) Limited signed an agreement, which led to the incorporation of an entity called Mbada Diamonds (Private) Limited. Grandwell Holdings and Marange Resources both held a 50 percent shareholding in Mbada Diamonds. Mbada Diamonds was to mine diamonds at Chiadzwa on special grants granted to Marange Resources (Private) Limited.

Sometime in 2015 the Government of Zimbabwe through the Minister of Mines and Mining Development decided to merge all diamond mining companies at Chiadzwa into one single entity, called the Zimbabwe Consolidated Diamond Company. In February 2016 the Secretary for Mines and Mining Development wrote to Mbada Diamonds advising that it had been discovered that the special grants entitling Mbada to mine diamonds had expired. Consequently, Mbada Diamonds no longer had title to continue with mining operations, and had to cease all mining activities with immediate effect and vacate the mining site. A dispute arose between the parties with *Grandwell* approaching the court for spoliation and other relief on behalf of Mbada Diamonds. One of the issues that arose was whether it was competent for *Grandwell* to bring a derivative action on behalf of *Mbada Diamonds*. Both the High Court and the Supreme Court found on behalf of the *Grandwell Holdings* on that point.

The Supreme Court identified two instances where the derivative action can be relied upon. The first instance is that it must be proved that a shareholders meeting was called to pass a resolution authorising the institution of proceedings by the company. If it is impracticable to hold such meeting, then the aggrieved shareholders may proceed by way of a derivative action. The second scenario which the court found to be reflective of the English law position was that if it was proved that the calling of a meeting was an exercise in futility, the other shareholders could still proceed by way of a derivative action without seeking the customary resolution. The court must however be satisfied that the majority shareholders or equal shareholders (as was

[6] *Grandwell Holdings (Pvt) Ltd v Minister of Mines and Mining Development & Ors* HH-193/16. See also the Supreme Court judgment reported as *Minister of Mines and Mining Development & Ors v Grandwell Holdings (Private) Limited & Ors* SC 38/18

the case in the Grandwell Holdings case), who are the wrongdoers were in effective control. For that reason, the meeting to pass the resolution would never materialise.

The Supreme Court however observed that the aggrieved shareholders could also demonstrate that the other shareholder was in effective negative control. MAFUSIRE J dealt with the principle of negative control in the *Grandwell Holdings* judgment as follows:

> "I agree with Mr *Moyo*. The derivative action is available, not in situations of fraud to the company only, but also in all situations in which the company is harmed by those in control. The term fraud covers more than just the ordinary common law fraud. It also covers situations of intentional or unintentional, fraudulent or negligent wrongdoing: see *Daniels v Daniels*[7]. Control need not be control by the majority shareholders. Negative control, that is, where a resolution to sue in the name of the company is defeated by a negative vote cast, should suffice"[8]

Citing GOWER's text, *Principles of Modern Company Law*,[9] the learned judge observed that there was no point having the aggrieved shareholders approach directors to institute proceedings where the said directors would end up being the defendants themselves. The court further observed that it was not necessary to prove control of the company by the wrongdoers, but merely to allege facts which if proved would establish control.

Mr *Mubaiwa* argued on the basis of the *Grandwell Judgments* that the derivative action is equally available to a majority shareholder based on the negative control principle. Mr *Maguchu* on the other hand argued that the derivative action was not available to the applicant herein since it was the majority shareholder. From my reading of both the High Court and Supreme Court judgments in the *Grandwell* case, it appears to me that the two courts were inclined to align with the English position of the law. The position is simply that there is no point in seeking to have a meeting convened for purposes of procuring a resolution authorising the institution of proceedings where it is clear that such a resolution was never going to be passed. It does not matter that the party finding itself in that precarious position happens to be the majority shareholder. Negative control occurs where the minority shareholder is able to frustrate any action that may be taken by the majority shareholder in the entity concerned.

Counsels' arguments on the point must be considered in the context of the above exposition of the law. It is common cause that the first respondent owns the properties in question. It is also common cause that there had already been a breakdown in the parties'

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[7] [1978] Ch 406
[8] At pages 13-14 of the High Court judgment
[9] 4th Edition at p 650

relationship. On 18 March 2024, the second respondent had written to the Commissioner General of Police complaining about the refusal by the local Police to intervene following complaints of unlawful eviction and harassment of the second respondent and its tenants by the first respondent. It is also common cause that the first respondent on its part referred its dispute with the applicant to arbitration. The parties held a pre-arbitration meeting on 20 March 2024. As already noted, the issues for arbitration primarily revolve around the affairs of the second respondent. The second respondent is not a party to the dispute that is pending at arbitration, yet it is the subject of those proceedings. The present application was only filed on 28 March 2024, well after the parties had submitted themselves to the arbitration process.

Clause 6.14 of the shareholders agreement provides as follows:

> "The quorum for any directors' meetings of the Company (which must remain pesent throughout the meeting) shall be 2 directors, of which 1 director shall be a nominee of NRZ and the other director a nominee of Landela respectively. If, within 30 minutes from the time appointed for the meeting a quorum is not present, the meeting shall stand adjourned to the same day the next week at the same time……
> Provided that notwithstanding anything contained herein a quorum, to be valid, shall always include representatives of each Shareholder."

From the above, it is clear that the presence of parties' directors was required for the purposes of passing a resolution authorising the institution of proceedings by or on behalf of the second respondent. It must also be recalled that the relief sought herein is primarily against the first respondent, being the applicant's co-shareholder in the second respondent. It follows that if ever a meeting was to be called for purposes of obtaining the required resolution, then the first respondent was effectively passing a resolution authorising the institution of proceedings against itself. A quorum for such meeting requires both parties to be represented. It would surely be absurd to expect representatives of the first respondent to sit in a meeting in which they were expected to approve a resolution that authorised the institution of proceedings against the entity they represented on the board.

In my view, it was a foregone conclusion under the circumstances that no such resolution would be passed. From my reading of the papers, it is clear to me that the second respondent's board has been crippled and become dysfunctional. That board is made up of representatives of the applicant and the first respondents. The two entities are currently at each other's throats. It is inconceivable that a resolution authorising the institution of proceedings against the first respondent by the second respondent would come out of any meeting of the second respondent's board. That would leave the second respondent completely abandoned.

The second respondent and by extension those with an interest in its affairs cannot be remediless. The law exists to serve a purpose. The applicant has an interest in the affairs of the second respondent. It cannot fold its hands and allow matters to deteriorate because of its fights with a fellow shareholder.

For the foregoing reasons I determine that the right to institute proceedings by way of a derivative action under the common law was available to the applicant herein. Having made that finding, it becomes needless for me to consider the applicant's alternative submissions with the respect to the institution of a derivative under s 61 of the COBE. For that reason, the court also determines that the applicant has *locus standi* to institute proceedings on behalf of the second respondent herein. The preliminary point is without merit and is accordingly dismissed.

Inadmissible Founding Affidavit

It was submitted that the averments made in the founding affidavit were based on hearsay evidence because the wrong applicant approached the court. The deponent to the applicant's founding affidavit was accused of not having personal knowledge of the facts as he was based in Zambia. He could not thus swear positively to the facts. Only an authorised person from the second respondent who was present at the point of the alleged spoliation would have personal knowledge of the facts.

In his answering affidavit, the deponent to the applicant's founding affidavit denied that he was based in Zambia and that he was not privy to the affairs of the applicant and the second respondent. In his oral submissions, counsel for the applicant submitted that the basis for challenging the averments made in the founding affidavit had to be properly articulated.

The first respondent's opposing affidavit does not articulate the part of the applicant's evidence that it found to be hearsay. What compounds the opaqueness of the first respondent's objection is that its opposing affidavit does not respond to the applicant's founding affidavit blow by blow. As observed in my analysis of the applicant's *locus standi* to institute the current proceedings, the applicant has a substantial interest in the affairs of the second respondent. It is a shareholder in that entity and was a signatory to the agreements that gave birth to the entity. It also has nominees on the second respondent's board of directors. Therefore, in the absence specific averments regarding the exact nature of the evidence that the first respondent found to be hearsay, I find no merit in the objection. It is accordingly dismissed.

Urgency

In his oral submissions, Mr *Maguchu* argued that the matter was not urgent, because the applicant appeared to be preoccupied with the first respondent's acceptance of rentals from some tenants. The applicant could still approach the arbitrator for an interim interdict. The arbitrator was a legal practitioner who had the flexibility to entertain the matter at any time unlike a duty judge who had to contend with other urgent matters on the roll of urgent matters. It was further submitted that the urgency of the matter had to be determined in the context of the pending arbitration dispute. An arbitral award would be rendered before 19 June 2024. The applicant was essentially fighting for the rentals for the months of May and June 2024. The loss of rental income for those two months did not give rise to ghastly consequences as would justify an approach to the court on an urgent basis. It was further submitted that the second respondent's business was that of managing real estate. Nothing had been placed before the court in the form of the applicant's accounts showing that it would be financially disabled for those two months that it was not receiving rental income.

In reply, Mr *Mubaiwa* submitted that the preliminary point on lack of urgency was taken with ill-intent. The opposing affidavit did not deny that the matter was urgent. It did not deal with the averments made on the question of urgency. The first respondent adopted a summarised approach in its response to the averments made in the founding affidavit. In so doing, the first respondent essentially admitted that the matter was urgent.

The question of urgency was not raised as a preliminary point in the first respondent's opposing affidavit. It was raised for the first time in the heads of argument and further motivated in oral submissions. Nevertheless, it remains a point of law which may be raised at any stage of the proceedings. The issue of urgency requires the court to have regard to considerations of time and consequences. In its heads of argument, the first respondent concedes that the applicant may have indeed acted promptly. However, the first respondent argued that the consequences that would befall the applicant if the court declined to hear the matter on an urgent basis were not so grave.

It seems to me that the first respondent has taken a rather superficial approach to the question of urgency. The applicant has not just approached the court for an interdict. It also seeks spoliatory relief. Spoliation proceedings are by their nature urgent. The first respondent does not dispute that the applicant acted promptly in approaching the court. In my view, in respect of spoliation matters, the consequences that are likely to befall the applicant if the

matter is not heard on an urgent basis must determined having regard to the merits of the case. This is because the court must also consider the first respondent's reaction to the alleged spoliation on the merits.

The applicant claims that the second respondent was locked out of the business premises. The first respondent interfered with its management of the shareholders' business. It is not in dispute that the second respondent has lease agreements with some tenants. The same tenants decided to switch allegiance to the first respondent thus violating the terms of their lease agreement with the second respondent. The first respondent does not deny that it received rentals from the said tenants who have leases with the second respondent. It is the conduct of the first respondent that must be interrogated by this court in determining this dispute. It is on that account that the court must also have regard to the merits of the dispute.

For the foregoing reasons, the court determines that the matter is urgent, and the preliminary point is accordingly dismissed.

THE MERITS

It was submitted on behalf of the applicant that the standard applicable in an application of this nature is two pronged. The first requirement is that the second respondent must have been in peaceful and undisturbed possession of the premises prior to the alleged spoliation. The second requirement is that it did not consent to the possession being taken away from it. Reference was made to the case of *Chiwenga v Chiwenga.*[10] The first respondent could only resist the claim on four defences which were set out in *Gumbo v Zimbabwe Anti-Corruption Commission*[11]. These are summarised as follows: that the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession; that the dispossession was not unlawful and therefore did not constitute spoliation; that the restoration of the thing was impossible and that the respondent acted within the limits of counter-spoliation in regaining possession of the article.

It was submitted that the fact that the first respondent confirmed the second respondent was in occupation of the offices at the premises resolved the requirement as to whether second respondent had peaceful and undisturbed possession. Whether the second respondent's loss of possession of the premises was caused by the first respondent was confirmed by evidence on record.

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[10] SC 86/20
[11] 2018 (1) ZLR 672 at p674F-H

In his oral submissions, Mr *Mubaiwa* pointed to the concession made by the first respondent in its opposing affidavit that it had been in contact with the tenants. He argued that the first respondent had no right to instil fear in the tenants. Such contact would not have taken place in the presence of the second respondent who had since been locked out. Counsel further submitted the receipts attached to the applicant's founding affidavit showed that some rental payments had been made to the first respondent. One did not refer to rental income unless there was a lease agreement between the parties.

In response, the first respondent acknowledged the requirements of spoliation as set out by the authorities. There were two classes of properties in issue, namely the offices occupied by the second respondent and the shops occupied by the tenants. The first respondent accepted that the second respondent was in possession of the offices. It had not despoiled the second respondent of the offices. The proceedings had been brought under the mistaken belief that the first respondent had locked the doors.

The first respondent denied that the second respondent was in possession of the shops. These shops were leased to various tenants. On conclusion of the lease, possession passed on to the tenants. No spoliation arose vis a vis the shops since the applicant had no possession. Further, applicant could not get relief without pointing out which tenant in which shop had been despoiled by the first respondent. The court could not be asked to restore possession to an unnamed tenant into an unspecified shop number.

As regards the claim for an interdict, it was submitted that the second respondent's tenants freely elected not to pay rentals in terms of their lease agreements. None of them had alleged coercion or force applied by the first respondent. The tenants had breached their lease agreements with the second respondent, and the second respondent should simply sue the tenants for breach of contract. The second respondent had therefore failed to satisfy the requirements of an interdict.

The law on spoliation is a well beaten path in this jurisdiction. The parties herein are agreed on the two-pronged test as set out in the case of *Botha and Another v Barret*[12] where the court held as follows:

> "It is clear law that in order to obtain a spoliation order, two allegations must be made and proved. These are:
>
> (a) That the appellant was in peaceful and undisturbed possession of the property and

[12] 1996 (2) ZLR 77(S) at p79

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

The requirements of an interdict were set out in the celebrated case of *Setlogelo* v *Setlogelo*[13] as follows: a clear right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of the relief; and that there is no other satisfactory remedy. I will in turn proceed to deal with the two forms of relief claimed herein.

Spoliation

It is common cause that the applicant was not itself in possession of the premises. The relief sought is on behalf of the second respondent for reasons already highlighted earlier in the judgment. It is also common cause that the second respondent was in possession of the premises. The first respondent itself insists that the second respondent was still in occupation, and if it vacated the premises, then it did so voluntarily.[14] The only issue that needs to be resolved is whether the second respondent was deprived of possession forcibly or wrongfully by the first respondent. I have no doubt from a consideration of the evidence and the submissions before the court that the second respondent was despoiled from the premises by the first respondent. Earlier on in the judgment, I referred to a letter of complaint by the second respondent to the Commissioner General of the Zimbabwe Republic Police. That letter complains about the inaction of the local police to deal with complaints made by the second respondent against the first respondent. The first and last paragraphs of that letter read as follows:

> "We write this appeal to you as the apex body for the national law enforcement arm of government, the Zimbabwe Republic Police, seeking protection from unlawful eviction and harassment of ourselves and our tenants by the National Railways of Zimbabwe which is our co-shareholder at the premises in question-The Victoria Falls Trading Post….
>
> The refusal by the local police to intervene in this matter is very disconcerting and casts a dark shadow upon economic turnaround efforts spearheaded by His Excellency and his team…."

That complaint was copied to the Attorney General of Zimbabwe. There is a stamp impression from that office confirming that it was received by that office on 18 March 2024. It was also copied to the Officer Commanding Matabeleland North Province and the Officer in Charge of Victoria Falls Police Station. I find it highly inconceivable that the second

[13] 1914 AD 221 at 227
[14] Para 27 of the opposing affidavit on p 95 of the record.

respondent would have dispatched such a letter to senior government officials based on unfounded allegations. It is also important to note that this application was launched a few days after the dispatch of that letter.

Further in para 28 of its opposing affidavit, the first respondent makes a tacit admission about the unlawfulness of its conduct and its involvement in the affairs of the second respondents and its tenants. It states as follows:

> "What transpired is that the 1st Respondent informed clients/tenants of the ongoing dispute between the shareholders. The clients/tenants of formed a view that it is likely that the right of possession over the Commercial Centre will be restored to the 1st Respondent. In view of this, the clients/tenants have of their own volition elected to make payment to the 1st Respondent for their rentals. This is not spoliation"[15]

This response suggests to me that some undue influence was brought to bear upon the tenants. The tenor of that statement suggests that the engagement between the first respondent and the tenants took place in the absence of the second respondent. The first respondent has no direct legal relationship with the tenants. The lease agreement exists between the tenants and the second respondent.

The first respondent's reaction to the pictures of the locked doors attached to the founding affidavit is far from convincing. Its response was that the pictures that were placed "on a mysterious door which may or may not be that of the Commercial Centre cannot be attributed to the first Respondent."[16] Given the nature of the allegations against it, one would have expected the first respondent to refute the accusations through a proper physical inspection of the premises. One would have also expected the first respondent to say it carried out a physical inspection in the presence of the second respondent and found the premises vacant.

The conduct of the first respondent leaves one in no doubt that it interfered with the second respondent's possession of the premises. The fact that it also confirmed receiving rentals from some of the tenants, yet it accepts the existence of a lease agreement between the tenants and the second respondent is quite revealing. Further, the first respondent denied that the second respondent was despoiled. It insisted that the second respondent remained in occupation. While a party has a right to oppose court proceedings in which they are cited, considering the circumstances of the case, one would have expected the first respondent to be

[15] Para 28 of the opposing affidavit on pages 95-96 of the record.
[16] Para 29 of the first respondent's opposing affidavit on p 96 of the record

upfront in absolving itself of any blame, instead of opposing the relief sought. The matter would not have come this far.

In view of the foregoing, the court is satisfied that the first respondent deprived the second respondent of its possession of the premises wrongfully.

Interdict

The interdict is sought in respect of the tenants. As already noted, the first respondent does not deny contact with the tenants. It confirmed receiving rentals from some tenants. It has however not set out the legal basis upon which it has started receiving rentals from the said tenants when it acknowledges the existence of the lease agreement between the tenants and the second respondent.

Earlier in the judgment, I alluded to the dispute that is already pending before the arbitration tribunal involving the validity of all the agreements signed between the parties herein. The interdict sought herein seeks to preserve the *status quo* pending the resolution of those contractual disputes by the arbitrator. Ironically, it is the first respondent that initiated the arbitration process. Its conduct therefore undermines the very legal process that it subjected the parties to. For that reason, I am satisfied that the requirements of an interdict were satisfied hereunder. The applicant, and by extension the second respondent that it is representing herein have a clear right in the business property being leased out to tenants. The second respondent was receiving rental income which was in turn shared by the two shareholders. There is a well-grounded apprehension of irreparable harm if the relief sought is not grounded. The balance of convenience clearly favours the granting of the relief herein. The integrity of the arbitral process that the parties have submitted themselves to must be respected.

I find it quite disturbing, for the first respondent to aver that any relief granted by this court would be rendered academic at the point of enforcement simply because the arbitrator undertook to render an award on or before 21 May 2024. The law exists in society to maintain order, resolve disputes as well as to protect rights of persons be it natural or juristic persons. Disputes must be resolved at the very point of their occurrence in order to avoid chaos and self-help. Courts are there to interpret and apply the law in the resolution of disputes to promote a culture compliance and respect of the rule of law.

It is for the foregoing reasons that the court is satisfied that the applicant herein is entitled to the further relief of an interdict that it sought.

Costs

The general rule is that costs follow the event. The applicant urged the court to make an order of costs on the punitive scale in the event that the court found in its favour. While I find no reason to deny the applicant its costs as the successful party, in the exercise of my discretion, I find an order of costs on the ordinary scale more appropriate in the circumstances.

Disposition

Resultantly it is ordered that:

1. The first respondent and all those claiming occupation through it be and are hereby directed forthwith to restore second respondent to exclusive, peaceful and undisturbed possession of the Administrative Block of the Commercial Centre owned by the first respondent and situate at Victoria Falls.
2. The Sheriff of the High Court of Zimbabwe is directed to cause the immediate vacation of the first respondent and all those occupying through it from the premises in paragraph 1 above and simultaneously facilitate, ensure, cause or procure the restoration of possession of those premises to the second respondent.
3. Pending the determination and final resolution of arbitration proceedings between the applicant and the first respondent, it is ordered that:
    a) The execution, implementation and enforcement of the agreements of lease entered into by and between the first respondent and the third and fourth respondents in respect of the premises otherwise known as The Commercial Centre owned by the first respondent and situate at Victoria Falls, be and is hereby suspended.
    b) The first respondent is directed to restore all tenants that were occupying any portions of the above premises on 20 March 2024 into occupation of their respective portions of the premises within 48 hours of this order failing which the Sheriff is empowered and directed, on the indication of such tenants by the applicant or the second respondent, to implement the order.
    c) The first respondent is interdicted from collecting rent or other charges from any tenants in occupation of the above premises without the prior written consent of the second respondent.
    d) The first respondent is directed to account for and surrender to the second respondent all monies collected from the third and fourth respondents and or any other tenants at the above premises within 48 hours of this order.
4. The first respondent shall pay the applicant's costs of suit.

Tarugarira Sande Attorneys, applicant's legal practitioners
Maguchu Muchada Attorneys, first respondent's legal practitioners